

Remote Hearings during the Pandemic

By Adam Hochroth

A functioning court system is essential to a civil society and the maintenance of the rule of law. When the COVID-19 pandemic first struck, it gave rise to obvious concerns about how courts could continue to function without undue risk to public health. Courts and practitioners have responded by adopting measures to ensure that, so far as practicable in accordance with public health regulations and recommendations, the wheels of justice continue to turn.

A significant component of the response to COVID-19 from the court system has been the use of audio or audiovisual technology to conduct hearings. The power to conduct a hearing through the use of such technology pre-dated the pandemic (see, for example, *Evidence (Audio and Audio Visual Links) Act 1998* (NSW), *Federal Court of Australia Act 1976* (Cth), ss 47A-47F), however since March 2020, use of the technology has increased significantly to limit in-person appearances.

While a number of courts are now beginning a staggered return to in-person hearings, it is clear that the increased use of technology to conduct hearings and other appearances remotely will continue for some time. Further, many barristers by now will be experienced in conferring with instructing solicitors and clients using videoconferencing technology. That too is likely to continue, with solicitors and clients continuing to work from home where possible in many cases.

The courts now have three months' worth of experience in hearing and determining cases remotely. This includes both short matters and lengthy trials. While some trials have been vacated or adjourned because they presented issues not easily able to be accommodated by use of technology, in many cases applications for an adjournment have been refused. Instructive decisions include *Capic v Ford Motor Company* [2020] FCA 486; *ASIC v GetSwift Limited* [2020] FCA 504; *Roberts-Smith v Fairfax Media (No 4)* [2020] FCA 614 and *Roach v Malsave Pty Ltd* [2020] NSWSC 364.



Barristers, their instructing solicitors and clients need to be aware that a hearing conducted remotely is still considered to take place in court. The place from which lawyers and witnesses appear is deemed to be part of the court, including for the purposes of, for example, laws relating to evidence, procedure, contempt of court or perjury.

Technologies

Barristers need to be aware of the various platforms and technologies being used by courts and tribunals to conduct hearings by audiovisual link:

- **Microsoft Teams** software has been used by the Federal Court and some Supreme Court judges to conduct hearings.
- **Zoom** software is widely used for videoconferencing and has been used by some Supreme Court judges. Some third party electronic trial providers offer solutions using Zoom.
- **Cisco WebEx** is the technology incorporated into the the JusticeLink

AVL platform used by the Supreme Court and District Court as well as the High Court's video connection system. Participants access the platform through their web browser.

- **BlueJeans** software has also been used by some third party electronic trial providers for the conduct of hearings and arbitrations.
- **Skype for Business** software is also widely used for videoconferencing and can be used for the conduct of hearings and arbitrations.

Barristers should familiarise themselves with the above technologies. While all offer subscriptions with advanced features, generally one can participate in a video call on each platform using a web browser or free application which can be downloaded easily. There are differences in functionality between the platforms, for example, with regard to the number of participants who may be seen on screen, how documents may be shared over video, and chat and messaging functionality.

Barristers should also be familiar with different platforms for uploading documents onto a cloud-based 'court book' (e.g. DropBox, OneDrive, Google Drive) and for communicating with solicitors and other counsel during a hearing (e.g. instant messaging platforms such as WhatsApp, Slack and Discord).

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Barristers and their instructing solicitors also need to be aware of arrangements which have been adopted to make the conduct of matters remotely more expedient. For example, the *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* (NSW) permits documents including affidavits to be witnessed by audiovisual link. Many

courts have accepted the filing of unsworn or electronically signed documents in the circumstances of the pandemic, upon an undertaking to supply a signed copy when available.

What the courts are doing

The *Bar Association* is maintaining a consolidated guide to COVID-19 related court arrangements, with information progressively updated on a regular basis. Barristers should consult the consolidated guide, and should also become familiar with the announcements, protocols, practice information and guides which have been published by the courts and tribunals in which they regularly practise. The information below is intended as a general summary of selected courts only and is correct as at 19 June 2020.

Full Court matters in the **High Court** were initially vacated for the months of April, May and June 2020. The High Court has since listed and heard a number of Full Court matters as well as hearing special leave applications, generally by video connection although also permitting counsel to appear in person and by video link between registries. Further information as to Full Court hearings beyond June 2020 is expected to be published soon. The Court has published a protocol for practitioners participating in video connection hearings, available on the Court's website.

The **Federal Court** has been conducting civil hearings, largely using Microsoft Teams, with directions hearings and hearings before Registrars also conducted by telephone. The Court has published a National Practitioners/Litigants Guide to Online Hearings and Microsoft Teams, which is available on the Court's website. The Guide includes a link to a ten minute video of part of a hearing before Perram J conducted using Microsoft Teams. The Court has also released a number of Special Measures Information Notes (SMIN) relating to remote hearings (in particular SMIN-1: Special measures in response to COVID-19).

The **Family Court** and **Federal Circuit Court** have also been conducting hearings using Microsoft Teams or by telephone. A Practitioner and Litigant Guide to Virtual Hearings and Microsoft Teams is available on the Courts' websites. On 12 June 2020, the Courts published an Updated Face-to-Face In Court Protocol, providing for a return to face-to-face hearings in a staggered way over the months from 15 June 2020. The Courts have also been managing dedicated lists for urgent parenting disputes arising out of the COVID-19 pandemic itself.

Jury trials in the **Supreme Court** have suspended since 16 March 2020 (aside from matters where a jury had been selected and



"Hey everyone, sorry about the mess."

empannelled by that date). It is planned that jury trials will re-commence on 29 June 2020. Arraignments have generally been conducted remotely, while contested bail applications have continued in-person.

The Court has continued to conduct civil hearings remotely, usually using the JusticeLink system (based on Cisco WebEx), Microsoft Teams or Zoom. The Court has released a Virtual Courtroom Practitioner's Fact Sheet, available on its website, as well as a number of announcements about the conduct of remote hearings. From 1 June 2020, the Court has begun a staged return to in-person hearings, with matters involving only two parties and a small number of witnesses and legal practitioners being permitted to proceed in person. Specialist lists in the Court are being conducted via modified procedures. The Court has a dedicated page of announcements in relation to the COVID-19 pandemic, which include guidelines for matters conducted in the Court of Appeal as well as the various specialist lists.

The **Land and Environment Court** has been conducting hearings remotely, using the JusticeLink system or Microsoft Teams. The Court has published a Telephone and Audio Visual Link Conferencing Protocol and a Microsoft Teams Practitioner's Fact Sheet on its website.

The **District Court**, like the Supreme Court, initially suspended new jury trials. The Court has begun limited jury trials in some venues from 15 June 2020. From 1 June 2020, the Court has permitted in-person appearances in certain criminal matters, including judge-alone trials and contested bail applications. Arraignments and readiness hearings have been conducted remotely.

The District Court has continued to manage civil matters towards hearing, with matters managed by the Judicial Registrar via the Online Court or telephone, and matters managed by the Civil List Judge by telephone. Until 18 May 2020, the Court's general policy was that civil hearings were to be conducted by a Virtual Courtroom. That policy has since been eased and limited matters may now proceed in-person. The Court has published a Virtual Court Practitioner Users Guide on its website, and maintains a dedicated page on its website to COVID-19 related announcements.

Further information about arrangements in a range of other courts and tribunals, as well as information on mediation and alternative dispute resolution, and legislation, orders, directions and regulations relating to COVID-19, is contained in the Bar Association's consolidated guide to COVID-19 related court arrangements, available on the Bar Association's website. **BN**