

# COVID-19: GOVERNANCE: THE WHEELS OF JUSTICE CONTINUE TO TURN, DESPITE THE GLOBAL PANDEMIC (AUSTRALIA)

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Legal Briefings - By **Graeme Johnson, Leon Chung, Alison Stead, Will Hanna, Winsome Hall and Winnie Liu**

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Australian courts remain operational during the COVID-19 outbreak, however, significant changes have been introduced in light of COVID-19 restrictions. The Courts are focussed on ensuring the safety of litigants, practitioners, judges and court staff, whilst attempting to minimise interference with the due administration of justice. The Courts also remain conscious of the important principle of 'open justice'.

In recent weeks we have dealt with changed court operations at all levels of the courts including trial, appeal, interlocutory and case management hearings across multiple jurisdictions. [We have highlighted our key insights below.](#)

## KEY CHANGES TO COURT OPERATIONS

Most courts have transitioned to conducting hearings by videolink or telephone conference including directions, interlocutory hearings, trials and appeals. Courts have also directed parties to consider whether aspects of their proceedings may be dealt with by consent and, where appropriate, courts will determine matters on the papers.

Most court registries now require documents to be filed electronically and have moved to providing services remotely by email or telephone.

The Federal Court of Australia, as part of its [Special Measures in response to COVID-19](#), has temporarily permitted the filing of written statements signed by e-signature and affidavits to be provided in draft form, to be sworn or affirmed at a later date.

## THE COURT'S APPROACH

Judges and court officials have adapted quickly to the effective use of technology in the courtroom and proceedings have been successfully conducted via a range of technologies including Microsoft Teams, Skype for Business, WebEx, Zoom videolink and telephone conferencing.

In New South Wales, the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) was amended to permit the appearance of a witness or legal practitioner by audio visual link if the court so directs.<sup>1</sup> This amendment came into effect on 25 March 2020.

## WHAT YOU NEED TO KNOW

### WHEN WILL A COURT ADJOURN A MATTER?

The courts have shown an unwillingness to adjourn a hearing simply on the basis that it is to proceed by telephone or videolink, or by reference to the current global environment. Parties have been required to show that some level of prejudice or unfairness will occur.

#### ***Keep calm and carry on***

On 25 March 2020, the WA Court of Appeal rejected an adjournment application in *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd* [2020] WASCA 38, on the basis that the hearing of an appeal by telephone or videolink would be inadequate. The Court noted that a number of appeals had been conducted satisfactorily since the change in procedure was announced by [public notice](#) on 18 March 2020. The Court did not accept that a telephone hearing would materially prejudice either party.

On 16 April 2020, Perram J rejected an application to adjourn a 6 week trial by 6 months in *Capic v Ford Motor Company of Australia Limited (Adjournment)* [2020] FCA 486. His Honour observed that *"It is not feasible nor consistent with the overarching concerns of the administration of justice to stop the work of the courts for such a period"*. The respondent raised a number of difficulties associated with a virtual trial including technological limitations, physical separation of legal teams, cross-examination of expert and lay witnesses, document management, extended trial length and expense. Perram J acknowledged that certain difficulties could arise in the current environment, however they will not necessarily lead to an unfair or unjust trial. His Honour noted that specific issues could be dealt with as they arise.

#### ***A risk of unfairness***

However, Courts *have* adjourned hearings in the event that continuation via telephone conference or videolink is likely to result in unfairness to one or more of the parties. Examples include:

- **Demeanour of the witness:** In *Quince v Quince* [2020] NSWSC 326, Sackar J vacated a hearing on the basis that cross-examination by videolink may lead to unfairness to both parties. The matter concerned an allegation that certain transfers of shares purportedly executed by the plaintiff were forgeries. His Honour found that given the seriousness of the allegation and a lack of corroborative evidence, the demeanour of the witnesses would play a very significant part in determining whether the allegation is made out, and therefore cross-examination could not adequately be carried out via videolink.
- **Susceptibility of key individuals:** In *Kahil v R* [2020] NSWCCA 56, the NSW Court of Criminal Appeal allowed an appeal seeking to vacate a trial on the basis that the accused's counsel, who was 69 years of age and had a compromised immune system, had withdrawn from the trial. The accused's solicitor had little to no criminal trial experience, leaving the accused effectively unrepresented. The Court concluded that to proceed with the trial would be unfair, in that the accused would be required to continue without competent representation.
- **Complexity of the matter:** In *R v Macdonald; R v Edward Obeid; R v Moses Obeid (No 11)* [2020] NSWSC 382, Fullerton J adjourned the part heard trial as the parties were experiencing persistent technical issues. Complexities in the trial included multiple parties, a Court Book that exceeded 7500 pages, and the need to cross-examine a significant number of witnesses. These all contributed to the difficulty of conducting the trial remotely. The trial was adjourned until 31 August 2020.

## HOW ARE MATTERS BEING CONDUCTED?

### *Hearings*

The courts have taken a variety of approaches, but all courts are now using audiovisual technology to facilitate hearings. Courts have a statutory obligation when using audiovisual technology to ensure that all persons can see or hear each other when giving evidence or making submissions.

Counsel have been taking instructions from solicitors via Skype for Business or other messaging platforms such as WhatsApp, which has been very effective.

The courts, and individual judges within the courts, have imposed different requirements on practitioners to allow hearings to be conducted remotely. Examples include:

- courts requiring counsel to attend 'practice hearings' prior to actual hearings;
- some judges allowing brief position papers to be put forward in contested matters prior to hearings, identifying the key issues in dispute; and
- courts listing matters on a staggered basis starting from an earlier commencement time of 8am until a later finishing time of 6pm.

### ***Document management***

Some difficulties have been experienced in virtually handing documents up to the court and courts have released guidelines indicating that tendering documents should occur in advance where possible.

In most cases, any difficulties have been overcome by emailing documents to court staff, or by virtually uploading them to the relevant technology during the hearing. Options for sharing documents include Dropbox, OneDrive, Google Drive, or via specialist service providers.

Some courts now require submissions and chronologies to be hyperlinked to underlying documents, in order to facilitate the smooth progression of hearings. Judge's Associates are routinely liaising directly with parties in relation to the provision of documents.

### ***Public access to courtrooms***

Courts have taken different approaches to maintaining open courtrooms, while protecting against interference and disruptions by non-parties, which can be harder to control when using technology. Some courts are streaming hearings that can be accessed in real time by the public, and there is even talk of uploading court hearings to YouTube!

The rules against recording or photographing proceedings without permission still apply. This includes taking screenshots of videolink proceedings or using the recording functions of a phone to record a hearing by teleconference.

### ***Mediation and arbitration***

Court-based and private mediations have continued using videolink and other technologies such as Zoom, Microsoft Teams and Blue Jeans, making effective use of virtual break out rooms.

The Australian Centre for International Commercial Arbitration has produced a draft procedural order for online arbitrations. They are offering virtual room hire services via the ADC Virtual platform so that parties can conduct arbitrations.

The Hong Kong International Arbitration Centre (**HKIAC**) has introduced measures to continue operation during COVID-19 with minimal disruption to service. The HKIAC is conducting e-hearings through major conferencing platforms and its case management team is fully operational. The London Court of International Arbitration also remains operational and is working remotely.

### ***Tribunals***

Tribunals also continue to be operational, though they are not open to the public. The Administration Appeals Tribunal (**AAT**) and the NSW Civil and Administrative Tribunal (**NCAT**) are conducting hearings by audio-visual link or telephone. Documents may be lodged online, by post or through Service NSW. The Victorian Civil and Administrative Tribunal (**VCAT**) is hearing less complex matters and directions by telephone, suitable matters by video conference and resolving appropriate matters on the papers where possible.

### ***Witnesses***

Some proceedings involving witnesses, especially complex cases, have been adjourned. However, we have continued lay and expert witness preparation via online technologies.

If affidavits are required, some courts are allowing these to be tendered un-signed.

In NSW, as of 22 April 2020, affidavits (and other documents that require witnessing such as wills, powers of attorney or statutory declarations) can now be witnessed by audio visual link if the document contains a declaration that this method was used, pursuant to the *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020 (NSW)*. These regulations will currently expire on 23 October 2020. Legislation in this area continues to develop, and therefore this position is subject to change.

Documents can be put to witnesses electronically. If a witness who is being sworn in to give evidence is taking an oath rather than an affirmation, the witness will be required to have a Bible or other relevant religious text with them. An electronic copy of the religious text is not sufficient.

## **OUR VIRTUAL COURTROOM EXPERIENCE**

We have had experience in recent weeks with changed court operations at all levels of the courts including trial, appeal, interlocutory and case management hearings. This has spanned multiple jurisdictions including:

- Motion hearing before Stevenson J in the Supreme Court of New South Wales Commercial List;
- Class action settlement approval application hearing in the Federal Court of Australia, including witness cross-examination;
- Interlocutory hearings before Le Miere J in the Supreme Court of Western Australia;
- Various case management conferences and directions hearings across the Supreme Courts and Federal Courts;
- Various ongoing private mediations by telephone and videoconference; and
- Preparation for a 4 week trial before Perram J in the Federal Court of Australia, commencing in May 2020.

## RECENT COURT ANNOUNCEMENTS ON COVID-19

<b>High Court of Australia</b>	The High Court of Australia <a href="#">website</a> provides that the Court will not be sitting until June 2020. Urgent matters will be heard by video conference. Special leave applications including hearings will be dealt with at individual registries.
<b>Federal Court of Australia</b>	<a href="#">Special Measures Information and Practice Note (SMIN-1)</a> updated 31 March 2020 <a href="#">Appeals and Full Court Hearings (SMIN-3)</a> issued 7 April 2020
<b>NSW Supreme Court</b>	<a href="#">Latest operational changes made in response to Coronavirus (COVID-19)</a> <a href="#">Changes to procedures relating to the Commercial List, Technology &amp; Construction List and Commercial Arbitration List</a> issued 25 March 2020 <a href="#">Corporations List</a> issued 23 March 2020 <a href="#">Equity Duty List</a>
<b>VIC Supreme Court</b>	<a href="#">Supreme Court changes in response to COVID-19</a> issued 20 March 2020 <a href="#">Guidance for civil proceedings affected by COVID-19</a> issued 15 April 2020 <a href="#">Information for practitioners about virtual hearings in the Supreme Court</a>
<b>QLD Supreme Court</b>	<a href="#">Notice to legal practitioners in relation to the COVID-19 pandemic</a> issued 20 March 2020 <a href="#">Use of technology during COVID-19 response</a> issued 1 April 2020
<b>WA Supreme Court</b>	<a href="#">Updated Public Notice – COVID-19</a> issued 18 March 2020
<b>SA Supreme Court</b>	<a href="#">Supreme Court practice changes – COVID-19</a> issued 24 March 2020 <a href="#">All matters before Supreme Court Masters from 30 March 2020</a> issued 26 March 2020
<b>ACT Supreme Court</b>	<a href="#">Special Measures in response to the COVID-19 Virus</a>
<b>NT Supreme Court</b>	<a href="#">Courts and Tribunals COVID-19 response</a> updated 15 April 2020

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# ENDNOTES

1. See s 22C of the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) which was brought into effect by the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020 (NSW)*.

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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