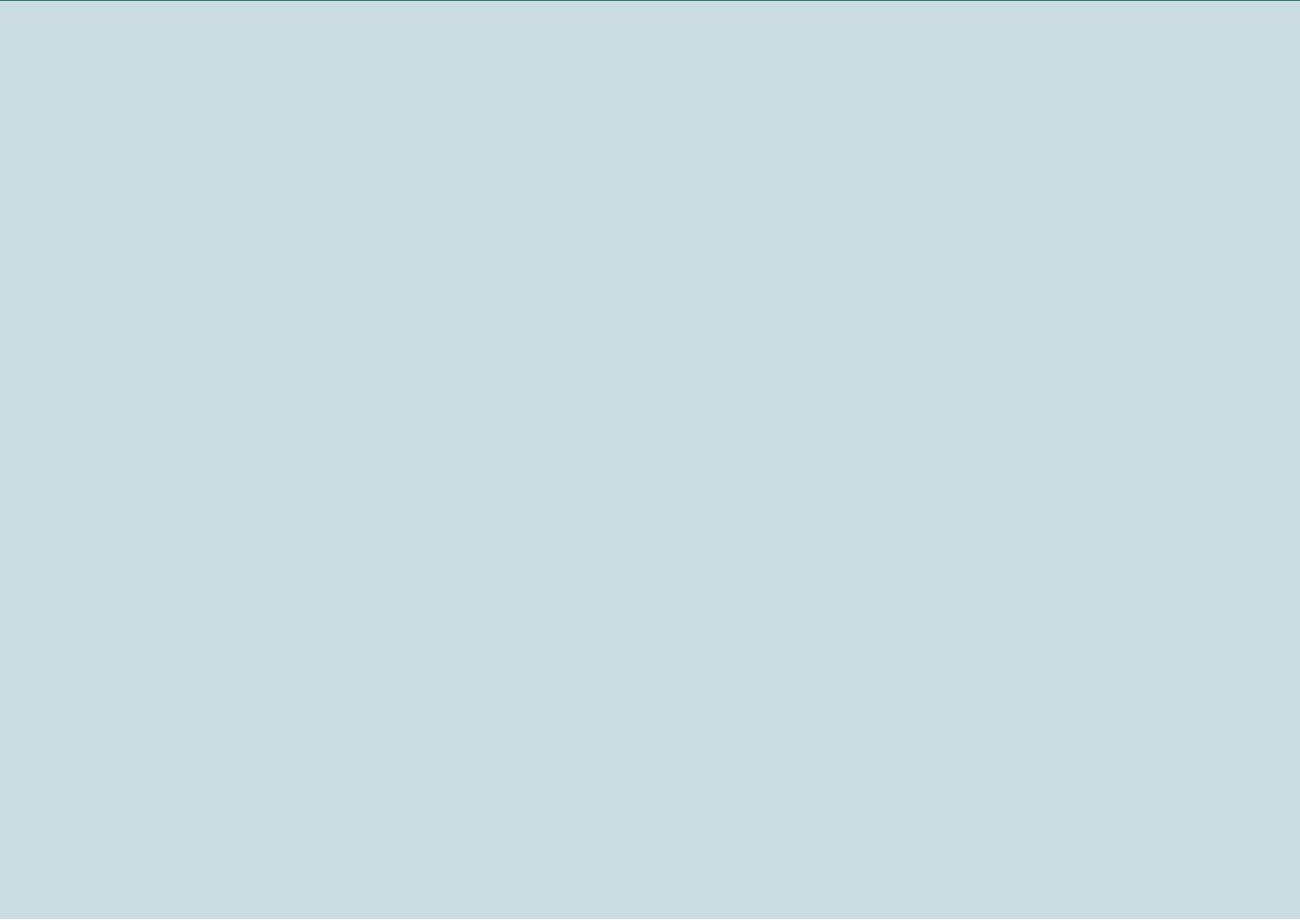




# **REMOTE COURT PROCEEDINGS TOOLKIT ADDITIONAL MATERIALS**



## Additional Materials

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## Annex One: Additional Advantages of RCP

RCP offers many advantages, some of which are:

- Increased availability of expert witnesses as their travel times are decreased, which can also decrease delay;
- Increased flexibility in the scheduling of proceedings and accommodation of witnesses;
- A reduced need to transport files;
- Increased thoroughness and preparation by Judicial Officers and lawyers;
- Increased efficiency and cost effectiveness for other justice agencies (for example, Legal Aid, Corrective Services and Public Prosecutions) due to reduced travel and waiting time;
- The technology can be used to educate the broader community on important issues such as domestic and family violence;
- Technology is advancing rapidly which will continually offset some of the disadvantages of RCP; and
- Carbon emissions of cars and aircraft are reduced due to reduced travel, benefiting the environment.

# Annex Two: National Practitioners / Litigants Guide to Online Hearings and Microsoft Teams (Federal Court of Australia)

## 1. Introduction

- 1.1. As per the Federal Court's Special Measures in Response to COVID-19 (SMIN-1) Information Note, to the extent possible, proceedings identified as being suitable will be listed for hearing using remote access technology known as Microsoft Teams (**Teams**).
- 1.2. Proceedings conducted in this manner will be referred to as **Online Hearings**.
- 1.3. Participants are reminded that Online Hearings are real hearings conducted by remote access technology. The expectations of courtroom behaviour and decorum still apply.
- 1.4. This Guide is intended to provide guidance for the legal profession and litigants-in-person appearing in Online Hearings. **Annexure A** contains illustrative instructions on how to use Teams.

## 2. Initial Steps

- 2.1. The success of an Online Hearing will depend on the facilities available to parties and their willingness to coordinate with each other and adapt quickly.
- 2.2. The Court is currently reviewing all upcoming hearings to determine their suitability for an Online Hearing.
- 2.3. Parties are asked to consider and liaise with the Court whether an Online Hearing is suitable giving consideration to:
  - the appropriate facilities available to relevant participants including practitioners, litigants-in-person, the parties themselves and any witnesses that the parties intend to call;
  - locations and time zones of witnesses;
  - firewall and security issues.
- 2.4. Parties should also consider and liaise with the Court whether a teleconference, in lieu of an Online Hearing, may be suitable.
- 2.5. Parties are expected to seek orders to facilitate an Online Hearing. See **Annexure B** for sample orders.
- 2.6. The Court will identify the manner in which a test run is to be conducted and advise parties accordingly.

## 3. Establishing an Online Hearing

- 3.1. Online Hearing Invitations
  - 3.1.1. Upon request, parties are to provide the Court with the individual email addresses for each of the Online Hearing participants.
  - 3.1.2. Where the Online Hearing is for a full day duration, parties will receive two Online Hearing invites – one for the morning session and another for the afternoon session. This is to allow the recording time to process over the luncheon adjournment.
  - 3.1.3. Teams invites include a link to join the meeting (see 3.2.1 below). This link is able to be passed on to witnesses or other practitioners who did not receive an invitation.



Note, however, that persons who join an Online Hearing via that Teams link are subject to being admitted or declined by the Court.

### 3.2 Applications Required

- 3.2.1 Parties can open up the Online Hearing from the [Join Microsoft Teams Meeting](#) link in the Online Hearing invite.
- 3.2.2 The Court recommends using a web browser other than Internet Explorer due to compatibility issues that may arise. The web browser may have limited features but the Court does not believe this is an issue.
- 3.2.3 Participants may also wish to download the Teams Application from the Microsoft product website [here](#) free of charge.
- 3.2.4 The Teams Application for iOS and Android are also available and free of charge however, features are limited. The Court does not believe this is an issue and encourages this option for parties who may not have the facilities, but do have access to a smartphone or tablet.
- 3.2.5 Participants also have the ability to ‘dial-in’ to Teams using a standard telephone connection. The dial-in details, including the unique conference ID number, can be found in the Online Hearing invite under the Join Microsoft Teams Meeting link.
- 3.2.6 A list of hardware requirements for Teams can be accessed [here](#).

## 4. Joining an Online Hearing

### 4.1. What participants can expect

- 4.1.1. When joining the Online Hearing, participants will be asked to enter their name. Be mindful that this name will be displayed for all participants to see. First Name and Surname are to be entered.
- 4.1.2. Parties should give consideration as to whether a participant’s name (and/or face) should not be displayed (for example, for their safety) and liaise with the Court accordingly in advance of the Online Hearing.
- 4.1.3. After ‘joining’ the Online Hearing, participants will enter a virtual lobby and will remain there until admitted into the Online Hearing.
- 4.1.4. Participants are to join the Online Hearing **at least 15 minutes prior to the listing time** to allow sufficient time to address any technical issues.
- 4.1.5. Participants are encouraged to wear headsets during the Online Hearing as this greatly improves the audio quality for the other participants and for the recording made for the purpose of producing the transcript.
- 4.1.6. Online Hearings are being recorded by the Court’s recording and transcription services contractor, Auscript, and through Teams directly. Participation in an Online Hearing indicates your consent to being recorded.
- 4.1.7. Transcript will be produced and available through Auscript, in accordance with the usual ordering processes. Some delays may be experienced during this time of transition to Online Hearings.
- 4.1.8. The use of communication and recording devices for the purpose of recording or making a transcript or otherwise is prohibited. Division 6.2 of the *Federal Court Rules 2011* (Cth) still applies.
- 4.1.9. In the event of unforeseen and unavoidable technological issues, the Court will temporarily adjourn to address those issues.
- 4.1.10. Provided [here](#) is a ten-minute portion of an Online Hearing conducted by Teams. That portion shows the end of dealing with objections to evidence, the respondents

calling their first witness, the swearing in of a witness (by the judge), and the beginning of examination and cross-examination.

#### 4.2. What is expected of participants

- 4.2.1. The same formal etiquette and protocol of a physical Court is expected in the Online Court.
- 4.2.2. The matter will be called and the Court will ask for appearances.
- 4.2.3. Judges are to be addressed as ‘Your Honour’, and registrars are to be addressed as ‘Registrar’.
- 4.2.4. Where a judge has elected to robe, counsel must also robe.
- 4.2.5. The Court may elect to dispense with any of the usual formalities, and the parties are expected to act accordingly.
- 4.2.6. Participants are to join an Online Hearing from a quiet, secure location.
- 4.2.7. Participants are expected to ensure that there is sufficient internet coverage in their location and all devices are fully charged.
- 4.2.8. Microphones and cameras are to be tested and working prior to joining an Online Hearing. This can be managed through the Teams Device Settings.
- 4.2.9. Other than practitioners/litigants-in-person appearing, all other participants are to keep their microphones muted and cameras turned off.
- 4.2.10. Where possible, identify and resolve any firewall and security restrictions before the Online Hearing commences.

#### 4.3. Witnesses

- 4.3.1. The same expectations for participants above at 4.2. also applies to witnesses in an Online Hearing.
- 4.3.2. The Court will administer the oath or affirmation of each witness.
- 4.3.3. Where a witness would like to take an oath, note that s 24(1) of the *Evidence Act 1995* (Cth) provides that it is not necessary that a religious text be used in taking an oath: *BZAAG v Minister for Immigration and Citizenship* [2011] FCA 217. However, the party calling the witness should ensure that the relevant religious text is available to that witness in advance of the Online Hearing where the witness prefers to use the religious text in taking an oath.
- 4.3.4. A witness is to be provided in advance with all documents to which they may be referred to. See more below at 6. Document Management.

## 5. Open Justice

- 5.1. The Court continues to consider its options for preserving the principles of open justice.
- 5.2. Until further notice, Court buildings remain open to the general public. However, all parties and practitioners are required to appear remotely for any Online Hearing that proceeds other than in exceptional circumstances and with the express authorisation of the Chief Justice.
- 5.3. The daily court list for each registry will provide advice for members of the public seeking to view an Online Hearing remotely.
- 5.4. Any member of the public who is permitted by the Court to join an Online Hearing undertakes to:
  - Remain silent (mute their microphone) and hidden (keep their camera turned off); and
  - Not record the proceedings (see 4.1.8. above).

- 5.5. The Court may require a member of the public who wishes to view an Online Hearing to provide an email address. The Court use this information solely for the purpose of providing that member of the public with a link to the Online Hearing, and it is not retained thereafter.

## 6. Document Management

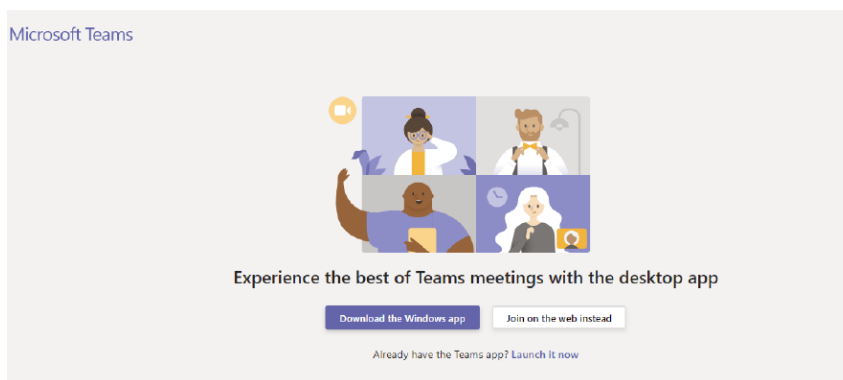
- 6.1. Where possible, a Digital Court Book is to be created for an Online Hearing.
- 6.2. The Digital Court Book is to be provided in accordance with the time and manner as directed by the Court
- 6.3. Arrangements are to be made, in consultation with the Court, regarding the ability to facilitate the ‘handing up’ of documents. Options may include:
  - by email to the Court;
  - by way of a secure, online file sharing platform, such as OneDrive;
  - by utilising the ‘sharing screen’ functionality within Teams (parties should liaise with the Court whether this may be appropriate intermittently by counsel or their instructing solicitors, or whether a Digital Court Book may be navigated by Court staff during the course of the Online Hearing).

## 7. Assistance

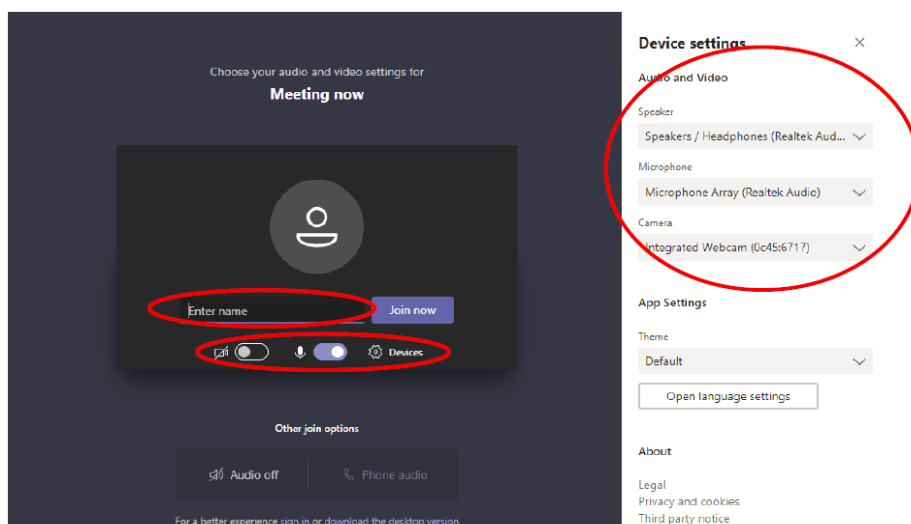
- 7.1. Please direct all questions relating to a specific matter to the chambers of the docket judge or relevant registrar.
- 7.2. Please direct all general questions to Registrar, Digital Practice via email.
- 7.3. The Microsoft Teams website and ‘Help’ section of the Teams application provides additional tips and advice about how to use the program.

## Annexure A: Simple Instructions on using Teams<sup>1</sup>

- To join an Online Hearing, click on the [Join Microsoft Teams Meeting](#) link at least 15 minutes prior to the Online Hearing commencing.
- For participants who already have Teams installed on their device, the link above should automatically redirect to the Teams App.
- However, the participant may be redirected to this screen in a web browser.

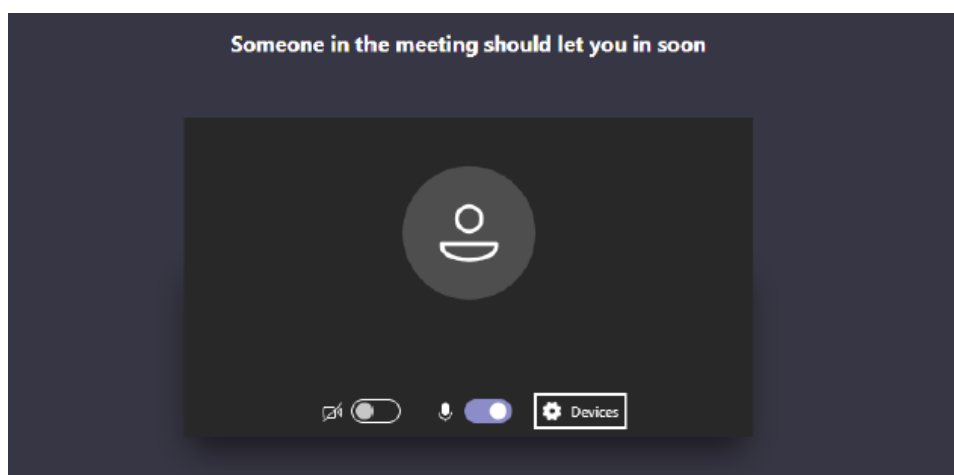


- If so, the participant may elect to Download the Windows App – which is free of charge.
- Alternatively, by selecting Join on the web instead, the participant will be redirected to another webpage. The participant may be asked to give permission for Microsoft to access their device’s microphone and camera – select Allow.
- On the next screen, enter your First Name and Surname in the relevant field
- Manage your microphone and camera settings, if required, through the Device Settings Panel
- Select ‘Join Now’

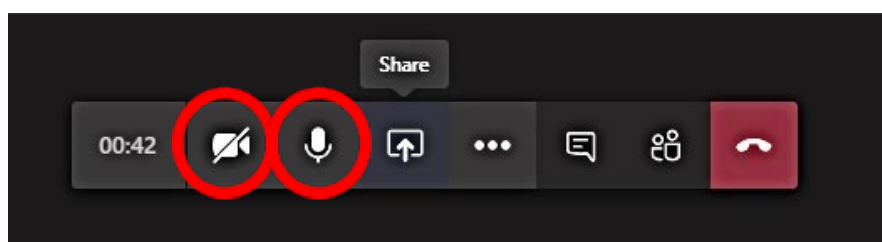


<sup>1</sup> Federal Court of Australia. 2020. Federal Court of Australia National Practitioners Guide to Online Hearings and Microsoft Teams. Federal Court of Australia. <https://www.fedcourt.gov.au/online-services/online-hearings>

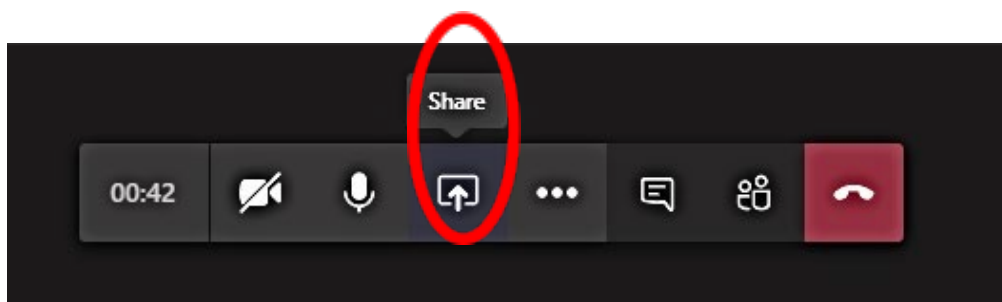
- Patiently wait in the virtual lobby until you have been admitted in to the Online Hearing.



- To mute and unmute your microphone, select the microphone icon on the Teams menu ribbon.
- To turn your camera on and off, select the camera icon on the Teams menu ribbon.



- **Only if directed by the Court**, the 'sharing screen' functionality may be used during an Online Hearing to display and navigate through documents.
- To do this, select the 'Share' button on the Teams menu ribbon.
- Then, choose to present either Desktop or Window (i.e. a particular program). The latter option is strongly recommended.



## Annex Three: Example of Daily Listings (Federal Court of Australia)

### Examples of “open justice” notifications on the Federal Court Daily Listings page:

Justice Moshinsky

By Web Conference COURT 8G (Level 8)

9:30 AM

Part Heard

- |   |   |  |
|---|---|--|
| 1 | VID339/2020<br>By Video-conference<br>(Victoria<br>Registry time) | IN THE MATTER OF SIENNA CANCER DIAGNOSTICS LIMITED --- This hearing is for the approval of a scheme of arrangement in respect of the plaintiff company and will be conducted via remote access technology. If a member of the public wishes to observe the hearing through Microsoft Teams they must contact the Associate to Moshinsky J by telephone or by email at least one hour before the scheduled start time. If a member of the public wishes to dial in and hear these proceedings – call (number) and enter the Conference ID #. Members of the public are not to provide their name or phone number when connecting, and are to remain muted. Members of the plaintiff company who wish to object to the scheme of arrangement can join the hearing remotely by one of the mechanisms outlined above. If the person objecting wishes to appear remotely, they must either contact the Associate to Moshinsky J at least one hour before the scheduled start time, or dial in to the proceedings at least 20 minutes before the scheduled start time. Persons who are objecting to the scheme of the arrangement and wish to appear will be asked to provide their name to the Court. |
|---|---|--|

Justice Middleton, Justice McKerracher, Justice Jackson

**COURT ONE (Level 8) By Web Conference**

Western Australia Registry, Court 1, Level 7

Western Australia Registry, By Web Conference

11:00 AM

Full Court Hearing

- |   |   |  |
|---|---|--|
| 1 | VID150/2020<br>by Video-conference<br>(Victoria<br>Registry time) | TRIVAGO N.V. V AUSTRALIAN COMPETITION AND CONSUMER COMMISSION - -- This proceeding will be conducted by remote access technology and is open to the public subject to the judges’ discretion or any order by the Court that may be made pursuant to s 17(4) of the Federal Court of Australia Act 1976 (Cth). If a member of the public wishes to observe the hearing they must contact the Associate to Middleton J via email at least one hour before the scheduled start time |
|---|---|--|

## Annex Four: Sample RCP Script

### STAGE ONE: LOGISTICAL ISSUES

1. “These proceedings are being conducted remotely and recorded”
2. “Are you able to hear me and can you understand what I am saying?”
3. “Are you able to see me and is the picture quality sufficient?”
4. “If, at any time, you are not able to see or hear what is happening in court today, you must immediately inform me of the issue.”
5. “If the internet drops out, please remain in the same place and turn on your mobile phone. Someone will contact you by phone if this happens. Alternatively, you can phone this number: XXXXXXX.”
6. “With respect to the proceedings, please wait to speak until requested.”
7. “If you wish to speak, please raise your hand.”
8. “When you speak, please do so normally, slowly and please do not interrupt others when they are speaking.”
9. “When you are not speaking, please mute your microphone.”
10. “Please do not move out of the frame and keep your faces and focus on the camera, as opposed to the screen.”
11. “If you need to have confidential communications, please ensure your microphone is muted and use the chat room or other device if required.”
12. “As we are still adjusting to the use of RCP, we ask everyone to be patient and mindful of the need to uphold the decorum and formality of the court.”

### STAGE TWO: PRELIMINARIES

13. “It is placed on the record that the parties consent to the proceeding being conducted via video conference technology.”
14. “You are advised that these proceedings are public proceedings and that the public may have access to these remote proceedings, however they cannot participate.”
15. “It is also placed on the record that the parties waive any rights they may have to be present in the courtroom for the proceeding.”
16. “The parties are advised that all court rules of evidence and procedure apply during remote hearings or conferences.”
17. “Are there any unmet disability or accessibility needs?”
18. “I confirm there is/is not a need for any interpreters?”
19. “Do the parties have any caretaker responsibilities (e.g., for a baby) or privacy issues (especially for domestic violence matters)?”

### STAGE THREE: WITNESSES

20. “Legal Counsel, please confirm that X will be appearing from Y and will not have access to the hearing before giving evidence.”
21. Swear in witnesses by oath/affirmations in the usual fashion
22. “Do you swear that you are alone?”
23. “Please scan your camera around the room and under tables, to confirm there is no one else present in the room.”
24. Advise the witness of the operational logistics of the RCP in Stage One above.
25. “Do you swear that you do not have any other electronic devices present in the room?”

26. “You are directed to refrain from exchanging any electronic messages with anyone while testifying.”
27. “You are directed that you are not to make any video or audio recordings of these proceedings.”
28. “You are also warned that penalties may apply if you do not comply with these directions.”
29. “You are warned that, although this is a RCP, it is an offence to commit perjury or contempt of court.”
30. “Which documents do you have in front of you?” etc....



## Annex Five: File Transfer Options and Considerations

### Transfer of files

It is of a practical necessity to discuss how to transfer files and create access to documents for the proceedings, principally from the file, from remote locations.

| Mechanism                              | Overview   | Benefits   | Considerations   | Other aspects   |
|--|--|--|--|---|
| <b>Email</b>                           | To allow transfer of one or many files between parties and court judiciary/staff independent of internal/external access to formal systems | <ul style="list-style-type: none"> <li>• Most common ‘application’ i.e. everybody is used to sending/receiving emails</li> <li>• People feel comfortable sending emails</li> </ul> | <ul style="list-style-type: none"> <li>• Emails can easily be sent to wrong person</li> <li>• Can easily be forwarded on to persons, not a party to the proceedings</li> <li>• Generally no ‘receipt’</li> <li>• May or may not be attached to the court file in CMS</li> <li>• Version control difficult to manage</li> <li>• Size of files often large, and may not ‘fit’ with email file size limits</li> <li>• Court documents remain on Mail Servers e.g. Gmail server</li> </ul> | <ul style="list-style-type: none"> <li>• Wherever possible, avoid this mechanism in favour of other mechanisms</li> <li>• Only use as last resort for quick transfer of a document</li> </ul>                                 |
| <b>Case Management System (CMS) or</b> | Documents (scanned or e-filed) attached to the case file in system, and then internal users  | <ul style="list-style-type: none"> <li>• Provides secure access to documents for internal users of the CMS/CTS</li> </ul>  | <ul style="list-style-type: none"> <li>• For those accessing remotely, e.g. judge in Australia, needs access to system through secure weblink or</li> </ul>  | <ul style="list-style-type: none"> <li>• Being put to good use by Republic of Marshall Islands with their PJSI Case Tracking System (CTS) which stores case documents in addition to case information. This allows</li> </ul> |

| Mechanism                                  | Overview  | Benefits  | Considerations  | Other aspects   |
|--|---|---|---|---|
| <b>Case Tracking System (CTS)</b>          | accessing system and thus documents                                     | <ul style="list-style-type: none"> <li>• Accessing the Source of Truth i.e. the court file in CMS/CTS</li> <li>• Ensures version control</li> <li>• No concern over ‘copies laying around’</li> <li>• Seeing the complete list/history of documents associated with the file</li> <li>• Can provide user with categorisation of documents e.g. affidavits, or applications – which assists the judiciary</li> </ul> | <ul style="list-style-type: none"> <li>• vehicles like Citrix (support is crucial in the early use of this mechanism)</li> <li>• Generally not available to external parties e.g. Counsel</li> </ul>  | <ul style="list-style-type: none"> <li>• for Appeal judges not in-country easy and secure access (and can easily print selected parts of any document)</li> <li>• Longer-term, CMS being extended in its access to external parties e.g. the Commonwealth Courts Portal (Australia) which allows parties to the case secure and direct access to the system/access</li> <li>• Preferred mechanism for access by internal users e.g. a judge in another country</li> </ul> |
| <b>Portal (external access to CTS/CMS)</b> | Provides external access for parties to a case, to the CTS/CMS securely | <ul style="list-style-type: none"> <li>• Secure access to the case details, including documents, allowing parties to view and load (file) their documents</li> </ul>  | <ul style="list-style-type: none"> <li>• Generally requires significant investment (\$s) to ensure appropriate levels of security and functionality</li> <li>• Requires a significant level of user support to the increased user base of the ‘system’</li> </ul> | <ul style="list-style-type: none"> <li>• Many leading CMS providers now provide such facilities as ‘add-ons’ to their CMS, or locally built (bespoke) systems have introduced with significant effort and cost</li> <li>• An example of note is the Commonwealth Courts Portal which integrates filing, viewing and communicating facilities for external parties</li> </ul>  |
| <b>Cloud Services</b>                      | Such services as DropBox, Google Drive and OneDrive                     | <ul style="list-style-type: none"> <li>• Requires at least one party to have an account</li> <li>• Can send link to a file, or folder, or share access to same</li> </ul>   | <ul style="list-style-type: none"> <li>• Requires setup to allow access to ‘folder’ securely i.e. cannot be shared</li> </ul>   | <ul style="list-style-type: none"> <li>• Other mechanisms such as CMS/CTS and Secure Transfer applications preferred over generic Cloud Service applications</li> </ul>   |

| Mechanism                           | Overview   | Benefits  | Considerations  | Other aspects  |
|-------------------------------------|--|---|---|--|
|                                     |  | <ul style="list-style-type: none"> <li>• Growing popularity and comfort levels in storing documents in the 'unknown' location of the Cloud.</li> </ul>  | <ul style="list-style-type: none"> <li>• Court staff must 'choose' which documents to share, which is additional effort for judicial staff</li> <li>• Simple links to documents can be forwarded to persons, not a party to the proceedings</li> <li>• Version control – files are not synched to CMS/CTS and must be copied across to the Cloud Service application</li> <li>• Documents can often 'remain in the cloud' unless consciously removed</li> </ul> |  |
| <p><b>Transfer applications</b></p> | <p>Purpose built applications that are built specifically for secure file sharing with increased protective features e.g. SafeDrop</p> | <ul style="list-style-type: none"> <li>• Highly secure transfer mechanism – can limit downloads, time to access etc.</li> <li>• No permanent storing of the file(s) – moves like traditional mail – doesn't stay at the Post Office</li> <li>• Full audit trail to the person who sends files – can see who/when/where file has been access/downloaded</li> </ul> | <ul style="list-style-type: none"> <li>• Typically have a fee associated with using the application</li> <li>• Court staff must 'choose' which documents to share, which is additional effort for judicial staff</li> </ul>   | <ul style="list-style-type: none"> <li>• Preferred use for external transfer to lawyers etc., when access to actual CMS/CTS is not possible</li> </ul> |

| Mechanism                | Overview   | Benefits  | Considerations  | Other aspects   |
|--------------------------|--|---|---|---|
| <b>Video application</b> | Transfer mechanism via the video conference application itself, i.e. share screen or transfer file | <ul style="list-style-type: none"> <li>• Can easily ‘share’ document for parties to see during the proceeding</li> <li>• While not a ‘storage facility’ can at least provide quick and ready access to ensure all parties are on the ‘same page’</li> <li>• If a document is tendered at the last moment, or during the proceeding itself, then sharing via application greatly assists the proceeding</li> </ul> | <ul style="list-style-type: none"> <li>• Only applicable at the time of the proceeding</li> <li>• Not ‘saved’ unless other mechanisms adopted e.g. save to CMS</li> <li>• Not a storage mechanism, nor a formal transfer mechanism</li> </ul> | <ul style="list-style-type: none"> <li>• Some video conferencing applications only have ‘share’ screen</li> <li>• Only applicable for ensuring that parties who for whatever reason may not have access to documents prior to proceeding to ‘see’ the documents.</li> </ul> |

**Preferred Mechanism by Case category of document**, and whether sending/receiving to Internal (I) users i.e. other judicial officers or External (E) users i.e. lawyers/parties

Notes:

- If cell is shaded, then the ‘mechanism’ is not seen as appropriate or applicable
- Ratings:
  - 4 – highly recommended
  - 3 – suitable
  - 2 – suitable but prefer other mechanisms
  - 1 – as a last option
  - 0 – not suitable/recommended

| Mechanism  | Court Notices |   | Evidentiary Material |   | Judgments Reasons |   | Orders |   | Applications |   | Warrants Summons |   | Email General Corro |   |
|--|---------------|---|----------------------|---|-------------------|---|--------|---|--------------|---|------------------|---|---------------------|---|
|  | I             | E | I                    | E | I                 | E | I      | E | I            | E | I                | E | I                   | E |
| Email  | 4             | 4 | 0                    | 0 | 4                 | 4 | 4      | 4 | 3            | 1 | 2                | 2 | 4                   | 4 |
| Case Management System (CMS) or Case Tracking System (CTS) | 4             |   | 4                    |   | 4                 |   | 4      |   | 4            |   | 4                |   | 4                   |   |
| Portal (external access to CTS/CMS)                        |               | 4 |                      | 4 |                   | 4 |        | 4 |              | 4 |                  | 4 |                     | 4 |
| Cloud Services   | 3             | 3 | 2                    | 2 | 3                 | 3 | 3      | 3 | 3            | 3 | 2                | 2 |                     |   |
| Transfer applications                                      |               |   | 4                    | 4 |                   |   |        |   |              |   | 4                | 4 |                     |   |
| Video application  |               |   | 1                    | 1 |                   |   |        |   |              |   |                  |   |                     |   |

# Annex Six: Court Protocols on Remote Hearings (New South Wales Bar Association)

## New South Wales Bar Association Court Protocols

### Protocol for Remote Hearings

#### Introduction

1. The purpose of this protocol is to provide guidance to practitioners, particularly counsel, appearing at remote hearings - described in various publications and practice notes as a 'virtual hearing' and described herein as a 'remote hearing'.
2. The protocol addresses minimum standards for such remote hearings, divided into three categories: General aspects of court hearings, Conduct and Technical. Practitioners should have regard in addition to this protocol to relevant court websites, practice directions and guidelines.
3. This document is likely to evolve over time as required and to take account of recent developments. The protocol has particular relevance to the current COVID-19 pandemic, while social distancing requirements are in force. However, the Protocol may well remain relevant beyond the current pandemic, in circumstances where it is considered necessary or appropriate in the interests of justice for a hearing to be held remotely.
4. It is not the purpose of this protocol to address the functional aspects of particular online platforms which might be utilised to conduct remote hearings (eg, Microsoft Teams, WebEx, Zoom) by the different jurisdictions, nor the particular procedural circumstances of each jurisdiction. Rather, the protocol is aimed at providing guidance for the standards to be adopted and applied, whichever platform is being utilised, or whatever jurisdiction counsel is appearing in.
5. The use of remote hearings has the potential to aid in the provision of access to justice. It may also improve efficiency in the delivery of justice in limited circumstances. At the same time, it is necessary to ensure that the features of the Australian judicial system, which embrace the rule of law and open justice, are not unreasonably compromised. In this context, the use of remote hearings might form part of various additional procedural innovations in the context of courts and tribunals to gradually adapt their processes.
6. It is not to be suggested by this protocol that it is anticipated or expected that criminal jury trials will be conducted by audio visual link or other than with the presence of the accused in person.

#### Court hearings: general

##### Judicial Authority

7. In Wallace and Rowden 'Remote Judging: the impact of videolinks on the image and role of the judge', *International Journal of Law in Context* (2018), 14, 504-524, the authors observe that the work undertaken by a judge in a courtroom is the most publicly visible aspect of their role. Furthermore, the place of justice, 'the court', has traditionally been synonymous with the location of the judge. The presence of the judge reinforces their role, emphasising their authority and neutrality, thus supporting the legitimacy of the court as an institution.
8. For these reasons, fundamental judicial tasks such as monitoring participant behaviour, exercising control of proceedings, ensuring a fair trial, and facilitating witness testimony are

affected when performed via video-link. Accordingly, in an online hearing, there are a number of aspects of the conduct of participants (addressed below) that bear upon the extent to which judicial authority is promoted and maintained. The judicial officer will also be alert to the factors affecting judicial authority in an online hearing.

9. A court hearing is ordinarily conducted with all participants attending in person, although over the last two decades there has been increasing use of audio-visual technology to conduct directions hearings, call-overs, bail hearings, and to take evidence from vulnerable or physically remote witnesses.
10. With the onset of the COVID-19 pandemic, the legislature has empowered courts to order that all participants (including parties, legal practitioners and witnesses) attend using online/virtual technology (see eg s.22C of the *Evidence (Audio and Audio Visual Links) Act 1998 (NSW)*). In keeping with these powers, practice directions emanating from courts and tribunals of NSW have for the most part directed that only in exceptional circumstances are proceedings to be conducted in person.
11. All practitioners persons who work within the court system are encouraged to be alive to the limitations that may arise with online hearings and that can affect the interests of justice. Such limitations may include:
  - a) the capability and capacity of participants to utilise technology;
  - b) equal access to technology - including the remote appearance of an accused/witness;
  - c) adducing of oral and documentary evidence;
  - d) cross-examination of certain witnesses, such as vulnerable witnesses; complex and lengthy cross examinations; and cross examination on credit.

These limitations may give rise to the need for counsel to apply to vacate/adjourn the online hearing, and counsel should not hesitate to make such an application where the interests of justice require it.

12. Practitioners are reminded that a matter which has been identified as being of particular concern is the appearance of an accused or offender via remote means for any final hearing, as studies have shown they may frame the individual in the context of their detention, intruding on legal process, and affecting their comprehension and participation (see McKay C “Video links from prison: Permeability and the carceral world”, *International Journal for Crime, Justice and Social Democracy*, 2016, 5(1): 21- 37. DOI: 10.5204/ijcjsd.v5i1.283). Similar considerations may apply to individual litigants.
13. The following general considerations may be apposite to a court’s determination as to whether or not it should conduct an online hearing:
  - a) the reason(s) to depart from in-person hearing (eg social-distancing restrictions);
  - b) the implications of (further) delay in the matter;
  - c) open justice principles;
  - d) procedural fairness;
  - e) suitable arrangements for witnesses and the testing of evidence.
14. There may also be considerations which are applicable to particular types of proceedings, such as
  - a) in a criminal trial, the overarching consideration that the accused receives a fair trial;
  - b) in Family Law proceedings, the interests of any child or children;
  - c) in civil proceedings more generally, a just determination of the issues in dispute in the most efficient, timely and cost-effective manner.
15. A number of these considerations are addressed in further detail below.

### Open Justice

16. Safeguarding the public interest in open justice is a primary objective of the administration of justice (see eg *Court Suppression and Non-Publication Orders Act 2010* (NSW), s 6).
17. Accordingly, and subject to the *Court Security Act 2005* (NSW) (referred to below), appropriate steps may be taken to permit members of the public and the media to attend remote hearings (subject to cases which would, in any event, be the subject of suppression orders). If this cannot occur, it may constitute a powerful consideration weighing against the remote hearing proceeding.
18. However, there may be circumstances where the interests of justice favour limiting remote non-party attendance if there are capability or capacity issues in relation to the technology - particularly in criminal matters where the accused is in custody. This may mean that no, or limited, access is available for those not directly concerned in the litigation, for example, one member of the media nominated to act as the 'in court' hub for others and similarly for family members or support persons.
19. Practitioners are reminded that members of the media or public who attend a remote hearing separately need to comply with all directions by the court to ensure they are not audible and their presence is not distracting (eg using the mute function and turning off their video).

### Procedural Fairness

20. Issues of procedural fairness can arise in all hearings and remote hearings are no different. However, the ability to perceive and manage fairness issues in a remote hearing may not always be possible. One reason for this is the loss of the traditional physical proximity of parties and the limited way in which all parties might participate in a remote hearing.
21. Appropriate arrangements should be in place for practitioners to take instructions, and to convey instructions and comments to counsel. This is likely to require both a separate online method of communicating (eg virtual private rooms, Whatsapp or email) and sufficient breaks in proceedings to allow counsel to confirm instructions. Particular considerations arise in relation to taking instructions from an accused in custody, and persons with limited technological access.
22. Appropriate arrangements should also be in place for each participant (in particular the parties, their legal representatives and the witnesses), to have access to reliable internet access and appropriate technology (eg computer and/or tablet to access the remote hearing), and (without limiting this requirement), access to documents.
23. Practitioners should make inquiries as to whether their clients and witnesses have appropriate facilities available to enable them to participate remotely in the hearing and provide instructions. If a party or a witness does not have sufficient technical (or cognitive), ability to fully participate using the appropriate technology, and alternate arrangements/assistance cannot be achieved, the case may not be able to proceed as a remote hearing.

### Witnesses

24. Particular difficulties may obtain to the taking of evidence from lay witnesses who may be unfamiliar with the court environment and may not appreciate the need for formality, respect to the court and court procedure. Many of these issues can be overcome when a witness is required to appear in-person. Furthermore, when a witness appears in-person the



- court can exercise its authority to require the attendance of the witness and protect the integrity of the witness's evidence while in the witness box.
25. Practitioners need to be aware of the risks that attend remote hearings using online technology, in particular involving assessment of witness evidence, such as evaluating witness credit and perception of their demeanour. Matters of concern in that regard may include a decreased ability to detect non-verbal cues during video-conferencing; the difficulty of picking up nuances and emotions; and the potential for eye contact to feel artificial across technology (which can make a witness appear evasive or dishonest).
  26. Having regard to the limitations with remote hearings, in a case which turns on the evidence of a critical witness (eg the plaintiff in a common law dispute giving oral evidence in chief), this may be a strong factor against that part (or all) of the hearing being conducted as a remote hearing. An AVL link may not capture the subtlety of human discourse and will always carry the risk of misunderstanding or a failure by a participant to be able to communicate normally. That will be particularly so for parties who are not familiar with technology.
  27. When a witness is to appear in a remote hearing from their home or other external premises, a number of challenges may arise. For example, the witness:
    - a) may have difficulties with the technology;
    - b) may not appreciate or follow the relevant procedure;
    - c) may struggle with managing electronic documents;
    - d) may be influenced by others who are present (affecting the integrity of their evidence);  
may present poorly on camera, for example not looking at the camera, or being poorly placed on the screen etc., if adequate training is not provided to them.Accordingly, practitioners should, as far as possible, ensure that the witness
    - a) is familiar and capable with the technology;
    - b) is informed about and will follow the procedure;
    - c) gives his or her evidence from a location that is quiet and not subject to interruptions;
    - d) does not give his or her evidence in the presence of persons who may unduly influence the witness;
    - e) is provided with access to appropriate support persons, eg, a parent, guardian or support person who is not also a witness in the proceedings; an interpreter; and where feasible a person to assist handling documents; and
    - f) is given an opportunity to test the online platform in conference beforehand.
  28. It may be appropriate for a practitioner to request the court to seek confirmation from the witness as to who else is present in the room with them, and to remind witnesses that even though they are appearing remotely:
    - a) they are required to comply with the court's directions, answer questions unless there is a proper basis for them not to do so and not leave unless and until they are permitted to do so;
    - b) they may not speak with any person about their evidence while court is adjourned and they remain under cross-examination;
    - c) they understand the provisions of sections 9 and 9A of the *Court Security Act 2005*.
  29. In this context, it is noted that:
    - a) when a witness is giving evidence, no communication is to occur between the witness and persons external to the proceedings (unless it is with an approved support person or witness intermediary); and
    - b) no person (including witnesses, party, media or members of the public) is to record the evidence by capturing an audio or video recording of proceedings - ss 9 and 9A of the *Court Security Act 2005* (NSW), respectively refer to

the ‘Use of recording devices in court premises’ and the ‘Prohibition on unauthorised transmission of court proceedings from courtroom’.

## **Conduct**

30. Court etiquette and procedure must be adhered to as far as reasonably practicable, at all times. This is necessary for ensuring that the authority and gravitas of the court is preserved, and includes:
  - a) bowing to the judicial officer at the commencement and conclusion of proceedings (whether standing or seated, as the Court may direct);
  - b) addressing the court and court staff with the same level of professionalism and courtesy as if appearing in-person;
  - c) not interrupting the judicial officer or opponent;
  - d) signalling an objection to evidence appropriately (this may also include non- verbal means, eg the word ‘OBJECTION’ on a white piece of paper).
31. Experience suggests that remote hearings can often take longer and be more taxing than in-person hearings because of technical connectivity problems, difficulties communicating with an instructing solicitor, leading or junior counsel, taking instructions from clients, all the while appearing remotely and with interruptions that would not otherwise be experienced if the matter were being heard in-person. These difficulties are exacerbated when the client is remote from his/her/their legal representatives and even further exacerbated when an accused is appearing by AVL from custody.
32. Practitioners should be prepared for these eventualities, consider those issues when matters are listed for hearing, and raise them with the court as necessary. As a general matter, flexibility will be required to accommodate the interest of justice and the needs of those involved. Participants (including counsel), may be grappling with competing priorities as a result of social-distancing restrictions (eg home schooling).
33. Prior to the commencement of the hearing, and having regard to any applicable court procedure or practice direction, practitioners should consider preparing a summary of the relevant arrangements, which is reduced to writing and provided to the court as a joint document, suggesting:
  - a) the technical platform to be utilised;
  - b) the method to be used for handling documents electronically;
  - c) the identity and location of:
    - i. all legal practitioners; ii. parties; and iii. witnesses;
  - d) arrangements to protect integrity of witness evidence (eg ensuring that they have access to relevant documents, ensuring no other person is present while they give their evidence remotely); and
  - e) a proposed hearing schedule (opening, witness schedule, closing submissions).

## **Practical observations**

34. The chosen technical platform to conduct the online hearing ought be tested to ensure it has sufficient functionality, is functioning smoothly, and that all participants can access, and develop familiarity with its functionality (in particular the ‘mute’ button, see below).
35. The parties should, in conjunction with the court’s own procedures, identify the appropriate method to be adopted for handling documents:
  - a) if an online document portal is to be utilised, this should be appropriately arranged into folders, eg court documents (ie pleadings and motions), submissions, and

- evidence (ie affidavits, exhibits), and ‘access’ permission managed appropriately (ie limiting the access provided to witnesses).
- b) if documents are to be made available through more ad hoc means (eg email) there ought be appropriate adherence to protocol regarding court communications.
36. The legal representatives and witnesses should ensure that for the duration of the hearing, they utilise a quiet, well-illuminated space.
  37. If counsel are concerned about interruptions when appearing from home, they should consider appearing from chambers. If this is not possible, it would be prudent to advise the court and the other participants about the potential for interruptions.
  38. In chambers, counsel should put in place arrangements to ensure no interruptions (eg telephone diverted, closed door with a sign indicating hearing in progress).
  39. Participants should ensure that when not speaking, their microphone is muted – this prevents background noise which is distracting and renders it harder for all participants to hear the person speaking.
  40. All participants with a ‘speaking role’ ought have their video ‘on’ and be visible at all times, ie:
    - a. the court;
    - b. counsel;
    - c. witness.
  41. Parties should liaise with the court as to whether participants without a speaking role ought have their video ‘off’ such that they are not visible. The court’s position may differ depending on the participant eg:
    - a) parties;
    - b) solicitors;
    - c) transcript providers;
    - d) members of the public;
    - e) members of the media.

## **Technical**

42. Technology must adapt to and serve the interests of justice rather than the interests of justice be limited by the functionality of technology. The variety of technological solutions cannot be used to trump the basic requirements of a hearing, which recognise the expectation of participants in relation to:
  - a) consistency and appropriateness of the technology;
  - b) continuous improvement of the use of technology;
  - c) feedback by all participants.
43. As far as possible, hearings should be held by way of audio-visual facility rather than telephone. This is because the limitations of audio-visual hearings which are set out in this document are exacerbated when visual cues are not present.

## **Practical observations**

44. Participants attending a remote hearing using an audio-visual facility will require a computer/laptop which is connected to the internet with a working internal camera and microphone. Other mechanisms which may be helpful, albeit not essential, include:
  - a) a second screen set up to look at documents etc.;
  - b) a portable tablet or other device which can be held while looking at the camera; and
  - c) a second device linked to the mobile network and not connected by Wi-Fi can assist when a connection disappears.
45. Participants should expect that connectivity will not always be available and plans should be made to protect against that possibility. Participants should also make contingencies as to the

- means by which to communicate with the relevant court or tribunal, with their clients and with their opponents in the event of technical or other failures.
46. The *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) enables the giving of evidence by audio and audio visual links (including, for instance, that the oath or affirmation be administered by means of audio-visual link: s 5D(1)(a)). Where a witness is located overseas, it is necessary to confirm that the laws of the witnesses' own jurisdiction do not prevent an oath or affirmation being administered.
  47. Witnesses ought not be able to view the evidence given by other witnesses before they give their evidence.
  48. If the court does not have a pre-existing protocol as to how documents should be shown to witnesses, then the parties should liaise with the court about an appropriate mechanism which ensures the integrity of cross examination is not undermined, and appropriate confidentiality in documents is maintained.
  49. Notwithstanding test run(s) and the best of intentions, technical issues during the course of a remote hearing are almost inevitable. In those instances, the court may need to adjourn so that the issue can be attended to. The sensible cooperation of all participants is necessary.

# Annex Seven: Special Measures Information Note (Federal Court of Australia)

## SPECIAL MEASURES IN RESPONSE TO COVID-19 (SMIN-1)

Special Measures Information Note

Updated 31 March 2020

### 1. Introduction

- 1.1. This Special Measures Information Note (SMIN-1) sets out arrangements for the continued operation of the Federal Court during the COVID-19 outbreak in Australia.
- 1.2. Due to the COVID-19 pandemic, where appropriate and necessary, the Federal Court is modifying its practices in order to minimise in person attendance on Court premises, with the Court's priority being the health and safety of the community, and in particular, parties, practitioners, judges and staff, and the families of all of these groups.
- 1.3. The cooperation of all court users and court staff is required in this regard.
- 1.4. This special measures information note takes effect from the date it is issued and, to the extent practicable, applies to all proceedings filed before, or after, the date of issuing.
- 1.5. This special measures information note remains in effect until and unless superseded or revoked.

### 2. Registry Operations

- 2.1. The health and safety of the community, judges and court staff is our priority, and therefore changes have been made to our registry operations. Registry services will be provided remotely, by telephone and through other online services. In urgent circumstance, face-to-face services in a registry may be provided, but only after initial assessment via telephone.

### 3. Electronic Filing of All Documents

- 3.1. To the extent possible, all documents must be lodged for filing using the Court's electronic filing facility, eLodgment.
- 3.2. Documents that are not able to be lodged through eLodgment may be faxed or emailed to the relevant registry (at the registry email address available on the Court's website) for filing.
- 3.3. Court users who do not have access to the necessary electronic equipment, including self-represented litigants, should contact the registry by telephone for assistance. Public scanning facilities can be made available in each registry to facilitate the electronic filing of all documents.
- 3.4. Registry staff have been asked to minimise hard copy document handling. To the extent possible, hard copy documents should not be posted or hand delivered to registries.

### 4. Signatures on Documents and Affidavits

- 4.1. To facilitate the electronic filing of all documents, if access to scanning technology is limited, the Court will temporarily allow documents to be signed electronically, including by having

the person signing the document type their name in the relevant space in the signature block in lieu of physically signing the relevant document.

- 4.2. The Court also acknowledges that remote working arrangements may pose significant challenges to having affidavits sworn or affirmed. The Court will accept the filing of unsworn affidavits on the understanding that, if required, these will later be sworn or affirmed when circumstances allow.

## **5. Subpoenas and Inspection of Documents**

- 5.1. Inspection of documents at all registries of the Court is to be by appointment only. Requests for an appointment should be made by emailing the relevant registry.
- 5.2. Legal practitioners and parties should only request an appointment to view subpoenaed materials if this is truly necessary for the conduct of the proceeding at the time. As a general guide, the Court will consider whether an appointment is necessary by reference to whether a matter is scheduled for hearing in the subsequent 4 weeks, or is otherwise urgent.

## **6. Triage Process for Newly Filed Judge Matters**

- 6.1. A triage process has been introduced for newly filed judge matters. Newly filed judge matters, other than urgent duty matters and Full Court and appellate matters, will first be provisionally allocated to the docket of the National Operations Registrar to be considered for allocation and a first return date.
- 6.2. As the Court has successfully begun to operate using remote means, allocations will now be made with a view to moving the Court to operating at about 50-60% of normal capacity. The success of this will of course depend upon the continued functionality and reliability of IT systems.
- 6.3. To assist in this process of triaging, parties will be contacted by the Court and asked to answer a number of questions relating to the proposed management of the matter.

## **7. All Court Listings and Events, including Hearings and Mediations**

- 7.1 In order to remain open and operational, whilst protecting health, safety and wellbeing, the Court must work to limit in person attendance on Court premises.
- 7.2 To the extent possible, alternative arrangements will be put in place for all listings and events that would ordinarily require in person attendance. In particular, the Court will contact legal practitioners and parties to determine whether listings and events may be able to be conducted on the papers, by telephone or by other remote access technology.
- 7.3 If alternative arrangements are not able to be put in place for listings and events that would ordinarily require in person attendance, such listings and events will need to be vacated or adjourned other than in exceptional circumstances and with the express authorisation of the Chief Justice.
- 7.4 If you have an upcoming listing or event, wherever possible the Court will endeavour to contact you at least two weeks prior in relation to any alternative arrangements. If you have not been contacted by the Court or if you remain unsure of what is happening in relation to a particular listing or event please email, with the matter number and title in the subject line.

## **8. Communications with the Court and Among Parties**

- 8.1. The Court is continuing to conduct its business on the docket system so communications with the specific docket judge remain important as always
- 8.2. In these extraordinary times it is necessary to remember certain fundamental aspects of court communication etiquette. There should be no ex-parte communication with chambers unless of course the matter concerns an ex-parte application. Practitioners and parties should continue to maintain all usual communication practices with the Court.
- 8.3. The Court expects that practitioners and the parties will exhibit real co-operation in dealing with each other and with the Court in order to avoid any unnecessary delay or misunderstanding in how matters are being dealt with.

## **9. Short Listings and Events, Half Day or Less**

- 9.1. The Court will seek to accommodate any listings or events that would ordinarily require in person attendance for half a day or less without requiring in person attendance, either:
  - i. on the papers;
  - ii. by telephone; or
  - iii. by a combination of both of the above.
- 9.2. In some circumstances, short listings may also be able to be accommodated by other remote access technology, including video conferencing' technology such as Microsoft Teams.
- 9.3. The preferred means of accommodating any short listings and events will be determined by the relevant judge or registrar, in consultation with legal practitioners and parties where appropriate.
- 9.4. Ahead of being contacted by the Court, legal practitioners and parties are encouraged to consider which aspects of their listings may be able to be dealt with by consent and/or on the papers, and to communicate with each other to seek to reach agreement on such matters.

## **10. Longer Listings and Events, Over Half a Day**

- 10.1. Longer listings and events that would ordinarily require in person attendance for half a day or more will undergo a triage and prioritisation process. Legal practitioners and parties should work cooperatively with the Court, and with each other, to identify how and when longer listings and events may be able to proceed.
- 10.2. The Court has already been able to accommodate some longer listings and events, including contested hearings, through the use of remote access and file sharing technology, including Microsoft Teams.
- 10.3. Issues requiring consideration include reliability of the proposed technology, document security, availability and timing of transcripts, and the ability to live stream hearings so as to facilitate open and accessible courts.

## **11. Remote Technology**

- 11.1. All hearings before the Court (other than in truly exceptional circumstances) are currently proceeding using remote access technology.
- 11.2. Currently, the Court is using Microsoft Teams and telephone conferencing in order to hear matters. It is anticipated that the number of available court rooms will shortly be adequate to enable wide spread access to remote technology for hearing purposes.



- 11.3. A National Practitioners/Litigants Guide to virtual hearings and Microsoft Teams will be available on the Court's website at: <https://www.fedcourt.gov.au/online-services/virtual-hearings>.
- 11.4. The Court is also considering streaming and other methods of ensuring the requisite degree of public access to hearings conformable with the open justice and open court principles.
- 11.5. The Court will amend this note of special measures when other methods and functions become operational.

## **12. Self-Represented Litigants**

- 12.1. The Court acknowledges the impact these special measures and the conduct of electronic hearings may have on self-represented litigants, and persons unfamiliar with the Court process.
- 12.2. Where appropriate, the Court will consider the needs of unrepresented litigants and other persons who may not have access to suitable technology to conduct or participate in hearings conducted by the Court using remote access technology.

## **13. Urgent Matters**

- 13.1. Duty judge and registrar contacts for urgent matters are available on the Court's website and will continue to be updated daily. Any requisite modifications to the published application process for urgent duty matters will be notified by the relevant duty judge or registrar.
- 13.2. If a matter has been allocated to a judge's docket, ordinarily any communication or application regarding carriage or conduct of the matter (including urgent communications or applications) should be made to him or her. However, if it is a new matter not yet allocated, or if for some reason it is not practicable or appropriate to approach the docket judge or if the inquiry specifically concerns the Court's response to the COVID-19 outbreak in Australia, queries should be addressed by email to the National Operations Registry at [NORTeam@fedcourt.gov.au](mailto:NORTeam@fedcourt.gov.au), or you can contact the NOR Team duty contact for the day, as published on the Court's website. Such queries will be prioritised, allocated to a senior member of the NOR Team and attended to as a matter of urgency.

**J L B ALLSOP**

Chief Justice 31 March 2020



## Annex Eight: Video Conference Applications: Comparison

The following assessment considers software platforms that can be used to host audio-visual meetings and enable remote conferencing proceedings. Of those platforms compared (*Footnote 1* outlines additional platforms found unsuitable for PJSI’s purposes), where users are already utilising Microsoft Office 365 platforms (through email accounts, SharePoint and cloud storage), the recommendation would be to utilise the free video/audio conferencing software associated with Microsoft Teams for internal communications, meetings and trainings. Where recording of content is required, or extensive engagement of external participants is expected, either Zoom or WebEx (depending on the available bandwidth and ability to download software, with WebEx requiring pre-download and registration) would be suitable.

This research was undertaken to assist PJSI’s programmatic activities. It was conducted internally and is not a comprehensive assessment. PJSI recommends that you use this information as a guide only, and undertake further research to determine which program/s best suits your individual needs.

| Platform                            | Microsoft Teams   |           | Zoom  |           | WebEx   |           | Google Meet <sup>2</sup>  | Skype <sup>3</sup>  |
|-------------------------------------|---|-----------|---|-----------|---|-----------|---|---|
| Link                                | <a href="https://www.microsoft.com/en-au/microsoft-365/microsoft-teams/group-chat-software">https://www.microsoft.com/en-au/microsoft-365/microsoft-teams/group-chat-software</a> |           | <a href="https://zoom.us/signup">https://zoom.us/signup</a> |           | <a href="https://cart.webex.com/sign-up">https://cart.webex.com/sign-up</a> |           | <a href="https://gsuite.google.com.au/intl/en_au/pricing.html">https://gsuite.google.com.au/intl/en_au/pricing.html</a> | <a href="https://www.skype.com/">https://www.skype.com/</a> |
| Starting Cost <sup>4</sup>          | Free <sup>5</sup>   | \$6.90    | Free  | \$20.99   | Free  | \$18.95   | \$8.40 <sup>6</sup>   | Free <sup>7</sup>   |
| Ease of Set-up and Use <sup>8</sup> | 😊   | 😊         | 😊   | 😊         | 😐   | 😐         | 😊   | 😊   |
| Participant Numbers                 | Up to 250   | 250+      | Up to 100   | Up to 100 | Up to 100   | Up to 100 | 100+  | Up to 50  |
| Meeting Numbers                     | Unlimited   | Unlimited | Unlimited   | Unlimited | Unlimited   | Unlimited | Unlimited   | Unlimited   |

<sup>2</sup> Note: this is formerly Google Hangout. Google Hangout is being phased out, but is still [currently available online](#) for immediate, free video calls with up to 10 people.

<sup>3</sup> Please note: [Skype for Business](#) will be retired and replaced by Microsoft Teams by July 31, 2021. Other platforms considered and determined unsuitable for PJSI’s purpose include: [Whereby](#); [True Conference](#); [GoToMeeting](#); [ClickMeeting](#); [UMeeting](#); and [BigBlueButton](#).

<sup>4</sup> All costs are in Australian Dollars (AUD), are calculated monthly, and are per subscription/user.

<sup>5</sup> For any organisation already using Microsoft Office 365 emails and platforms.

<sup>6</sup> This price includes the full suite of GSuite products, including: video conferencing, web chat, email address, online cloud storage and website builders.

<sup>7</sup> When calling another Skype account.

<sup>8</sup> These ratings have been applied by the PJSI team based upon PJSI’s experience with set-up and use of these platforms.

| Platform                              | Microsoft Teams   |           | Zoom       |          | WebEx      |          | Google Meet | Skype    |
|---------------------------------------|---|-----------|------------|----------|------------|----------|-------------|----------|
| Meeting duration                      | Unlimited   | Unlimited | 40 minutes | 24 hours | 50 minutes | 24 hours | 24 hours    | 24 hours |
| Screen Share                          | ✓   | ✓         | ✓          | ✓        | ✓          | ✓        | ✓           | ✓        |
| File Sharing                          | ✓   | ✓         | ✓          | ✓        | ✓          | ✓        | ✓           | ✓        |
| Messaging                             | ✓   | ✓         | ✓          | ✓        | ✓          | ✓        | ✓           | ✓        |
| Audio Calls                           | ✓   | ✓         | ✓          | ✓        | ✓          | ✓        | ✓           | ✓        |
| Video Calls                           | ✓   | ✓         | ✓          | ✓        | ✓          | ✓        | ✓           | ✓        |
| Break-out Rooms                       | ✓   | ✓         | ✓          | ✓        | ✓          | ✓        | ✗           | ✗        |
| Application and Browser               | ✓   | ✓         | ✓          | ✓        | ✓          | ✓        | ✓           | ✓        |
| Recording                             | ✗   | ✓         | ✓          | ✓        | ✓          | ✓        | ✓           | ✗        |
| Registration required by participants | ✗   | ✗         | ✗          | ✗        | ✓          | ✓        | ✗           | ✓        |
| Security                              | It is recommended that Partner Courts explore the various security considerations of each platform, in order to identify which is most suitable to their needs. This may include considerations of: encryption; manual security settings; two-factor authentication for access to accounts; level of security and protection from accidental and deliberate security breaches; and security of data stored on the platform, among others. |           |            |          |            |          |             |          |
| Bandwidth <sup>9</sup>                | 1.2 mbps  | 1.2 mbps  | 600 kbps   | 600 kbps | 500 kbps   | 500 kbps | 1.5 mbps    | 128 kbps |

<sup>9</sup> The bandwidths listed are the minimum required in order to run the software effectively for audio/video calls. Bandwidth is the range of frequencies required to transmit a signal (the amount of data that can flow in a given time). *Mbps* stands for megabits per second, and *kbps* stands for kilobits per second. 1,000 kbps equals 1 mbps.

## Annex Nine: Connectivity Snapshot

Below is an example of a connectivity snapshot as produced by the IT Manager for Pohnpei, FSM.

| LOCATION | BUILDING ROOM              | COURT                  | USERS SHARING CONNECTION | CURRENT PLAN    | ACTUAL PERFORMANCE (Ping, download & upload speed) |
|----------|----------------------------|------------------------|--------------------------|-----------------|--|
| Pohnpei  | Separate to State – 1 room | National Supreme Court | 20                       | 8mb Fibre Optic | Ping – 25mS<br>Download – 3mB<br>Upload – 1mB      |

## Annex Ten: How to Set up an RCP Room

The basic steps to set up a RCP Room is:

1. Bring into the courtroom:
  - a) Laptop;
  - b) Projector;
  - c) Drop-screen ;
  - d) Logitech camera/speakerphone; and
  - e) Logitech mini web-cam.
2. Connect laptop to Wi-Fi;
3. Connect projector to laptop, and ensure display maximises on the screen;
4. Connect Logitech Camera/speakerphone to laptop:
  - a) Test to make sure audio/video is working clearly; and
  - b) Ensure camera is pointing/focussed on the Judicial Officer/clerk.
5. Connect Logitech mini web-cam to clerk's desktop:
  - a) Test to make sure video is clear;
  - b) Ensure camera is pointing towards bar tables and gallery; and
  - c) Ensure desktop audio is on mute.
6. Connect from laptop to VCA;
7. Connect from desktop VCA;
8. Check on the big screen – two active windows – one showing the Judicial Officer/clerk and the other showing the bar tables/gallery:
  - a) Check the sharing of an exhibit on the big screen.
9. Depending on where the person is attending via VC, await them joining;
10. Ensure digital recording – if available - is ready – and prior to proceeding – do a sound check to ensure all audio is recorded clearly;
11. Other considerations:
  - a) Depending on the size of the 'second room', additional audio/video facilities maybe required, e.g. a large audience. In this case it may be necessary to supplement the 'second room' with additional speakers, monitors, and microphones.

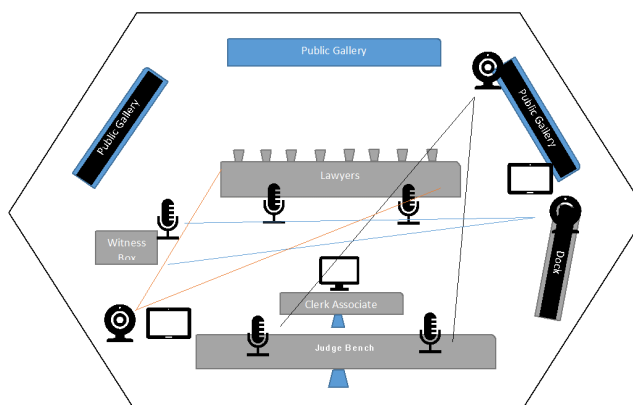


Diagram 1 RCP Setup

# Annex Eleven: Cost Estimate Template

Table 1 Cost Estimate Table

| Item                                  | Cost AUD | Level 3 | Level 2 | Level 1 | TOTAL | TOTAL Cost |
|---------------------------------------|----------|---------|---------|---------|-------|------------|
|                                       |          | #s      | #s      | #s      | #s    |            |
| <b>Setups</b>                         |          |         |         |         |       |            |
| Plasma Screen                         | \$1,000  |         |         |         |       |            |
| Portable/mobile stand                 | \$500    |         |         |         |       |            |
| Projector                             | \$500    |         |         |         |       |            |
| Screen                                | \$200    |         |         |         |       |            |
| Cabling equipment                     | \$100    |         |         |         |       |            |
| PTZ Optic camera (or similar)         | \$4,000  |         |         |         |       |            |
| Logitech Group camera (or similar)    | \$2,000  |         |         |         |       |            |
| Logitech c920 for laptop (or similar) | \$100    |         |         |         |       |            |
| Laptop                                | \$1,000  |         |         |         |       |            |
| Desktop                               | \$800    |         |         |         |       |            |
| <b>TOTAL per setup</b>                |          |         |         |         |       |            |
| <b>TOTAL COST</b>                     |          |         |         |         |       |            |

# Annex Twelve: Examples of Court Responses to COVID-19 Health Restrictions<sup>10</sup>

EXAMPLES OF COURT RESPONSES TO COVID-19 HEALTH RESTRICTIONS

|                                       | Federal Court of Australia   | Family Court and Federal Circuit Court  | Supreme Court of NSW  | District Court of NSW   | NSW Local Court  | NSW Civil and Administrative Tribunal  |
|---------------------------------------|--|---|---|---|--|--|
| <b>New Matters and Filing</b>         | New matters undergo triage process.<br><br>Filing by eLodgment or otherwise email.   | Assigned first available date.<br><br>Filing by eLodgment or otherwise email.   | By Online Registry, Online Court, or otherwise email/post.  | By Online Registry, Online Court, or otherwise email/post.  | By Online Registry, Online Court, or otherwise email.  | Consumer and Commercial applications lodged online. Other applications by post/ Service NSW, or otherwise email.   |
| <b>Lists – Directions and Motions</b> | By AVL or phone, depending on Judge and party availability.  | By AVL or phone.  | Registrars' and Judges' Lists by Online Court, phone, or AVL on staggered basis. Some Judges' lists on the papers.  | General and Motions List moved to Online Court.<br><br>Certain lists managed by interval sittings.  | Online Court/ phone, or otherwise vacated.   | Interlocutory hearings by phone or AVL. Most group Lists suspended, some Lists by phone.   |
| <b>Urgent Applications</b>            | Initial assessment by phone for applicability of in person services.   | If urgent/ remotely impracticable, in person services provided at Registry's discretion.  | Urgent/ remotely impracticable matters by phone. Only cases of compelling urgency in person.  | Parties to email application for arrangements.  | Email Magistrate. Conducted by phone, submissions restricted to 10 minutes.  | No in person hearings without prior approval of the President.   |
| <b>Trials</b>                         | By Microsoft Teams, phone or on the papers. In person only in exceptional circumstances or with prior approval of Chief Justice.<br><br>Some chambers dispense with formalities, knocking in, robes, etc.<br><br>Dropbox used as virtual court-book. | By Microsoft Teams, phone or on the papers. In-person hearings at discretion of Judge based on urgency.<br><br>Low priority Family Matters sent to ADR, Registrar Conference or Family Consultant.<br><br>Tendered documents to be emailed. | By Virtual Courtroom as default. External tech providers such as Microsoft Teams allowed if funded by parties.<br><br>New jury trials suspended, current trials continue. | No new trials. Existing trials proceeding by Virtual Courtroom.<br><br>Parties seeking to vacate hearing still require application to List Judge by way of notice of motion and supporting affidavit. | No new trials. Existing trials until 30 September 2020 vacated.<br><br>New hearing dates to be allocated and reviewed in October 2020.<br><br>Small claims by phone. | All hearings by phone, AVL, or on the papers.<br><br>Capacity reduced, priority given to urgent cases e.g. Guardianship, Tenancy, Administrative and Equal Opportunity and Occupational. |
| <b>Appeals</b>                        | By Microsoft Teams.  | By Microsoft Teams or where necessary in person.  | By Virtual Court. Authorities received over email.  | By Virtual Court or phone.  | By AVL for Annulment Applications.   | By AVL, phone, on the papers or adjourned.   |

<sup>10</sup> Legg, M., Song, A. (2020) The Courts and the Pandemic: *the role and limits of technology*. Law Society of New South Wales Journal. <https://lsi.com.au/articles/the-courts-and-the-pandemic-the-role-and-limits-of-technology/>

## Annex Thirteen: Bench Guide for Judges (NCSC)

### CONDUCTING FAIR AND JUST REMOTE HEARINGS:<sup>11</sup>

#### A BENCH GUIDE FOR JUDGES

Many courts have embraced innovative communication technologies, especially videoconferencing platforms, to conduct routine hearings during the COVID-19 pandemic. Although these technologies provide an effective solution for managing cases until the pandemic abates, interpersonal communication in a remote platform differs considerably from the in-person experience. These differences can affect whether litigants and other hearing participants believe they have been treated fairly. Courts must make procedural fairness (also called procedural justice) for litigants the highest priority, regardless of where proceedings take place, as litigant perceptions of how they are treated have a greater impact on their acceptance of and compliance with court orders than the actual outcome of hearings. This bench guide offers practical tips for adapting judicial techniques to ensure procedural fairness in remote hearings.

#### CORE ELEMENTS OF PROCEDURAL FAIRNESS

- **VOICE:** the ability of litigants to participate in the case by expressing their own viewpoints;
- **NEUTRALITY:** the consistent application of legal principles by unbiased decision makers who are transparent about how decisions are made;
- **RESPECT:** individuals are treated with courtesy and respect, including respect for people's rights;
- **TRUST:** decision makers are perceived as sincere and caring, trying to do the right thing;
- **HELPFULNESS:** litigants perceive court actors as interested in their personal situation to the extent that the law allows.

#### PREHEARING PREPARATION

##### **Adjust calendaring practices to ensure sufficient time to give each case your full attention.**

Preliminary reports suggest that remote hearings take longer than in-person hearings. Litigants who are unfamiliar with the technology platform or who have poor internet connectivity may need extra time to logon, present evidence, or make arguments. Litigant appearance rates also tend to be higher for hearings conducted remotely, eliminating the cushion of time that judges have come to expect by entering default judgments or orders to dismiss for failure to prosecute. "Zoom fatigue" is real; do not schedule more cases than you can realistically manage.

##### **Review case files before hearings.**

Making direct eye contact shows litigants that you are attentive and engaged, but this is difficult to do this while simultaneously reviewing motions, briefs, and other documents during the hearing. Advance preparation shows respect by demonstrating your familiarity with litigants' individual circumstances.

##### **Ensure that litigants have access to information and resources to participate effectively in the hearing.**

Providing a URL to the videoconferencing platform does not necessarily ensure that litigants can participate effectively. Hearing notifications should be written in plain language and include information not only about how to connect and participate on the platform, but also how to access additional information to prepare for the hearing (e.g., gathering documents to present as evidence, potential claims and defenses, etc.).

<sup>11</sup> National Centre for State Courts. 2020. Conducting Fair and Just Remote Hearings: *A Bench Guide for Judges*. <https://www.ncsc.org/newsroom/public-health-emergency>

The notification should also communicate the court's expectations about litigant preparation for the hearing (e.g., timeliness, formality of the hearing). Finally, some litigants may require a foreign language interpreter or an accommodation under the Americans with Disabilities Act to participate in a remote hearing. Ensure that the hearing notification includes information on how to request such assistance.

**Offer alternatives for litigants who lack devices or internet access to participate remotely.**

Courts should suggest community resources (e.g., public schools, libraries, community centers) where litigants can use computers or get access to a stable internet connection, including, if possible, dedicated computer kiosks or Zoom pods at the courthouse.

### FAIR AND EFFECTIVE USE OF VIDEOCONFERENCING PLATFORMS

**Use a “technical bailiff” to help litigants logon and troubleshoot on technical problems.**

The bailiff should rename litigants to indicate their full name, especially litigants using devices with default names (e.g., “Mom’s iPad”) or litigants who have called in on a telephone connection. The bailiff can also move litigants to waiting areas or breakout rooms staffed by ADR professionals, pro bono attorneys, or court staff who can provide legal information or assistance while waiting for hearings to begin.

**Pay close attention to videoconference dashboards.**

Many default platform settings require participants to raise hands virtually or require the host to permit entrance from a virtual waiting room. Also be alert for hackers (Zoom bombing) disrupting the hearing.

**Unmute litigants and check that they can hear and be heard.**

Before starting the hearing, identify all participants to ensure that everyone is present on the record. Provide a brief explanation to litigants on how to participate, including raising hands for permission to speak. If litigants are represented by counsel, explain how they can communicate privately using breakout rooms or separate text communications. Before entering a final judgment, check that all participants are still present on the platform, have heard everything that was said, and had an opportunity to express their viewpoint.

**Be careful not to overlook litigants who appear on the screen as black boxes due to lack of webcams or unstable connectivity or who have called into the hearing on a telephone line.**

It is easier to engage with people whose faces you can see. Similarly, some viewing options on videoconference platforms do not permit users to see all participants simultaneously. Make it practice to call on each person to ensure that they are still present on the platform, have heard everything that was said, and ask them if they have anything else to add before closing the hearing.

**Speak to the camera, not to the screen, and wait for litigants to finish speaking before responding.**

Looking directly at the webcam makes it appear that you are looking directly at the trial participants, rather than off to the side. In addition, looking through multiple screens or databases during the hearing can make judges look distracted or disengaged. Finally, the delay in audio transmission sometimes causes people to speak over each other. Wait for litigants to finish speaking before responding.

**Ensure that litigants participating by telephone are fully informed and have the opportunity to speak during hearings.**

Litigants participating by telephone lack the visual cues on which other participants rely to



understand what is happening during the hearing. For example, they may not know who is present for the hearing and they will not be able to view documents or other evidence displayed on a shared screen. Litigants participating by telephone also do not have access to platform dashboard tools (e.g., to raise hands to indicate their interest in speaking).

**Take time to explain the hearing’s purpose and procedures, and the basis for any decisions.**

Judges should avoid the urge to rush through cases by cutting off litigants or skipping explanations about the basis for their decisions in an effort to clear calendars. Consider using a form or checklist judgment to explain the legal reasoning for decisions. Use status conferences as an opportunity to advise litigants about upcoming procedures and to connect them to other community resources. Always ask whether litigants have had an opportunity to get legal assistance before entering final judgments.

**Ask litigants about the location from which they are participating.**

Not all litigants have a private, quiet place in which to participate in the hearing. If they are participating from a public area, they may not have the confidence or ability to provide candid information. In addition, background conversations or activities, including some that should be private, may be audible during the hearing and might even be captured on the videoconference recording.

If this occurs, alert the litigant that you can hear the background conversations and ask them to move to a more private location, if possible, or to tell the other group that they can be overheard. Also ask whether litigants have had an opportunity to get legal assistance before entering final judgments.

### JUDGES’ CONDUCT DURING HEARINGS

**Take time to explain the hearing’s purpose and procedures, and the basis for any decisions.**

Judges should avoid the urge to rush through cases by cutting off litigants or skipping explanations about the basis for their decisions in an effort to clear calendars. Consider using a form or checklist judgment to explain the legal reasoning for decisions. Use status conferences as an opportunity to advise litigants about upcoming procedures and to connect them to other community resources. Always ask whether litigants have had an opportunity to get legal assistance before entering final judgments.

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If this occurs, alert the litigant that you can hear the background conversations and ask them to move to a more private location, if possible, or to tell the other group that they can be overheard. Also ask whether litigants have had an opportunity to get legal assistance before entering final judgments.

# Annex Fourteen: Draft Video Link Order (Federal Court of Australia)

Appeal from:

File number(s): <FileNo>

Judge(s): JUDGE

Date of judgment:

Catchwords:

Legislation:

Cases Cited:

**ORDERS:**

<FileNo>

**BETWEEN:**

**AND:**

**JUDGE: JUDGE**

**DATE OF ORDER:**

**THE COURT ORDERS THAT:**

1. Pursuant to s 17(4) of the *Federal Court of Australia Act 1976* (Cth), to the extent and for so long as public health regulations and statutes operate to limit or exclude members of the public from being able to attend the court during the hearing of the proceeding, the sitting of the Court continue, notwithstanding the inability of members of the public to be present who have not applied to the Registry or an associate to observe the hearing by video or audio link, while submissions are being given pursuant to ss 47A, 47B, 47D and 47E of the *Federal Court of Australia Act 1976* (Cth).
2. Unless the Court otherwise orders, no person, being a member of the public, who is observing the hearing of the proceeding by accessing any audio or video link including by link to the platform Microsoft Teams may:
  - (a) Make any audio or video recording or photograph of the hearing or any part of it; and
  - (b) Participate in, or interrupt, the hearing,
3. Provided that nothing in this order shall prevent any person, based on what he or she has seen or heard during the hearing:
  - (c) Making his or her own notes or record of the proceeding; or
  - (d) Publishing a fair report of the proceeding.
4. The Court notes that a contravention of Order 2 may constitute a contempt of court which is punishable by imprisonment, fine and/or sequestration of property.

**Note:** Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

# Annex Fifteen: Terms of Use of Footage of Judicial Proceedings (Supreme Court of Victoria)

**Sentence – R v XXXX – 10.30am, Friday,  
10 July – Court 11 – Justice XXX**

## TERMS OF USE

- The Supreme Court of Victoria retains copyright in this footage.
- This footage is provided for the following reasons:
  - To enable litigants and interested persons to view the proceedings.
  - To assist media who are unable to personally attend judicial proceedings to fairly and accurately report on those proceedings.
  - To allow schools, universities and legal training bodies to show judicial proceedings for educational purposes.
- By watching this footage you are agreeing:
  - That you are not a prospective witness giving evidence in this trial.
  - That if you are a witness giving evidence in this trial, your evidence is completed.
  - Not to copy, store, edit, modify, broadcast, post or redistribute this footage without the prior written approval of the Supreme Court of Victoria.
  - To include the attribution 'Supreme Court of Victoria with any link to this footage.
  - To abide by any orders or directions made relating to the confidentiality and/or non-publication of the proceedings shown in this footage. If you do not, you should be aware that you may be subject to a legal action including for breach of copyright, or defamation or, potentially, contempt of court.

# Annex Sixteen: Overseas Service and Evidence Practice Note (Federal Court of Australia)

J L B Allsop, Chief Justice

25 October 2016<sup>12</sup>

## General Practice Note

### 1. Introduction

- 1.1. This practice note provides guidance on service of originating process and other documents outside Australia, as well as on evidence taken abroad. Subject to paragraph 2.3 below, this practice note applies to all proceedings in the Federal Court.
- 1.2. This practice note takes effect from the date it is issued and, to the extent practicable, applies to proceedings whether filed before, or after, the date of issuing.

### 2. Service of Process Overseas

- 2.1. The kinds of proceedings in which an originating application may be served outside Australia are described in r 10.42 of the Federal Court Rules 2011 (Cth) ("Federal Court Rules"), and include proceedings that are based on a cause of action arising in Australia and proceedings in which the person to be served has submitted to the jurisdiction of the Court.
- 2.2. Leave of the Court should ordinarily be obtained prior to serving an originating application or other court document outside Australia, although if there is a sufficient explanation for the failure to seek leave beforehand, the Court can subsequently confirm service made without leave (see rr 10.43 and 10.44 of the Federal Court Rules). Leave to serve an originating application outside Australia will only be granted if the Court has jurisdiction in the proceeding and the party has a *prima facie* case for the relief that is claimed (see r 10.43(4) of the Federal Court Rules).
- 2.3. The Trans-Tasman Proceedings Act 2010 (Cth) provides for service in New Zealand of initiating documents in civil proceedings started in Australian courts. An applicant in a proceeding in this Court may proceed under that Act rather than under Division 10.4 of the Federal Court Rules.
- 2.4. A party applying for leave to serve an originating process or other court documents on a person in a country other than Australia under Division 10.4 of the Federal Court Rules, or for an order confirming service already undertaken, should support the application with an affidavit (as required by rr 10.43(3) and 10.44(2) of the Federal Court Rules) and include information obtained from the Australian Government Attorney-General's Department in relation to the appropriate method of transmitting documents for service in that country, including whether documents:
  - (a) should be transmitted in accordance with an international agreement or arrangement, and the details of that agreement or arrangement (see Division 10.6 of the Federal Court Rules with respect to service under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters;
  - (b) should be transmitted for service via the diplomatic channel (see Division 10.5 of the Federal Court Rules); or

<sup>12</sup> J L B Allsop, Chief Justice. 2016. Overseas Service and Evidence Practice Note (GPN-OSE). Federal Court of Australia, 25 October 2016. <https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-ose>

(c) may be transmitted for service by a private agent within the territory of that country.

Such information may be obtained from the Private International Law Section of the website of the Attorney-General's Department.

### 3. Taking of Evidence Overseas

- 3.1. Parties and their legal representatives should be aware of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. There are two fundamental methods of taking evidence abroad under the Convention: Chapter 1 – Letters of Request; and Chapter 2 – Taking of evidence by Diplomatic Officers, Consular Agents and Commissioners. The Convention and useful working and explanatory documents can be found on the website of the Hague Conference on Private International Law.

#### *Applying for an Order to Examine a Witness outside Australia*

- 3.2 A party may apply under Division 29.2 of the Federal Court Rules for an order for the examination of a witness before a Judge outside Australia. A draft of the order sought must be lodged with the application (see r 29.11(2) of the Federal Court Rules). The application should also be accompanied by an affidavit or other evidence relied on in support.
- 3.3 In deciding whether to make the order, the Court will consider whether the examinee is willing or able to come to Australia to give evidence, whether the evidence is expected to be material and whether, having regard to the interests of the parties to the proceeding, justice will be better served by granting or refusing the order.<sup>[3]</sup>
- 3.4 If an order is made parties should expect that, in the ordinary course, the order will:
- provide that the examination will be conducted before a Judge in a specified place outside Australia;
  - provide for witnesses (usually named) to be examined on oath or affirmation; and
  - be expressly conditional upon the payment into Court of an amount, to be subsequently determined, as provision for expenses of the Judge and Court staff in relation to the examination.
- 3.5 The parties (if appropriate) should arrange suitable accommodation for the conduct of each examination and for transcription facilities.
- 3.6 The costs and expenses of, and incidental to, the examinations will be borne in the first instance equally by the parties to the proceedings and, subject to any order to the contrary, be treated as part of the general costs of the proceeding.
- 3.7 Evidence should be adduced of whether or not each witness proposed to be examined is an Australian citizen and whether or not each witness is expected to give evidence voluntarily.
- 3.8 Under Government policy, all official overseas travel by judges of the Court must be approved by the Chief Justice. The hearing of any application should be timed to allow the judge hearing it to consult with the Chief Justice and ascertain whether, should an order to appoint a judge to take evidence outside Australia be made in the proceeding, approval to travel will be given.

#### *Notification*

- 3.9 Following the making of any order appointing a judge to take evidence outside Australia, the following letters are sent by the Court. Further letters may be necessary to confirm dates and other arrangements.

| Sender                                  | Recipient  | Reason   |
|---|--|--|
|   |  | To obtain permission for the judicial officer to examine witnesses in that jurisdiction  |
| Chief Justice                           | Counterpart in overseas jurisdiction<br>Attorney-General | To comply with Government policy requiring notification, at least three weeks in advance, of any proposed official overseas travel by federal judges                   |
| District Registrar of relevant registry | Department of Foreign Affairs and Trade                  | To ensure that the relevant government authorities are informed and all approvals are sought, including approval for the examiner to administer an oath or affirmation |
| District Registrar of relevant registry | Relevant court administrator in overseas jurisdiction    | To obtain courtroom or chambers accommodation, if required.  |

### Calculation of Travel Expenses

- 3.10 Travel expenses of a judge are determined according to the determination in force from time to time of the Remuneration Tribunal under the *Remuneration Tribunal Act 1973 (Cth)*. Further information is available on the [Remuneration Tribunal website](#).
- 3.11 Travel expenses for Court staff are determined by the Chief Executive Officer and Principal Registrar of the Court or delegate. This normally includes accommodation at a standard reasonably equivalent to that provided to Court staff in Australia and meal and incidental allowances at the rates determined annually by the [Australian Taxation Office](#) in its taxation ruling dealing with reasonable travelling allowance amounts. Further information is available from the District Registrar of the relevant [registry](#).

### Travel Proposal and Projection of Costs

- 3.12 As soon as possible after any order is made for the taking of evidence outside Australia, the parties should prepare and lodge with the District Registrar of the relevant registry a travel proposal for the Judge and any Court staff, together with a projection of costs including:
- proposed dates, route, flights, class, carrier and ticketing (fully flexible return tickets must be provided) for travel;
  - proposed arrangements for ground travel;
  - three options (if possible) for hotel accommodation;
  - daily allowance for meals and incidentals; and
  - any other anticipated expenses.
- 3.13 The parties will also provide to the District Registrar details of what arrangements are proposed for accommodation for the conduct of each examination and for transcription.

### Payment into Court

- 3.14 On receiving the travel proposal and the projection of costs, the District Registrar will liaise with the Judge to identify whether the proposal is satisfactory and consider whether the cost projection made is sufficient to provide for the likely expenses of the examination. The District Registrar will, if necessary, liaise with the parties about any possible modifications. If required the District Registrar may seek directions from a judge. Once the amount for the provision for the Court's expenses of the examination

is determined and before the commencement of the examination, the parties will pay that amount in equal shares into Court.

#### *Reconciling Expenses*

- 3.15 As soon as possible after the examination, the District Registrar will reconcile and account to the parties for the costs actually incurred by the Court of and incidental to the examination. If the amount paid as a provision for those expenses exceeds those costs, the excess will be refunded to the parties in equal shares. If there is a shortfall in the amount paid as a provision for those expenses against those costs, the parties will pay the amount of the shortfall into Court in equal shares within 7 days of receiving written notification.

#### *Evidence from Overseas by Video Link*

- 3.16 Refer to the Technology and the Court Practice Note (GPN-TECH) and the Court's website for further information on arrangements for the use of a video link in a hearing.

**JLB ALLSOP**  
**Chief Justice**  
**25 October 2016**

<sup>[1]</sup> See: [www.hcch.net/en/home](http://www.hcch.net/en/home). A Practice Handbook on the operation of the Convention can be purchased from this website.

<sup>[2]</sup> Although the examiner will usually be a judge, a registrar of the Court or other person may also be appointed for the purpose of an examination (see r 29.11 and the definition of "Examiner" in Schedule 1 of the Federal Court Rules).

<sup>[3]</sup> See s 7(2) of the Foreign Evidence Act 1994 (Cth).



# Annex Seventeen: Outline of the Hague Evidence Convention

## OUTLINE EVIDENCE CONVENTION



### HCCH Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

#### **Purpose of the Convention**

The Evidence Convention establishes methods of co-operation for the taking of evidence abroad in civil or commercial matters, between States Parties.<sup>1</sup> The Convention provides an effective means of overcoming the differences between civil law and common law systems with respect to the taking of evidence, via (i) *Letters of Request*, and (ii) *diplomatic or consular agents and Commissioners*,<sup>2</sup>.

#### **Letters of Request (Chapter I)**

A judicial authority of one State Party (Requesting State) may request, by means of a Letter of Request, a competent authority of another State Party (Requested State) to obtain evidence which is intended for use in judicial proceedings in the Requesting State. The judicial authority of the Requesting State transmits the Letter of Request to the *Central Authority* of the Requested State (see also Arts. 24(2) and 25). The latter then forwards the Letter of Request to the competent authority in its country for execution. The law of the Requested State applies to the execution of the Letter of Request. In order to expedite and facilitate execution, the Convention provides an option to allow the presence of members of the judicial personnel of the requesting authority, the parties, and/or their representatives, at the execution of the Letter of Request. The requesting authority may also request the use of a special method or procedure in the execution of the Letter of Request, provided this is not incompatible with the law of the Requested State or impossible to perform. Certain States have even amended their domestic law in order to permit techniques for the execution of requests that are customarily used in other States (e.g., the drafting of verbatim transcripts of testimony, the possibility of cross-examination, the use of video-link).

A requested authority unable to execute the Letter of Request itself may appoint a suitable person to do so (this applies particularly where execution is sought in common law countries; the court addressed may be unable to perform the Letter of Request itself because its procedural rules leave the collection of evidence to the parties). The person to be questioned or requested to produce evidence is entitled to assert a privilege or duty to refuse to give evidence under either the law of the Requesting State or the law of the Requested State.

A Letter of Request shall be executed "expeditiously" and may be refused only in specific cases. Lastly, the execution of the Letter of Request may not give rise to any reimbursement of taxes or costs; however, the Requested State may require the Requesting State to reimburse fees paid to experts and interpreters, as well as costs occasioned by the use of a special procedure requested by the Requesting State.

#### **Diplomatic or Consular agents, Commissioners (Chapter II)**

Chapter II of the Convention allows diplomatic or consular agents and Commissioners to take evidence, which may be subject to the prior permission of the appropriate authority of the

<sup>1</sup> For a comprehensive and updated list of Contracting States to the Convention, follow the link entitled "Updated list of Contracting States (status table)" on the "Evidence Section" of the HCCH website at < [www.hcch.net](http://www.hcch.net) >. An explanation of the status table is also available by following the link entitled "How to read the status table" on the Evidence Section.

<sup>2</sup> Art. 33, however, provides an option for any State Party to exclude, in whole or in part, the application of the provisions of Chapter II relating to diplomatic and consular agents and commissioners.



State in which the evidence is to be taken. States may exclude, in whole or in part, the application of Chapter II. It is therefore critical to check whether a State has made a reservation in this respect.<sup>3</sup> Subject to the relevant permission, the representative or Commissioner may take evidence, insofar as their proposed actions are compatible with the law of the State of execution, and may also have power to administer an oath or affirmation. The consular or diplomatic agent or Commissioner may not compel the person requested to give evidence. The Convention provides, however, that States may, by declaration, authorise diplomatic or consular agents or Commissioners to apply to the competent authority for appropriate assistance to obtain the evidence by compulsion. Unlike Letters of Request, the taking of evidence pursuant to Chapter II is, as a rule, performed in accordance with the manner required by the law of the Court before which the action is initiated. Cross-examination, during which the witness is questioned by counsel for both parties, is also permitted. However, if the manner in which the evidence is taken is forbidden by the law of the State of execution, it may not be used. Lastly, the person required to give evidence may, in the same way as pursuant to a Letter of Request, assert a privilege or duty to refuse to give evidence.

#### **Pre-trial discovery (Art. 23)**

Pre-trial discovery is a procedure known to common law countries, which covers requests for evidence submitted *after the filing of a claim but before the final hearing on the merits*. The Convention permits States Parties to ensure, by way of declaration, that Letters of Request for the purpose of obtaining pre-trial discovery of documents are sufficiently substantiated so as to avoid requests whereby a party is merely seeking to find out what documents might be in the possession of the other party to the proceedings.

Due to existing misunderstandings of the nature of pre-trial discovery, the 2003, 2009 and 2014 meetings of the Special Commission clarified the nature and purpose of this procedure and invited States that have made a general, non-particularised declaration to revisit their declarations.<sup>4</sup>

#### **Practical Handbook on the Operation of the Evidence Convention (3<sup>rd</sup> Edition, 2016)**

The Practical Handbook offers detailed explanations on the general operation of the Evidence Convention as well as authoritative commentaries on the major issues raised by practice over the past forty-five years. This edition of the Handbook marks a substantial change in concept and content as compared with previous editions. To order the Handbook, see the "[Evidence Section](#)" of the HCCH website.

#### **Monitoring of the Convention**

The practical operation of the Convention has been reviewed by several Special Commissions (in 1978, 1985, 1989, 2003, 2009 and 2014). The Special Commissions have confirmed the continuing global interest in this Convention and reaffirmed its practical utility. A model Letter of Request was adopted at the 1978 Special Commission and amended in 1985. The latest version of the Model Form is available on the "Evidence Section" of the HCCH website.

For additional information, please visit the "[Evidence Section](#)" of the HCCH website at [www.hcch.net](http://www.hcch.net) or contact the Permanent Bureau of the HCCH.

<sup>3</sup> A list of States that have excluded in whole or in part the application of Chapter II is available on the "Evidence Section" of the HCCH website.

<sup>4</sup> See Nos 29-34 of the Conclusions and Recommendations of the 2003 Special Commission, Nos 51 and 52 of the Conclusions and Recommendations of the 2009 Special Commission, and Nos 18 and 19 of the Conclusions and Recommendations of the 2014 Special Commission; a list of States that have made a declaration pursuant to Art. 23 of the Convention is available on the "Evidence Section" of the HCCH website.

## Annex Eighteen: Guidance Note (Chief Justice of Vanuatu)

REPUBLIC OF VANUATU



CHIEF JUSTICE'S CHAMBERS

**GUIDANCE NOTE FOR REMOTE HEARINGS - VANUATU COURT OF APPEAL – SECOND SESSION MAY 2020 (VIDEO-CONFERENCING FACILITIES) DUE TO COVID – 19. ADDITIONAL TO COURT ARRANGEMENTS PROTOCOL ISSUED ON 9 APRIL 2020**

### INTRODUCTION

1. This Guidance Note for Remote Hearing for the Court of Appeal of Vanuatu is an additional part to the Court Arrangements, the Chief Justice has issued on 9<sup>th</sup> of April 2020.
2. Because of the Covid-19 pandemic, two (2) Oversees Panel Members of the Vanuatu Court of Appeal Judges could not participate in the May 2020 session as they normally do due to the closing of International Borders in Vanuatu and in their own respective countries (Australia and New Zealand).
3. The unprecedented challenge to the operation of the court in the current Covid-19 pandemic, with serious public health concerns, does not allow the court to operate in the usual manner. This requires the use of alternative modes of hearing so as to maximize the continued and safe operation of the justice system while maintaining social distancing and reducing the risk of Covid-19 spreading in the community as far as possible. It is of paramount importance that

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justice is duly administered continuously and effectively without compromising public health and safety.

### **COURT OF APPEAL REMOTE HEARINGS: RATIONALES**

4. In the exceptional circumstances of the current public health crisis, the Vanuatu Court of Appeal shall conduct its proceedings and hearings by way of remote hearings through Video Conferencing Facilities (“VCF”) in its 2020 Second Session in May so that the two (2) overseas Appeal Panel members could participate actively and fully.
5. This Guidance Note is issued to set out the practice for remote hearings by electronic means by Videoconferencing of appeal cases during this session.
6. The Vanuatu Court of Appeal’s VCF installed for the purpose uses the Government’s technology arrangement that is set up by the Office of the Government Chief Information Officer (OGCIO) within the Government networks; it is logistically feasible and appropriately secure and it will allow applicable court rules and procedures. The OGCIO will technically assist the Court of Appeal during its remote hearings in this session.
7. Whatever technology is employed for remote hearings will require the flexible application of the guidance.
8. The essence is to replicate as closely as practically possible the core requirements of court hearings. The ultimate question is one of fairness, it being understood that standards of fairness are not immutable and the requirements of fairness are flexible and closely conditioned by the legal and administrative context.
9. Remote hearings using video technology preserve most of the benefits of an oral hearing, allowing parties and their legal representatives and



the court to interact with each other on a real-time basis. Parties and their legal representatives will be expected to focus their submissions (and evidence, if applicable) so as to promote the efficient use of the technology within the shortest possible appropriate time. As even remote hearings may require some persons to be physically present in the same place, the duration of hearings should be limited to reduce public health risk to those present. All participants should keep in mind the wider public interest of maintaining social distancing as a strategy to combat the pandemic spreading.

10. Insofar as the conduct of remote hearings might impact the open justice principle, it is settled law that different balances may be struck with regard to different aspects of open justice being subject to restrictions when other competing fundamental rights are engaged. The court will be astute to ensure the appropriate balance is struck, for example by the continued public dissemination of reasoned decisions as it is always the practice of the Vanuatu Court of Appeal.
11. All participants in remote hearings will need to be sympathetic to the technological and other difficulties which might be experienced by other participants, in the setting up of and in the conduct of remote hearings.
12. As the hearing will be listed to be heard in open court, even though conducted as a remote hearing, robes should be worn by the barristers and/or solicitor advocates appearing, as well as by the Judges. All court rules and practice on court etiquette will continue to apply (save that standing at the beginning and end of hearings will not be necessary or standing when making submissions not required except if the microphones at the Bar Table are set for standing only).
13. Subject to the direction of the Judges, a remote hearing will be conducted openly where public and media can attend physically. However, in the exceptional circumstances of the threat to public health caused by the current pandemic, the impossibility of public or media access to a hearing should not ordinarily prevent the remote

hearing taking place. The decision whether, how, and to what extent, to permit public or media access to a remote hearing rests with the Judges conducting the hearing.

14. The costs of the use of VCF and any other services and/or materials used in conjunction with them will form part of the costs of the proceedings (if any), and will be subject to such costs orders as the court thinks fit.

## **PRACTICAL CONSIDERATIONS**

### **BEFORE STARTING A VIDEO CONFERENCE, PLEASE NOTE THE FOLLOWING:**

- The parties and their representatives shall attend the remote hearing by way of the Court's video-conferencing facilities.
- No person may take any form of recording of the remote hearing, other than the Court if required (through the TrueConf Feature).
- The remote hearing shall take place at [time] on [date] with a time estimate of [length].
- The remote hearing shall be conducted by the Court from Supreme Court Room No.1 at Dumbea, Port Vila, Vanuatu.
- The Court of Appeal usually begins proceedings at 9:00 a.m. in the morning and again 2.00p.m in the afternoon. A call over of appeal cases is to be on Monday 4 May 2020 at 9.00 am. However, there is a need to adapt or adjust the starting time of hearing considering the time difference between South Australia (Adelaide) and New Zealand. Technical staff at the court of appeal room must be available to assist at this hour.



- If there is a real time difference, it has to be considered and taken into account for the starting time of the hearings of the Court of Appeal in this session.
- The court generally requires at least time in advance for videoconferencing for testing purposes before a hearing begins.
- The test must be conducted in the Court room and with the system that will be used for the scheduled hearing and checked with the remote judges' location sites in Adelaide and Auckland if everything is alright. It is recommended that technical staff and someone from the court be present for the test.
- To ensure a seamless experience on each day of court sitting, it is important that the court room and judges' rooms or locations in Adelaide and Auckland are free of clutter and noise.

**ON THE DAY(S) OF THE VIDEOCONFERENCE, PLEASE NOTE THE FOLLOWING:**


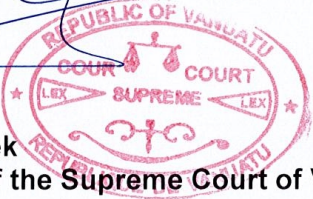
- The court will connect the videoconference at least 15 minutes before the start of the scheduled hearing to allow time to work through any unexpected connection problems. The court will also test all microphones and camera angles. It is important that technical staff at the court room site be present at this time.
- While the proceeding is in progress, technical staff at the court room site must remain available by telephone in case of a problem.
- As the Court of Appeal session is scheduled for 2 weeks (multiples days), the court will connect at least 15 minutes early each day or each time required.

## FINAL NOTE

- A telephone conference link is also set up as a stand-by or backup system in the Courtroom (if necessary).
- Another video conference link is set up in the Supreme Court conference room at the Supreme Court Registry Office with a telephone conference link set up as its backup for the judges' communications and discussions during the appeal period.

15. This Guidance Note will take effect on 4 May 2020. It may be subject to amendment and will continue until further notice.

Dated this 28<sup>th</sup> of April 2020.

**Vincent Lunabek**  
Chief Justice of the Supreme Court of Vanuatu

## Annex Nineteen: Additional Sources of Information

**Coronavirus & the Courts. National Centre for State Courts.** (2020) Coronavirus and the Courts: Links to State Courts COVID-19 Websites<sup>13</sup>

<https://public.tableau.com/profile/ncscviz#!/vizhome/StateCourtResponsestoCOVID-19/CovidTheCourts>

**Law Society of New South Wales Journal**<sup>14</sup> at <https://lsj.com.au/articles/the-courts-and-the-pandemic-the-role-and-limits-of-technology/>

**National Center for State Courts** has a site, Coronavirus and the courts<sup>15</sup> at <https://www.ncsc.org/pandemic>

**Remote Hearings Guide;** Californian Commission on Access to Justice as adapted for Conference of Chief Justices, Conference of State Court Administrators, National Centre for State Courts<sup>16</sup> at [https://www.ncsc.org/\\_data/assets/pdf\\_file/0018/40365/RRT-Technology-ATJ-Remote-Hearings-Guide.pdf](https://www.ncsc.org/_data/assets/pdf_file/0018/40365/RRT-Technology-ATJ-Remote-Hearings-Guide.pdf)

**Remote Courts Worldwide** website, hosted by the Society for Computers and Law, funded by the UK LawTech Delivery Panel, and supported by Her Majesty's Courts & Tribunals Service, United Kingdom. The site was developed in response to the Covid-19 pandemic to provide the court community internationally with a systematic way to exchange and deposit news of operational systems, plans, ideas, policies, protocols, techniques, and safeguards around RCP's. <https://remotecourts.org>

**The Courts of the State of Michigan**<sup>17</sup> at <https://courts.michigan.gov/news-events/covid19-resources/pages/default.aspx>

**The Hague Convention** has produced a Good Practice Guide on Use of Video-Link under Evidence under the HCCH 1070 Evidence Convention.

<https://www.hcch.net/en/news-archive/details/?varevent=728>

**The American Bar Association** has put together resources from the Standing Committee on Legal Aid and Indigent Defense against the COVID-19<sup>18</sup>:

[https://www.americanbar.org/groups/legal\\_aid\\_indigent\\_defense/?\\_cpx\\_camp\\_rule\\_id=3565](https://www.americanbar.org/groups/legal_aid_indigent_defense/?_cpx_camp_rule_id=3565)

**The Texas Judicial Branch** maintains a site on Zoom Information and YouTube Support<sup>19</sup> at <https://www.txcourts.net/electronic-hearings-zoom>

<sup>13</sup> National Centre for State Courts. 2020. Coronavirus and the Courts: *National Centre for State Courts Data Visualisations*. <https://public.tableau.com/profile/ncscviz#!/vizhome/StateCourtResponsestoCOVID-19/CovidTheCourts>

<sup>14</sup> Legg, M., and Song, A. 2020. The Courts and the Pandemic: *the role and limits of technology*. LSJ Online, Law Society of New South Wales Journal. <https://lsj.com.au/articles/the-courts-and-the-pandemic-the-role-and-limits-of-technology/>

<sup>15</sup> National Center for State Courts. (2020) Coronavirus and the Courts. NCSC and Thomson Reuters. <https://www.ncsc.org/pandemic>

<sup>16</sup> California Access to Justice Commission. 2020. Remote Hearings and Access to Justice: *During COVID-19 and Beyond*. National Center for State Courts. [https://www.ncsc.org/\\_data/assets/pdf\\_file/0018/40365/RRT-Technology-ATJ-Remote-Hearings-Guide.pdf](https://www.ncsc.org/_data/assets/pdf_file/0018/40365/RRT-Technology-ATJ-Remote-Hearings-Guide.pdf)

<sup>17</sup> Courts of the State of Michigan. 2020. COVID-19 News and Resources. Michigan Judiciary. <https://courts.michigan.gov/news-events/covid19-resources/pages/default.aspx>

<sup>18</sup> American Bar Association. (2020) Standing Committee on Legal Aid and Indigent Defense. (American Bar Association) [https://www.americanbar.org/groups/legal\\_aid\\_indigent\\_defense/?\\_cpx\\_camp\\_rule\\_id=3565](https://www.americanbar.org/groups/legal_aid_indigent_defense/?_cpx_camp_rule_id=3565)

<sup>19</sup> The Texas Judicial Branch. 2020. Court Coronavirus Information: *Zoom Information and Youtube Support*. <https://www.txcourts.net/electronic-hearings-zoom>





Toolkits are evolving and changes may be made in future versions. For the latest version of the Toolkits refer to the website - <http://www.fedcourt.gov.au/pjsi/benchbooks/toolkits>

Note: While every effort has been made to produce informative and educative tools, the applicability of these may vary depending on country and regional circumstances



# REMOTE COURT PROCEEDINGS TOOLKIT

PJSI Toolkits are available on: <http://www.fedcourt.gov.au/pjsi/resources/toolkits>

