



VIRTUAL HEARINGS – A FRAMEWORK TO BUILDING A NEW MODEL FOR LITIGATION

“You never change things by fighting the existing reality. To change something, build a new model that makes the existing model obsolete”
Buckminster Fuller.

COVID-19 has prompted hearings to be conducted virtually with many hearings and other court and Tribunal processes, including full trials, being conducted electronically.

“Oral advocacy is perhaps the most difficult aspect of a virtual hearing. It is important to make sure you can be heard in the virtual court room.”

Whilst the use of a telephone link up for uncontentious interlocutory matters and the receipt of evidence from witness testimony via video-link is becoming more common, the emergence of COVID-19 has increased the prospect that full hearings are to be conducted remotely.

A virtual hearing envisages that the proceeding will be conducted only by audio-visual means without any requirement for a physical appearance of any person or party in a court room or in an arbitral forum.

This can be done by telephone link-up or any number of video conferencing platforms such as Webex, Zoom, Microsoft Teams or Skype.

Several Courts including the Australian Federal Court are also utilising software called Immediation to conduct mediations virtually.

The move to virtual hearings has proven to be fluid and fast-paced. It is fair to say that all participants including judges, arbitrators, mediators and legal practitioners have been through a learning process.

This note seeks to address the practical ways virtual hearings can be conducted.

Framework

Information is available online concerning how each jurisdiction runs virtual hearings. Notwithstanding this guideline, we always suggest that you review the court/tribunal websites to see whether new and more prescriptive practice directions have been issued.

For example:

- Federal Court of Australia¹
- Supreme Court of New South Wales²
- Supreme Court of Victoria³

General decorum

- You should dress appropriately and professionally, ask the judge's associate prior to the hearing if Counsel is required to be robed where appropriate.
- If practicable have Counsel, instructing solicitors and the client in the same physical location during the virtual hearing. Where this is not practicable a separate secure communications system is essential (see below).
- Login to the virtual court room prior to the start time and attend a technology check if one is offered (most Courts are testing systems the day prior although this is likely to decrease as virtual trials become more prevalent).
- Use headphones and a microphone (check if you can be heard clearly prior to the start of the hearing).
- You should still stand when the judge enters.
- Each judge may have a different preference, but it is generally acceptable to be seated while addressing the court.
- Instructing solicitors and other attendees at the virtual hearing will typically be asked to turn off their cameras and microphones. Even if not asked it is advisable to do so anyway to minimise the risk of any unwanted distraction to the decision maker.
- Advocates should mute their microphones when they are not speaking.
- Use a separate and secure third party private messaging service such as Whatsapp to communicate between Counsel, instructing solicitors and the clients throughout the hearing. Using the messaging services offered by the various platforms is not recommended due to the risk of inadvertently sending a message to the wrong person.

1 <https://www.fedcourt.gov.au/online-services/online-hearings>

2 http://www.supremecourt.justice.nsw.gov.au/Pages/sco2_facilitiesupport/sco2_courtroomtechnology/sco2_videoconferencingteleconferencing.aspx

3 <https://www.supremecourt.vic.gov.au/law-and-practice/virtual-hearings>



Pre-hearing

Choice of platform

Courts will often prescribe the platform which will be used to conduct the virtual hearing.

The Victorian Supreme and County Courts currently prescribe Webex, Skype or Zoom as the platform of choice. The English Courts have prescribed BT conference call, Skype for Business, Court video link, BT MeetMe, Zoom or telephone.

In arbitral proceedings, parties may jointly agree on a platform which can be used, so as to accommodate the parties' respective preferences. There is considerable competition in this space at the moment with many new offerings competing alongside existing technology such as BlueJeans.

If given the choice as to platform, take into account the specific circumstances of your matter. While Zoom may offer better sound quality, the reported security issues regarding privacy may factor in your decision making. Zoom now offers "password protection" which prevents non-attendees from gaining access.

Further, while some platforms are available for free, others must be subscribed to at a cost. Larger matters may warrant this additional cost but it is not a one size fits all approach.

There are also numerous online forums in which practitioners opine on the merits of various platforms.

Court books

The use of Court books should be streamlined.

Unless the Court requires all of the documents filed, it is beneficial to all of the parties and the Court to minimise bundles to only relevant core documents (and where possible only relevant parts of those core documents). The smaller the bundle, the easier it is to navigate electronically. This also helps with remote working by legal teams.

You should try to only include the documents that are referred to in written submissions and anything else relevant to the particular hearing.

Keep in mind that:

- while it may be possible to 'hand up' a document by email, this process becomes longer and disruptive in a virtual hearing; and
- all of the major video-conferencing platforms have a "share screen" option. This allows practitioners and the courts to share specific pages of court books to participants during a virtual hearing.

The same goes for authority bundles. Some judges will only want the

relevant passages from authorities relied upon to be included.

PDF software such as Adobe Pro can add levels of functionality and interactivity to the electronic court bundle which is useful. There is also more expensive software which offers integrated court books which can allow highlighting by one person to be displayed on other versions of the court books.

In addition to paginating the court books and authorities bundles, you should ensure that each tab is bookmarked and the document is word searchable, for ease of navigation.

Advocacy

Written

Written advocacy takes more importance in a virtual hearing as it can be difficult to create atmosphere to grab the attention of the Court room which is normally a strength of oral argument. Further, technical difficulties may cause certain points to be lost in translation and the added length of time it takes to conduct matters virtually may impose shorter time constraints upon oral submissions.

With this in mind it is crucial to cover everything and include references to all relevant authorities in your written submissions so that the judge has

everything at his or her fingertips. Your written submissions should make and support every point you intend to make.

One tip is to draft the submissions as if you will not be provided the opportunity to make oral submissions.

Oral

Oral advocacy is perhaps the most difficult aspect of a virtual hearing. It is important to make sure you can be heard in the virtual court room.

Once you have ticked all the technical boxes it is important to be engaging in your delivery. Remember judges are also human and sitting at a screen for hours on end can be tiring, so try your best to be engaging. Make your points clearly and quickly, don't drag on for longer than is necessary.

Avoid objecting when everyone is operating in a virtual environment. Wait for the right opportunity to raise an issue, but don't do so in a manner which is disruptive. Use the "raise your hand" function to highlight a need to make a point.

Witnesses and presentation of evidence

Proper planning and preparation is important. You may find it easier to work from an electronic court book or notes but keep in mind you will need room on your screen to view both of these items as well as the virtual courtroom. Having two screens can make this process a lot easier.

Consider having a hard copy back up of your questions or the paginated court book.

Be prepared to suffer technical difficulties and keep in mind witness examination will take longer than normal.

When examining a witness keep in the mind the same tips which apply to oral advocacy.

You may want to consider sharing your screen if it makes it easier to go through particular parts of a specific document or decisions.

Conclusion

Virtual hearings are somewhat uncharted territory and for this reason can be intimidating but it is important to keep in mind that everyone is going through the same learning experience. There will be issues which cause disruption but you should take them in stride and accept them.

HFW is ready to provide advice and assist with any matter concerning a virtual hearing or otherwise.

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