

Litigation by Webex, Zoom and Teams in the COVID-19 era

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Temporary Changes (all Courts)

Service of Proceedings

- ▶ All Courts, whether by Practice Direction or Notice to Profession, have emphasised *Civil Procedure Act 2010* considerations on the issue of service.
- ▶ Notices to profession reminding of:
 - ▶ Rule 6.11 - informal service;
 - ▶ Rule 6.03 - effective service by placing down in person's presence;
 - ▶ Rule 6.09 - service on solicitor;
 - ▶ Rule 6.10 - Order for substituted service.
- ▶ Subtext = don't be difficult when it comes to service.

Temporary Changes (all Courts)

Affidavits

- ▶ As a result of the *COVID-19 Omnibus (Emergency Measures) Act 2020*, a new Part 5A was inserted into the *Oaths and Affirmations Act 2018*.
- ▶ Provides for the following in relation to the taking of affidavits:
 - ▶ A party to an affidavit may sign the affidavit by electronic means (s. 48B);
 - ▶ Signature may be witnessed by audio visual link (s. 49C);
 - ▶ May sign copy document (s. 49D).
- ▶ If any of the above measures utilised, affidavit must specify which and why (s. 49E).
- ▶ Court has power to admit unsworn affidavits (s. 49F).
- ▶ None of the changes modify the effect of an affidavit/advice given.

Magistrates' Court (part 1)

- ▶ **Practice Direction No. 19 (formerly #12) (General Civil Matters)**
 - ▶ GENERAL RULE - don't attend Court unless directed
 - ▶ Applications on the papers.
 - ▶ May call for further submissions, appearance or OMC
 - ▶ Alternative Dispute Resolution.
 - ▶ Less than \$10k = PHC
 - ▶ \$10k to \$40k = PHC/ENE/hearing
 - ▶ \$40k+ = mediation
 - ▶ Discovery 14 days before/offers 7 days before;
 - ▶ Early Neutral Evaluation (designed for cases involving \$50,000 or more, complex issues).
 - ▶ Attendance by OMC or in-person with Counsel, solicitor, client (and expert);
 - ▶ Discovery 14 days before/offers 7 days before;
 - ▶ Accurate listing information required.
 - ▶ Subpoena inspection by appointment.
 - ▶ Post Judgement = by phone or in person

Magistrates' Court (part 2)

- ▶ Contested Hearings
 - ▶ Court Book requirements - 7 days in advance
 - ▶ Joint Paginated Court Book
 - ▶ Index
 - ▶ Pleadings
 - ▶ Chronology
 - ▶ Agreed facts/key issues
 - ▶ Witness statements of evidence in chief
 - ▶ Documents
 - ▶ Caselaw
 - ▶ Cases under \$40k or involving a motor vehicle collision - no Court Book required
 - ▶ Requirement to file documents to be relied upon 7 days in advance
 - ▶ iPad or better - phones discouraged
 - ▶ Witnesses required to be alone in quiet location

Magistrates' Court (part 3)

- ▶ **Practice Direction No. 13 (Workcover).**
 - ▶ Mention List on the papers.
 - ▶ Contested Hearings - Workcover matters a priority.
 - ▶ Court Book filing requirements - 7 days
 - ▶ Index
 - ▶ Pleadings
 - ▶ Chronology
 - ▶ Documents to be relied upon (including medicals and subpoenaed documents)
 - ▶ Caselaw
 - ▶ Plaintiff and one additional witness (willing participant); and
 - ▶ Realistic Listing of less than two days.
 - ▶ Parties may request ENE or may be directed by the Court
 - ▶ In-person attendance by Counsel, instructor and Worker (defendant by telephone);
 - ▶ Accurate listing information required;
 - ▶ To advise Court of resolution or narrowing of issues within 14 days.
 - ▶ Subpoena inspection by appointment.

County Court (part 1)

- ▶ *COVID-19 Omnibus (Emergency Measures) Act 2020* - changes to *County Court Act 1958* and *Supreme Court Act 1958*.
 - ▶ Permits the Court to decide any issue in civil proceeding on basis of written submission and without appearances.
- ▶ Common Law Division
 - ▶ Directions Hearings (including post-mediation) (Zoom);
 - ▶ Remote Visual Hearings in the absence of jury (Zoom);
 - ▶ Emphasis on eCourt Books
 - ▶ Presumption that all matters can proceed.
 - ▶ Any issues - parties are to advise early (42 days) by written outline
 - ▶ Consent Orders required confirming matter ready to proceed
- ▶ Witnesses arrangements controlled by solicitor
- ▶ Stage 4 - special rules (deposed to by solicitor)
 - ▶ Witness must give evidence alone in quiet room

County Court (part 2)

▶ Commercial Division

- ▶ Mention list on the papers;
- ▶ Summonses determined on the papers;
- ▶ Greater emphasis on witness statements/electronic Court Books;
- ▶ Non-binding Neutral Evaluations/Early Neutral Evaluations;
 - ▶ May have costs consequences
- ▶ eTrials (by Zoom) to be held - presumption that matters proceed.
 - ▶ Directions to confirm smooth running of trial

Supreme Court

- ▶ Guidance for Practitioners - largely mirrors that done in the County Court for Practice Court and Commercial Court
 - ▶ Strong presumption that parties are to NOT attend Court;
 - ▶ Summons/Applications on the papers - need to justify if not;
 - ▶ Parties may apply for urgent hearings;
 - ▶ Trial hearings conducted by virtual Courtroom (Webex) and using existing eTrial measures.

Federal Court

- ▶ Documents to be filed by eLodgement in accordance with usual practice.
- ▶ Subpoena inspection by appointment.
- ▶ Uses Microsoft Teams rather than Webex/Zoom.
- ▶ Online management of cases operates on docket system:
 - ▶ Initial Directions Hearing assigned to List Judge;
 - ▶ Subsequent directions and requirements to appear as directed by the List Judge;
 - ▶ eTrials running by Teams, unless ‘truly exceptional circumstances’;

In practice - remote Courtrooms

- ▶ Currently in practice = Webex, Zoom, Teams (sometimes telephone).
- ▶ Remote Courtrooms managed by Judge's associate
 - ▶ Invites sent from Court, which manages 'meeting';
 - ▶ Communication is key - additional links, witness arrangements organised in advance;
 - ▶ Courts require sound-testing (a useful exercise);
 - ▶ Good internet connection is a MUST - have a backup;
 - ▶ Be familiar with the program you're using;
 - ▶ Headphones help greatly;
 - ▶ Ability to mute;
 - ▶ Written submissions may assist given advocacy limitations;
 - ▶ Documents to be used need to be before the Court in advance (i.e. Court Book, Affidavit etc);
 - ▶ Telephone the usual backup.

In practice - remote Courtrooms (continued)

- ▶ What can you do?
 - ▶ BE PREPARED/BE ORGANISED
 - ▶ Prepare once and properly
 - ▶ Negotiate early
 - ▶ Exchange documents early
 - ▶ Agree with opponent what's relevant or not
 - ▶ Keep witnesses up to date and aware of what the experience will look/feel like
 - ▶ Distil the case - keep it simple
 - ▶ Can the Court be assisted by screen sharing?
 - ▶ Courts have asked for continuity of Counsel (yay!) so brief early
 - ▶ Speak to Counsel about written submissions or draft some
 - ▶ Check Practice Directions
- ▶ IN SUM - there are advantages to be gained if you're better at this and adapt faster than your opponent

What if you don't want to litigate online

- ▶ Presumption now in all Courts = you get listed and your matter gets heard
- ▶ Exceptions may be made in exceptional cases (e.g. Ben Roberts-Smith)
 - ▶ Complex issues of fact
 - ▶ Witness credibility issues paramount
 - ▶ Fraud cases?
- ▶ Parties to address/justify attempts to remove matters from online hearings
 - ▶ Dealt with on papers
 - ▶ Draft submissions if it's important

Questions?