



CountyCourt  
VICTORIA

# **Common Law Division: arrangements and expectations during coronavirus (COVID-19) restrictions**

# DOCUMENT CONTROL

## Details

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<b>Notes</b>	

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## Related documents

Document title	Version
Common Law Division Practice Note	1.0

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## 1. Overview

- 1.1 This document has been prepared to assist parties understand the updated arrangements and expectations of the Common Law Division.
- 1.2 The Court is striving to deliver justice in a timely manner, notwithstanding the current circumstances, including the inability to empanel juries due to COVID-19.

### ***Civil Procedure Act 2010***

- 1.3 We all face considerable difficulties in progressing civil litigation proceedings in the current circumstances, which require physical distancing rules and people working remotely whenever possible. Now, more than ever, there is a need to comply with the overarching obligations in Part 2.3 of the *Civil Procedure Act 2010* (“the CPA”).
- 1.4 Practitioners and parties should in particular be aware of their paramount duty to further the administration of justice in relation to any civil proceeding; and the obligations to cooperate with the parties to a civil proceeding and the Court in connection with the conduct of that proceeding, use reasonable endeavours to resolve the dispute, and narrow the issues in dispute.
- 1.5 The CPA and the *County Court Civil Procedure Rules 2018* (“the Rules”) give the Court great flexibility to do what is necessary to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute, including, where appropriate, dispensing with compliance with the Rules as they would ordinarily apply, and giving any direction or imposing any term or condition for the conduct of the proceeding which it thinks conducive to its effective, complete, prompt and economical determination.

## 2. Pre-trial arrangements

### **Filing of documents**

- 2.1 Electronic filing of documents has been the accepted manner of lodging documents for filing with the Court for many years. Parties are requested to maximise the use of the Court’s electronic filing facilities, CITEC Confirm, at this time.
- 2.2 To enable the electronic filing of documents at this time, 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.

### **Witnessing affidavits**

- 2.3 Parties are referred to the Part 5A of the *Oaths Affirmations Act 2018* (Vic) (“the OAA”) (Temporary measures in response to COVID-19 pandemic) and in particular:
  - (a) Section 49B, which permits a deponent or authorised affidavit taker to sign or initial an affidavit, jurat or other document by electronic means;
  - (b) Section 49C, which permits a requirement that a thing be done in the presence of another person to be satisfied by doing the thing by audio link or audio-visual link; and
  - (c) Section 49D, which permits an authorised affidavit taker to sign or initial a scanned hardcopy or electronic copy of the affidavit, jurat or other document in lieu of the original.

If any of the above steps are taken in relation to an affidavit, then under s49E the authorised affidavit taker must state, in addition to the matters in s27(1)(a), the following in the jurat –

- (a) that the affidavit, as signed and notated by the authorised affidavit taker, was signed or initialled by the deponent by electronic means;
- (b) that specified things in respect of the affidavit were done by means of audio link or audio-visual link; and
- (c) that the affidavit, jurat or other document is a scanned hard copy or an electronic copy, not an original.

2.4 It is anticipated that these provisions will resolve the difficulties experienced in having affidavits sworn or affirmed; however, if in any particular case an affidavit cannot be sworn or affirmed due to measures to minimise the spread of COVID-19, the Court may accept the filing of an affidavit which has not been sworn or affirmed,<sup>1</sup> provided:

- (a) parties take responsibility for ensuring these documents are formally sworn or affirmed when circumstances allow and filed with the Court as soon as practicable;
- (b) the affidavit is signed by the deponent and a paragraph is included in the body of the affidavit stating that it cannot be sworn or affirmed at this stage due to measures to minimise the spread of COVID-19;
- (c) the lawyer arranging the affidavit has clearly instructed the deponent that this relaxation of formality does not diminish the need for them to satisfy themselves that the content of the affidavit is true and correct; and
- (d) the party or their lawyer has satisfied themselves that the deponent is prepared to swear or affirm the affidavit in the form provided.

## Inspection of subpoenaed documents

### Encouraging electronic filing

- 2.5 Practitioners should familiarise themselves with PNCI 8-2020 eCase electronic subpoenas which provides guidelines for using eCase to manage subpoena requests, including submissions, objections, inspections and destruction.
- 2.6 To encourage the electronic filing of subpoenaed material, when serving a subpoena, practitioners should ensure that they also serve the addressee with a copy of the [eCase electronic subpoenas: Notice to Addressees](#).

### Where material is filed in hardcopy

- 2.7 Where possible, all subpoenaed material should now be submitted electronically via eCase.
- 2.8 A party wishing to inspect subpoenaed material which has been produced in hardcopy must make an appointment with the Registry. Appointments to inspect subpoenaed documents are currently scheduled at a reduced level and are held in the Melbourne Registry.
- 2.9 Parties wanting to make appointments to inspect and copy subpoenaed evidence should read the information below:
  - (a) The preferred way to make an appointment for inspection is to do so via email. Please contact the Registry at [subpoenas@countycourt.vic.gov.au](mailto:subpoenas@countycourt.vic.gov.au). For urgent matters only, please telephone 8636 6525. Please leave a message with your name, telephone number and case number and a Registry staff member will call you back.

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<sup>1</sup> See OAA, s49F

- (b) On arrival, parties inspecting material will need to use a mobile phone to call the Registry on 8636 6566 prior to gaining access to the Registry office.
- (c) Material required for the appointment can then be collected from a Registry staff member at the Registry counter at the time of the appointment.
- (d) Fees for inspection appointments – electronic modes of payment are preferred. Payments will either be taken over the phone the day prior to the appointment or by card (PayWave/Tap and Go) at the Registry counter.
- (e) Hand sanitiser and gloves are provided for persons with appointments.
- (f) Access to subpoenaed material located at Circuit Registries will be inspected by appointment with the Registrar in Melbourne.

### **3. Directions hearings**

- 3.1 These will be conducted via videolink unless the parties seek prior approval from the Court for onsite appearance. Such applications must be approved by the Chief Judge.
- 3.2 For all directions hearings held via videolink, the parties will be sent a link to attend the directions hearing at an allocated time, which will be as close as possible to the time indicated in the Court's directions hearing notice.
- 3.3 The County Court's Common Law Division uses Zoom to conduct these hearings.
- 3.4 Parties should familiarise themselves with Zoom. Instructional videos and guides are available on the Zoom website.
- 3.5 Further useful information on how to use Zoom can be located in the [Common Law practice notes section](#) on the County Court website.

### **4. Post mediation directions hearings**

- 4.1 Due to unpredictability in civil listings due to COVID-19 restrictions, the Court has not been allocating a hearing date until satisfied that the case is ready for hearing.
- 4.2 Once all interlocutory steps are complete and the mediation is complete, the parties are encouraged to send in minutes of consent, confirming:
  - (a) All interlocutory steps are complete;
  - (b) Mediation has been held and the matter did not resolve;
  - (c) Proceedings are ready for hearing, with an estimate of the length of the hearing.
- 4.3 On receiving such minutes of consent, the next available trial date will be allocated, ordinarily within approximately 28 days.
- 4.4 Parties are invited to send these minutes of consent as soon as they are able to and should do so well prior to the scheduled post mediation directions hearing. In such circumstances, no appearance will be required at the post mediation directions hearing.

### **5. Trial dates in Causes**

- 5.1 In anticipation of the Court significantly increasing its capacity to hear criminal jury trials in the

second half of 2021, there will be a greater number of judges available to hear proceedings in the Common Law Division in the first half of 2021, than there will be in the second half of next year.

- 5.2 Parties are encouraged to do all that is possible now to ensure that the Court's timetabling orders are met and that immediately after a mediation is held (where the matter has not settled), parties should provide consent orders to the Court seeking the earliest available trial date. The Court will endeavour to list such cases within approximately 28 days .

## 6. Trial dates in Serious Injury Applications

- 6.1 Trial dates for Serious Injury Applications will continue to be listed approximately six months after a notice of appearance is filed.

## 7. In court hearings

- 7.1 The following proceedings are able to be heard in court from 23 November 2020 where they are listed to be heard in Melbourne:
- (a) Causes with an estimate of four days or more;
  - (b) Any civil trial or other hearing where a party is self-represented, a party may apply for leave for all or any part of the trial or hearing to take place in person;
  - (c) All Family Violence Protection and Personal Safety Intervention Order appeals, Department of Health and Human Services Appeals and Supervision Order appeals;
  - (d) Where a party to the proceeding requires an interpreter to give their evidence, the Court may grant leave for that party and the interpreter to give evidence/interpret in person if satisfactory remote arrangements cannot be made.
- 7.2 The sitting times for in court proceedings will be staggered by Civil Listings in accordance with the direction of the Chief Judge. It is anticipated that such hearings will commence at 10.00am, with a lunch recess from 12.30pm until 2.00pm. The proceedings will then adjourn at 4.00pm.
- 7.3 Where a proceeding is being heard in court, each party is allowed to have two legal representatives per party in court at any given time. For example one instructing solicitor and one counsel or both counsel. In a situation where two counsel are briefed, the party has the discretion as to whether it is the instructing solicitor or counsel who will appear remotely, whilst the other practitioners for that party are in court. Where a practitioner wishes to appear remotely, arrangements will be made for such practitioners to appear, or view the proceedings via Zoom. Where the trial judge considers that the onsite attendance of a party is essential for the operation of justice, such party can attend court.
- 7.4 Where the trial judge considers that the onsite attendance of a witness is essential for the operation of justice, such witness can attend court to give evidence. This will be considered on a case by case basis by the trial judge, having regard to:
- (a) The overarching approach that all witnesses should participate remotely wherever possible;
  - (b) The logistical considerations of facilitating the evidence remotely;
  - (c) While each case must be considered on its own merits, the starting point is that evidence can generally be given remotely in an effective and fair manner including where credibility and reliability are in issue.

7.5 Public and other Court users will continue to be able to view the proceedings by remote virtual hearing.

## 8. Remote virtual hearings

8.1 The following proceedings will continue to be heard as remote virtual hearings, unless the Chief Judge approves onsite attendance:

- (a) Serious injury applications
- (b) Causes with an estimate of 1-3 days
- (c) Directions hearings
- (d) Summons
- (e) Mediations, Judicial resolution and case conferences
- (f) Confiscation List matters
- (g) Section 85B Compensation Applications.

8.2 Legal representatives, parties and witnesses will not be able to attend Court in the proceedings listed in paragraph 8.1 above unless their attendance has been approved by the Chief Judge on the grounds that in person attendance is essential for the operation of justice

### Pre-trial preparation

8.3 To ensure remote virtual hearings run efficiently, the Court anticipates pre-trial case management timetables will be agreed to, so as to minimise, as far as reasonable, the length of the virtual hearing.

8.4 If a party considers that a matter is not suitable to proceed as a remote virtual hearing (and the case has an estimate of 1-3 days), that party must, no less than 14 days prior to the date scheduled for the hearing of the matter, give notice of this issue to the Court.

8.5 In such circumstances, that party shall provide a brief outline of reasons why the matter is not suitable to proceed via video conference (limited to two pages). This communication should be emailed to the Court at the following email address: [CCVCommonLawDutyJudge@courts.vic.gov.au](mailto:CCVCommonLawDutyJudge@courts.vic.gov.au). It must also be emailed to all other relevant parties.

8.6 Each other party to the proceeding may file and serve a brief outline in response.

8.7 This issue will be determined by the Duty Judge in chambers, on the basis of the written submissions, unless the Duty Judge considers it necessary to list the matter for a directions hearing in order to hear oral submissions.

8.8 Participants appearing remotely at a virtual hearing are taken to be appearing as though they were present at Court. This means that laws that would apply in court, including laws relating to evidence, procedure, contempt of court and perjury, will continue to apply.<sup>2</sup>

8.9 The expectations for remote virtual hearings are as follows:

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<sup>2</sup> See *Open Courts Act* 2013 (Vic) ("the OCA"), s33(1)(a); *Evidence (Miscellaneous Provisions) Act* 1958, s42E, s42U-s42W

## Device capability

- 8.10 It is the Court's recommendation that participants to a remote virtual hearing use a smart device no smaller than an iPad (9.7 inches). iPhones and Androids should not be used for remote virtual hearings. Where a directions hearing does not require participants to view documents online, a participant may use an iPhone or Android where they have no other device available to them.
- 8.11 The quality of the connection to a remote virtual hearing depends on the quality of the internet connection. The Court encourages participants to access remote virtual hearings through a device from a location that has a reasonable internet speed, whether via Wi-Fi or a cellular network such as 4G.
- 8.12 Participants may wish to wear a headset during the remote virtual hearing to improve audio quality and reduce any audio feedback; however, mobile phone in-ear headphones do not generally provide reliable audio.
- 8.13 Participants should join the remote virtual hearing from a quiet private location.

## Court Books

- 8.14 To ensure the efficient running of a remote virtual hearing, it is essential that the parties comply with:
- (a) the Common Law Division's Use of Technology Practice Note as to the preparation of eCourtbooks;
  - (b) Court orders in respect of preparation and service of court books; and
  - (c) ensure that there are no late additions to the eCourtbook.

## Arrangements for trial

### Robing

- 8.15 Counsel are expected to be robed when appearing at a remote virtual hearing which may be determinative of a matter and when taking judgment. Robes are not required to be worn for directions hearings or summons.
- 8.16 Where counsel do not own their own robes and therefore share robes with other counsel, due to COVID-19, such counsel will currently be excused from robing. Please inform the Judge's Associate of this prior to the hearing.
- 8.17 Solicitors and other participants are expected to be attired in a manner appropriate to attendance at Court.

### Virtual background

- 8.18 On Zoom, a practitioner is able to upload a neutral background to use while participating in the video hearing. This is preferable when appearing from home. Neutral backgrounds are available from the Victorian Bar website or from the Judge's Associate.

### Virtual hearing protocol

- 8.19 Immediately prior to the hearing, the Judge's Associate will check with all participants that they are able to see and hear each other, and that they are ready to proceed.
- 8.20 Whilst the Court has endeavoured to conduct the hearings as closely as possible to the usual practice of the Court, some variations have been made given the hearings are being held remotely. The Judge hearing the matter will not enter the remote virtual hearing until the parties

have confirmed they are ready to proceed. Once the Judge has been added to the hearing, the Associate will call on the matter, following which the parties are to enter their appearances.

- 8.21 Parties should remain seated when the Judge enters and exits the remote virtual hearing, and when addressing the Court.

### **Recording of hearing**

- 8.22 A recording of the matter will be made by the Associate to the Judge and if transcript has been arranged, then the transcribers in the virtual hearing are permitted to record the proceedings, in order to prepare transcript. No other participant is permitted to record the remote virtual hearing. Practitioners should ensure that their clients are aware of this prohibition.

### **Oral evidence**

- 8.23 Lay witnesses are expected to give evidence from the offices of the solicitor who arranged the calling of that witness. The solicitor is to ensure that there is a room available for the lay witness to give evidence from, and such room must be free of any other occupants at the time the lay witness is to give evidence. Expert witnesses may give evidence from their professional rooms, but should also be on their own in their rooms when giving evidence. If a lay witness desires to give evidence from a neutral venue, please inform the Judge's Associate in advance of the eTrial and arrangements can be made for the witness to give evidence from a meeting room in the Court.
- 8.24 Before the commencement of their evidence, witnesses will be asked by the Judge or Judicial Registrar whether they are alone in the room and will be told that if anyone enters the room, they must notify the Court.
- 8.25 The witness must have a device as recommended above, and access to copies of the court book (if the parties wish for this to occur). The witness's mobile phone must be switched off and they must not have any other documents with them in the room from which they are giving their evidence, unless arrangements have been made for this to occur prior to the hearing.
- 8.26 As usual, the witness will be sworn or affirmed by the Associate or Tipstaff. Witnesses can choose to take an oath or make an affirmation via audio-visual link. Witnesses choosing to take an oath are not required to hold a religious text.

### **Interpreters**

- 8.27 Where an interpreter is required, it is not necessary for the interpreter to be in the same room as the witness and this should not occur where it would breach the current social distancing requirements. An interpreter may appear via video in the remote virtual hearing, or, if this is not possible, then they may interpret via telephone, linked into the remote virtual hearing.

### **Surveillance**

- 8.28 Where a party wishes to show surveillance during a remote virtual hearing, the practitioner must contact the Judge's Associate prior to the commencement of the hearing, to make suitable arrangements for the film to be shown during the hearing. Such options include file sharing (for example Dropbox), or alternatively, counsel can share the video footage using the screen sharing function.

## **9. Views**

- 9.1 Applications for a view should be made to the trial judge. Where the trial judge considers that the undertaking of a view in a proceeding is essential to the operation of justice, a view may be held

provided that such view can be conducted in accordance with the requirements for social distancing, the wearing of masks and a limited number of attendees consistent with in court appearances.

## 10. Judgment arrangements

- 10.1 Unless the Judge otherwise advises, parties will be advised via email as to when judgment is to be delivered. Judgments will usually be delivered via videolink. The Associate to the Judge delivering judgment will contact the parties in the normal course and send a link to appear at the judgment at the designated date and time.<sup>3</sup>
- 10.2 Judgments will be listed in the daily list.
- 10.3 The Judge's Associate will email the parties with a copy of the published judgment.<sup>4</sup> Parties will then be invited to make submissions concerning what consequential orders ought to be made.

## 11. Juries

- 11.1 For now, civil jury trials remain indefinitely suspended. Until civil jury trials resume, the Court will not accept the payment of jury fees.
- 11.2 The Court acknowledges that where a jury trial has been sought, and the relevant notice has been given in accordance with the *Rules*, that party has a prima facie entitlement to a trial by jury. At such time that civil jury trials can resume, the parties will be notified and the party seeking the jury will be given the opportunity to pay the requisite jury fees.
- 11.3 For upcoming jury trials, where a party seeking to maintain a jury trial must give notice to the Court and each other party, accompanied by a brief (not more than two pages) outline of reasons, this communication should be emailed to: [CCVCommonLawDutyJudge@courts.vic.gov.au](mailto:CCVCommonLawDutyJudge@courts.vic.gov.au). Each other party to the proceeding may file and serve a brief outline in response.
- 11.4 The mode of trial will be determined by the Duty Judge in chambers, on the basis of the written submissions, or if the Duty Judge considers it necessary, it will be listed for a directions hearing for oral submissions.

## 12. Circuits

- 12.1 For the remainder of 2020, circuit cases will continue to be heard as remote virtual hearings.
- 12.2 In 2021, where a regional court is able to accommodate a civil circuit, the parties will be informed of this at the call over of the circuit. Where this is not possible, the circuit cases will be heard as remote virtual hearings.

## 13. Updates

- 13.1 The Court appreciates that practitioners desire regular information as to what is expected in these current times, due to restrictions imposed by COVID-19. The Court will update this document as needed.

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<sup>3</sup> See OCA, ss33K(1)(b), (3)

<sup>4</sup> See OCA, ss33K(1)(b), (3)