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

**DOCUMENT CONTROL**

**Details**

|  |  |
| --- | --- |
| **Document type** | Notice to practitioner |
| Division | Common Law Division |
| Reviewed by | Judge Tsalamandris |
| Authorised by | Judge Tsalamandris |
| Notes |  |

**Release history**

|  |  |  |  |
| --- | --- | --- | --- |
| Version | Date | Author | Summary of changes |
| 1.0 | 15/04/20 | Judge Tsalamandris | Document created |
| 1.1 | 17/04/20 | Judge Tsalamandris | Minor editorial corrections |

CONTENTS

[1. Overview 4](#_Toc38015350)

[*Civil Procedure Act* 2010 4](#_Toc38015351)

[2. Pre-trial arrangements 4](#_Toc38015352)

[Personal service 4](#_Toc38015353)

[Filing of documents 5](#_Toc38015354)

[Witnessing affidavits 5](#_Toc38015355)

[Inspection of subpoenaed documents 5](#_Toc38015356)

[3. Directions hearings 6](#_Toc38015357)

[4. Remote eHearings 6](#_Toc38015358)

[Device capability 6](#_Toc38015359)

[Court Books 7](#_Toc38015360)

[Robing 7](#_Toc38015361)

[Virtual background 7](#_Toc38015362)

[eHearing protocol 7](#_Toc38015363)

[Recording of hearing 7](#_Toc38015364)

[Giving evidence 7](#_Toc38015365)

[Surveillance 8](#_Toc38015366)

[5. Trial arrangements 8](#_Toc38015367)

[6. Judgment arrangements 8](#_Toc38015368)

[7. Circuits 8](#_Toc38015369)

[8. Updates 9](#_Toc38015370)

# Overview

* 1. This document has been prepared to assist parties understand the current arrangements and expectations of the Common Law Division.
  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. We all face considerable difficulties in progressing civil litigation proceedings in the current circumstances, which require physical distancing rules and many people working remotely. 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”)*.
  2. 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.
  3. 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.

# Pre-trial arrangements

## Personal service

* 1. Personal service may pose difficulties in the current circumstances. Lawyers are reminded that the Rules provide means for avoiding physical contact by:
     1. allowing a person not to accept a copy and for the copy to be put down in the person’s presence (r 6.03(1)(b))
     2. deemed service when a document comes to the notice of the person served (r 6.11)
     3. applying for substituted service where it is impracticable to serve a document in the manner required by the Rules (r 6.10)
     4. acceptance of service by a solicitor with authority (r 6.09) which can be done electronically, as a copy of a document includes an electronic copy.[[1]](#footnote-1)
  2. Having regard to the duty to cooperate imposed by the *CPA*, the Court expects that acceptance of service electronically would be adopted in almost all cases.
  3. If necessary, an application for substituted service may be made. This should be done via email to the Common Law Registry: [commonlaw.registry@courts.vic.gov.au](mailto:commonlaw.registry@courts.vic.gov.au).

## Filing of documents

* 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. 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

* 1. Current measures to minimise the spread of COVID-19 may result in difficulties having affidavits sworn or affirmed. Given this, the Court may accept the filing of an affidavit which has not been sworn or affirmed, provided:
     1. parties take responsibility for ensuring these documents are formally sworn or affirmed when circumstances allow and filed with the Court as soon as practicable
     2. 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
     3. 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
     4. 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

* 1. Appointments to inspect subpoenaed documents are currently scheduled at a reduced level. Appointments are only available for matters that are listed to be heard or are deemed urgent by the Registry or a judicial officer. Appointment times are 9.30am and 11am in the Melbourne Registry.
  2. Parties wanting to make appointments to inspect and copy subpoenaed evidence should read the information below:
     1. Contact the Registry by telephone on 8636 6525 to discuss making an appointment to inspect subpoenaed documents. Please leave a message with your name, number and case number and we will call you back.
     2. 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.
     3. 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.
     4. Material required for the appointment will be placed in a separate room equipped with a photocopier prior to the appointment time.
     5. Hand sanitiser and gloves are provided for persons with appointments.
     6. Access to subpoenaed material located at Circuit Registries will be inspected by appointment with the Registrar in Melbourne.
  3. The County Court is urgently looking at ways to allow for electronic lodgement and inspection of subpoenaed documents and will notify practitioners and parties as soon as this is possible.

# Directions hearings

* 1. These will be conducted 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.
  2. The County Court’s Common Law Division is currently using Zoom to conduct these hearings.
  3. Parties should familiarise themselves with Zoom. There are instructional videos and guides on the Zoom website.
  4. Further, useful information on how to use Zoom can be located in the Common Law Practice Notes section on the County Court website:  
     [https://www.countycourt.vic.gov.au/practice-notes?filters[division]=1](https://www.countycourt.vic.gov.au/practice-notes?filters%5bdivision%5d=1).

# Remote eHearings

* 1. Unless a hearing by videolink is not feasible, it is anticipated that all hearings (including trials and directions hearings) will be conducted via videolink until restrictions due to COVID-19 are lifted.
  2. Participants appearing remotely at an eHearing 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 and contempt of court and perjury, will continue to apply.[[2]](#footnote-2)
  3. The expectations for eHearings are as follows below:

## Device capability

* 1. It is the Court’s recommendation that participants to an eHearing use a smart device no smaller than an iPad (9.7”). iPhones and Androids should not be used for eTrials. 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.
  2. The quality of the connection to an eHearing depends on the quality of the internet connection. The Court encourages participants to access eHearings through a device from a location that has a reasonable internet speed, whether via Wi-Fi or a cellular network such as 4G.
  3. Participants may wish to wear a headset during the video hearing to improve audio quality and reduce any audio feedback; however, mobile phone in-ear headphones do not generally provide reliable audio.
  4. Participants should join the eHearing from a quiet private location.

## Court Books

* 1. To ensure the efficient running of a remote eTrial, it is essential that the parties comply with:
     1. the Common Law Division Practice Note (PNCLD 2-2018) as to the preparation of eCourtbooks
     2. Court orders in respect of preparation and service of court books; and
     3. ensure that there are no late additions to the eCourtbook.

## Robing

* 1. Counsel are expected to be robed when appearing at an eHearing which may be determinative of a matter and when taking judgment. Robes are not required to be worn for directions hearings or summons.
  2. 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.
  3. Solicitors and other participants are expected to be attired in a manner appropriate to attendance at court.

## Virtual background

* 1. 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.

## eHearing protocol

* 1. 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.
  2. 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 eHearing 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.
  3. Parties should remain seated when the Judge enters and exits the eHearing, and when addressing the Court.

## Recording of hearing

* 1. 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 eHearing are permitted to record the proceedings, in order to prepare transcript. No other participant is permitted to record the video hearing. Practitioners should ensure that their clients are aware of this prohibition.

## Giving evidence

* 1. Witnesses must be in a room on their own when giving evidence. The solicitor calling the witness is required to ensure this. Further, prior to the commencement of their evidence, witnesses will be asked by the Judge whether they are alone in the room and will be told that if anyone enters the room, they must notify the Court.
  2. 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 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.
  3. 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 eHearing, or, if this is not possible, then they may interpret via telephone, linked to the video hearing.
  4. Lay witnesses may give evidence from a room located at the solicitor’s office. Expert witnesses may give evidence from their professional rooms. In the event that 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.

## Surveillance

* 1. Where a party wishes to show surveillance during a video 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 video hearing. Current options include sharing the film as a link during the video hearing, or arranging for a USB or DVD of the surveillance to be delivered to the Judge’s Associate prior to commencement of the hearing.

# Trial arrangements

* 1. From 1 June 2020, the Court anticipates having the capacity to hear causes of more than two days.
  2. To ensure remote eTrials run efficiently, the Court anticipates pre-trial case management timetables will be agreed to, as to minimise, as far as reasonable, the length of the eHearing.
  3. The Court will communicate with the parties as to its expectations as to the preparation and running of such hearings.

# Judgment arrangements

* 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.
  2. Judgments will be listed in the daily list.
  3. The Judge’s Associate will email the parties with a copy of the published judgment. Parties will then be invited to make submissions concerning what consequential orders ought to be made.

# Circuits

* 1. These will continue, where possible, as remote eTrials.

# Updates

* 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.

1. *Electronic Transactions (Victoria) Act* 2000, s8–s10; *Interpretation of Legislation Act* 1984, s38 [↑](#footnote-ref-1)
2. *Evidence (Miscellaneous Provisions) Act* 1958, s42W [↑](#footnote-ref-2)