

Article Information

Authors: Ian Nathaniel, Louise Gehrig, Rob Norton

Service: Dispute Resolution & Litigation, Restructuring & Insolvency

Sector: Aged Care & Senior Living, Agriculture & Food, Education, Energy & Resources, Financial Services, Government, Health & Life Sciences, Hospitality, Tourism & Gaming, Infrastructure, IT & Telecommunications, Not-for-Profit, Private Clients, Real Estate, Transport & Logistics

Courts in the face of COVID-19: Still open for business

There has been considerable focus in the media on the changes to the Corporations Act 2001 (Cth), the Bankruptcy Act 1966 (Cth) and related legislation which have the effect of slowing the enforcement process or putting it on hold.

We know what we can't do, namely proceed to issue statutory demands and bankruptcy notices unless the debt threshold of a minimum of \$20,000 is met (rather than \$2,000 and \$5,000 respectively) and that compliance with these documents has been extended to 6 months (commencing from 25 March 2020)[\[i\]](#).

In addition, both commercial and residential landlords have had their wings clipped when it comes to evictions, with a 6 month moratorium being put in place[\[ii\]](#).

Whilst those temporary changes reduce the appeal of the relevant methods of enforcement right now, there are other steps that can be taken to advance a dispute. First, there is particular appeal in commencing recovery proceedings in Courts now that there is a 'virtual' absence of the statutory demand option. At least by commencing a proceeding you maximise the leverage available presently, put yourself at the front of the queue and avoid wasting time advancing a proceeding towards a hearing or ultimate enforcement, even if the latter needs to occur once business returns to a new version of 'normal', after the present crisis ameliorates.

There has been less focus on the way in which civil Courts have already adapted to advance proceedings and the steps that remain open in the case of enforcing contractual and other legal rights and causes of action. This article aims to comment on what we are seeing in practice both directly and anecdotally.

All Courts and the VCAT have long had electronic capabilities in place for the filing of initiating process in most instances and also in relation to the filing of the outstanding majority of documents. Those facilities continue to allow proceedings to be initiated by the various electronic platforms operational in Courts and the VCAT. Below we consider some of the ways in which proceedings are presently being advanced across Victorian and Commonwealth jurisdictions.

Federal Court

Justice Beach made orders earlier this week assuming he is able to conduct video-conferencing to resume a trial fixed in early May 2020, with witnesses to be examined by video link, including administering oaths or affirmations by that means. He made a host of alternative orders in the event he is unable to proceed by video-conference involving the examination of witnesses by deposition before an Examiner (a barrister) appointed by the Court. The alternative orders provide for access to documents to be put to witnesses and they permit represented parties to have lawyers in attendance and a representative of each party[\[iii\]](#). The use of depositions in Australia is not unheard of, having been used in for example the George Pell case, but it is not common. It is encouraging that the Court has been prepared to think outside the box and consider less common ways of progressing proceedings.

Some applications, particularly of a few hours duration are being run by telephone conference, allowing submissions to be made orally and oral reasons to be handed down. Instructing solicitors are dialled in. There are challenges being able to speak to Counsel. It seems likely to us that in those circumstances parties will need to adapt and pre-arrange an alternative method of communication with their Counsel to keep a line of electronic communication open to receive short notes (replicating the physical post-it note). Counsel could when checking their notes prior to concluding their

submissions, also check the pre-arranged line of communication, without unduly interrupting the flow of a hearing.

The Court is trialling the use of Microsoft Team and using other platforms to advance matters.

Supreme Court/Court of Appeal

It has been common to see directions hearings and modest applications being conducted on the papers (by written submission), often at short notice to practitioners. Proceeding on the papers is being encouraged by the Court wherever practicable. Judgments in such applications will be handed down on the papers (by email) too. The focus is as much as possible on written witness statements. The days of a single continuous lengthy trial are likely to be on hold for the present – instead the focus is on determining what parts of cases are able to be advanced and what methods can be used to achieve that advancement.

Last week a 3 day civil trial proceeded by use of WebEx video conferencing. The Judge appeared in an empty court room, with three parties appearing from various locations, with the internet quality experienced variable. The Judge did however have the company ultimately of a single witness, with cross examination proceeding via video conferencing. Some Counsel were able to appear from their instructing solicitors offices, with clients able to listen in by mobile telephone set to mute. Whilst time was lost when internet connections temporarily failed and there was an increased number of transcript discrepancies requiring resolution, the trial was able to be concluded. An observation was made to us that greater levels of concentration were required to hear evidence and that in turn made for a far more taxing experience for those appearing.

The Court is also encouraging the use of Zoom software for video conferencing requirements. It remains to be seen how we might be able to conduct an expert hot tub by such platforms or for that matter how a trial with major issues of credit might proceed. It does however presently still remain possible for witnesses on at least a limited basis to appear in person.

County Court

Last week we were involved in a directions hearing in the Commercial Law Division which was conducted using Zoom software following the vacation a week earlier of a trial with an estimated hearing length of 2 weeks, the vacation of the trial essentially being attributable to the challenges of COVID-19.

A number of the parties requested the Court conduct the directions hearing by telephone, but that was not acceptable to the Court because of difficulties being able to record a directions hearing conducted that way and accordingly the Court required the directions hearing to be conducted on Zoom, with only a single legal representative for each party being permitted to participate. That meant Counsel appeared for the parties, but were not instructed by solicitors during the directions hearing. Notwithstanding some challenges hearing all submissions, the directions hearing proceeded and orders were pronounced.

The Court has also proposed neutral non-binding evaluations and is heavily advocating the use of remote access judicial resolution conferences.

Where possible, the Common Law Division will hear serious injury applications capable of being conducted remotely, which have an estimated hearing length of 2 days or less. Causes beyond 2 days will be considered once the capacity to hear such matters remotely increases, but the message is clear – the Courts will find a way, as the dust settles.

Magistrates' Court

The Court has divided its Melbourne based Magistrates' into two teams and has those teams working alternate weeks to enable the alternate team to be deployed quickly in the face of a positive COVID-19 test of a member of staff or someone present in the Court building.

The Court is adapting by conducting pre-hearing conferences by telephone. Whilst personal service may be effected by registered post.

Early neutral evaluations are also being encouraged and foisted upon all matters listed for contested hearing (contested hearings are being adjourned presently).

Importantly some enforcement avenues remain open. All post judgement applications such as attachment of orders, garnishee applications, instalment order applications, summons for oral examinations will be conducted by a court registrar by telephone conference or as the court directs.

VCAT

Like the State Courts, the VCAT is still operating in a highly modified fashion. At present, most matters before the Tribunal have been adjourned and no hearings are being conducted face to face. However the Tribunal is still prioritising cases it deems to be critical, which on the whole has proved to be guardianship matters and some residential tenancy disputes being heard by telephone.

New cases can still be commenced via online filing and the tribunal is looking to enhance its ability to hear applications via telephone in the near future.

Most, if not all, Courts and Tribunals will accept the filing of unsworn affidavits on the understanding that, if required, these will later be sworn or affirmed when circumstances permit.

Online Mediations

Private, non-court mediations are still proceeding in new and different ways, with on-line applications being utilised to conduct mediations between groups of people, or with each participant online from their own computer, provided that they have at least a fair quality internet connection. Virtual “breakout rooms” are achievable, with the mediator being able to drop in an out as required. Similarly groups of opposing lawyers can convene online with the mediator.

Key Takeaways

The state and federal Courts, the VCAT and Mediators are not closed. They all remain open for business in some form or another. They are naturally achieving things more slowly than before and in different ways, but the focus of all Courts, the VCAT and Mediators is to find more innovative ways to advance proceedings.

It remains possible to commence claims electronically in all Courts and to proceed with many forms of hearing or trials. Given the challenges with some forms of enforcement by reason of temporary legislative changes, the Courts and the VCAT in many instances offer the best way forward for disputing parties.

[i] Refer to “[New COVID-19 Treasury Amendments: Insolvency and Financial Hardship](#)” by Piper Alderman Partners, Andrew Rankin, Angelina Kozary, Ted Williams & Denise Burloff dated 25 March 2020 and “[Trading in the time of Pandemic – What Directors Need to Know About the New “Safe Harbour” Laws](#)” by Piper Alderman Partners, Michael Lhuede & Joanne Hardwick dated 31 March 2020

[ii] Refer to “[Rent Relief arising from COVID-19](#)” by Piper Alderman Partners, Mark Askin, Warren Denny & Kylie Maxwell dated 30 March 2020

[iii] *Directed Electronics OE Pty Ltd v OE Solutions Pty Ltd [VID 1157/2017]* – Video link orders made pursuant to ss47A, 47D & 47E of the *Federal Court of Australia Act 1976* (Cth) (**Act**). Deposition orders made pursuant to ss46A, 47A, 47D & 47E of the *Act* & Division 29.2 of the *Federal Court Rules 2011* (Cth)