

# Video justice: ten years of progress for courts in eight weeks<sup>1</sup>

The Hon Justice Nye Perram

The Federal Court conducted its first trial by videoconferencing platform on 16 March 2020 which was the day that State governments began the process of lockdown. The Court has since rapidly expanded its use of this technology to all aspects of its work. Entire hearings have been conducted with all participants working from home. The quick move to conduct as much work as possible on these platforms has attracted international attention. We are well ahead of the curve.

This success story is due to the attitude of the participants. The profession has displayed flexibility and willingness in the face of novel and difficult circumstances. The bench too has been willing to try different processes. A shared sense of adversity has produced outcomes which could not have been imagined only three months ago. I doubt that what has been achieved in the last eight weeks could have been achieved in 10 years under normal circumstances. The principal difference is that difficulties which are encountered are treated as obstacles to be surmounted rather than roadblocks to be surrendered to. My colleague Michael Lee recently reminded me of Voltaire's quip that we must not make the perfect the enemy of the good. This is true.

The process for hearings conducted online is now clear and involves some refinement of the procedures thrown together for the first hearing conducted on 16 March 2020. The parties and their representatives are sent invitations to the hearing by the judge's associate. The fact that the hearing will be conducted via Microsoft Teams is advertised in the publicly available Court list. Interested members of the public are asked to approach the Court for an invitation to the hearing if they wish to attend. When everyone is in the hearing the judge is invited in last. From there on it runs, as best it can, in the manner of an ordinary hearing. All of the persons who are not speaking are asked to mute their microphones. Counsel and solicitors communicate with each other on a messaging service (WhatsApp has proved



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popular). Skype Instant Messaging is used between judges and their staff.

For trials, robes are usually worn to bring some formality to the proceeding. Counsel does not stand. The assessment of the credit of most witnesses is easier than expected. I have seen a most effective cross-examination conducted on Microsoft Teams. On the other hand, the technology is problematic where witnesses have few IT skills or with self-represented parties or witnesses requiring interpreters.

There have been unforeseen problems. The process is somewhere between 20% and 40% slower. Care must be taken to avoid talking over one another. The disappearance of body language has shown how much useful background information was communicated that way. Conducting a trial this way is, in truth, like swimming in aspic. It is possible but not optimal and tiring for all concerned. There may be much to be said for reducing the length of the court day and introducing more breaks. Then there are the usual distractions of working from home: the unexpected toddler, the distant lawnmower, the over-curious cat.

The Federal Court is now conducting most of its business via Microsoft Teams including, if necessary, with judges and staff working from home. This includes most trials, appeals, case management hearings and interlocutory hearings. Most judges have been doing this during the last eight weeks and, if there should be a second wave and a further lockdown, this is a mode to which we can readily return. We have shared what we have learnt with other tribunals which have expressed an interest such as the Family Court, the Federal Circuit Court and the Administrative Appeals Tribunal. This is no time for institutional chauvinism.

The interesting questions are not so much about the present situation but about what this will mean in the future. It is too early to say definitively but some themes are emerging. In a system of hearings which is not located anywhere, the distinction between state based professions blurs since domestic travel is no longer necessary. A national court not physically tied to any capital city is likely to usher in a national profession. In the short term, although individual judges will differ on this, I have come to the view that I prefer case management hearings to be conducted on Microsoft Teams. It is also difficult to see overseas witnesses being required to travel to Australia. Further, given that a video feed of a hearing is now readily available there may no longer be a need to travel from overseas to give instructions. The continuation of closed borders for the foreseeable future will only accelerate this.

As with most things, it is impossible to know what all of this will mean in the longer term. However, my feeling is that this will turn out to have been a blessing in disguise. **BN**

## ENDNOTES

<sup>1</sup> This is the longer version of a piece that ran in the *Australian Financial Review* on 14 May 2020.