

## 2023 North Queensland Law Association Conference

### “Federal Court in the Tropics”

The Hon Justice Derrington

#### Introduction

1 Some years ago, and shortly before COVID, I realised that nearly all of the matters on my docket, whether they were commercial, insurance, corporations, tax or the like, had their *locus* no further north than the outer Brisbane suburb of Strathpine. Indeed, the Brisbane Registry of the Federal Court appeared to determine substantially more matters originating from regional New South Wales than from Queensland.

2 No doubt there have been many reasons why those legal practitioners who are not located in South-East Queensland have not considered pursuing litigation in the Federal Court. First, the Supreme Court is the natural home of the legal profession and that is a consequence of history. Secondly, it is unfortunate that Federal Court practice and procedure is not a matter taught in universities to any substantial degree, and there is, perhaps, a general trepidation about the manner in which litigation occurs there. However, I suspect that the most important factor has been that, not only did the Federal Court appear to be inaccessible, it was, *in fact*, inaccessible.

3 In the ordinary course, the Federal Court has no physical presence in Queensland other than in the greater Brisbane area. Cairns is therefore a distance of approximately 1,600kms from the Federal Court in Brisbane, Townsville approximately 1,300kms, and Rockhampton 618kms. Looking to other regional towns, Mackay is 954kms away, and Mt Isa 1,825kms.

4 Given those distances, historically, there has been little to no perceived business efficacy in practitioners in regional Queensland endeavouring to conduct litigation in the Federal Court in Brisbane with the added expense of either engaging town agents or having to fly regularly to Brisbane for appearances. Although the Court has had video conferencing facilities for many years, that was only as between the several Registries in the State capitals.

5 However, one silver lining of the COVID-19 experience is that we have all learned to utilise internet platforms to greater effect, particularly for virtual, face-to-face interactions. The pandemic forced the Federal Court to radically adapt its processes in this respect. It having now done so, anyone with a computer or even a smart phone can conduct litigation there, no

matter where they may be located. Moreover, it requires only a modicum of computer literacy to utilise the accessibility that is now offered.

6 This paper considers the new accessibility to the Federal Court, how it is available to practitioners and litigants, and the ease with which litigation there can be conducted remotely.

7 There is no competition between the Federal Court and the Supreme Court. The latter is blessed with many exceptional judges located throughout the State, and it is an efficient forum for the resolution of your clients' disputes.

8 However, all Queensland taxpayers contribute to the costs of the Federal Court, as do the taxpayers of all States and Territories, and it should no doubt be accessible to whomsoever chooses to use it. Therefore, the purpose of this paper is to give some explanation of the scope of the Court's jurisdiction and how practitioners, on behalf of their clients, might now utilise it to their advantage.

9 Generally, this paper focuses on the commercial practice areas as examples of how the new accessibility of the Court operates. It should be acknowledged that practitioners who are involved in Native Title and admiralty matters, which are litigated regularly in the Federal Court, may well be aware of some of what is said.

### **Scope of the Court's work**

10 By way of general overview, the practical jurisdiction of the Federal Court is broken down into nine areas called National Practice Areas (NPAs), a number of which have further sub-areas. The nine NPAs are:

- Administrative and Constitutional Law and Human Rights;
- Admiralty and Maritime;
- Commercial and Corporations;
- Employment and Industrial Relations;
- Federal Crime and Related Proceedings;
- Intellectual Property;
- Native Title;
- Taxation; and
- Other Federal Jurisdiction.

11 The Commercial and Corporations NPA is broken down into six more specialised sub-areas which are:

- Commercial Contracts, Banking, Finance and Insurance;
- Corporations and Corporate Insolvency;
- General and Personal Insolvency;
- Regulator and Consumer Protection;
- Economic Regulator, Competition and Access; and
- Commercial Arbitration.

12 The Intellectual Property NPA is broken down into:

- Patents and Associated Statutes;
- Trade Marks; and
- Copyright and Industrial Design.

13 Within the catch-all of “Other Federal Jurisdiction” falls a variety of matters concerning things such as civil aviation, negligence involving off-shore and environmental issues, federally regulated elections and defamation.

14 Although all judges of the Court will do work in the Administrative and Constitutional Law NPA, judges are otherwise allocated to particular practice areas according to their ability, experience and desire for that specific type of work.

15 In the ordinary course, if a significant matter in a particular practice area is filed in the Court, it will be assigned to a judge who will have many years’ experience in that area of law.

### **How do you end up in the Federal Court involuntarily?**

16 A litigant can end up litigating in the Federal Court either voluntarily or involuntarily.

#### ***Involuntary litigation in the Federal Court***

17 They may be forced to litigate there, as a respondent or a defendant, because an applicant or plaintiff (as the case may be) has commenced its proceeding there, leaving them without any choice in the matter.

18 There is also a range of matters that can only be litigated in the Federal Court. They include administrative and constitutional law matters arising under certain federal legislation. In

particular, challenges to decisions made under the *Migration Act 1958* (Cth) can only be litigated there, or perhaps in the Federal Circuit and Family Court of Australia. Similarly, employment and industrial relations matters may need to be commenced in the Federal Court, as may Native Title matters and federal taxation matters.

19 Even within the Commercial and Corporations NPA, some matters need to be litigated in the Federal Court, including general and personal insolvency and some federal regulatory proceedings.

### ***Shared jurisdiction with the Supreme Court***

20 However, there is also a wide range of matters in respect of which a party may choose to litigate either in the Supreme Court or in the Federal Court. In general, but not exclusively, these matters fall within the Commercial and Corporations NPA and its various sub-areas. In particular, they include commercial contracts, banking, finance and insurance, corporations and corporate insolvency, consumer protection and commercial arbitration. Similarly, some admiralty and maritime matters can be litigated in either court, as can some intellectual property matters.

### **Jurisdiction**

21 A party choosing to litigate in the Federal Court must ensure that the Court has jurisdiction with respect to the matter from which the relevant cause of action arises. When federal jurisdiction is mentioned, it brings to mind the foreword to Professor Geoffrey Lindell's book, *Cowen and Zines's Federal Jurisdiction in Australia*,<sup>1</sup> where Sir Anthony Mason wrote:

The very mention of "federal jurisdiction" is enough to strike terror in the hearts and minds of Australian lawyers who do not fully understand its arcane mysteries. The expression conjures up images of constitutional train wrecks, of which *Momcilovic v The Queen* is a spectacular example.

22 Whatever may have been the position in times past, particularly in relation to the nuanced interplay between State and federal criminal law, the situation is quite different today and particularly so in relation to commercial matters.

23 In reality, in the litigation of commercial and corporations matters, very few jurisdictional questions now arise. Section 39B(1A)(c) of the *Judiciary Act 1903* (Cth) vastly widened the Federal Court's jurisdiction, and, due to the wide scope of federal regulation of commercial

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<sup>1</sup> The Federation Press, 4<sup>th</sup> ed, 2016.

conduct, nearly any commercial matter will have a direct federal element which attracts the Court's jurisdiction.

24 Section 39B relevantly provides:

**39B Original jurisdiction of Federal Court of Australia**

*Scope of original jurisdiction*

(1) ...

(1A) The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any **matter**:

(a) in which the Commonwealth is seeking an injunction or a declaration; or

(b) arising under the Constitution, or involving its interpretation; or

(c) **arising under any laws made by the Parliament**, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.

25 This is, by no means, a paper on the concept of a "matter" under s 39B(1A)(c) or its analogue in s 75(v) in the *Constitution*. However, I will just give the briefest outline in order to demonstrate the width of the Court's jurisdiction.

26 In the simplest of terms, a "matter" arises under a Commonwealth law where that law forms an integral part of a claim or a defence, or is relied upon as conferring the right in issue or as affording a defence.

27 In other words, a matter arises under a federal law where some right or duty in question owes its existence to federal law, or depends upon federal law for its enforcement. That does not mean that the determination of the controversy involves the interpretation or validity of a federal law.

28 In many commercial cases, there is some federal legislation that gives rise to a cause of action, a claim or a right, or ground of defence that obviously attracts the Court's jurisdiction. Actions under any intellectual property legislation are good examples. Similarly, a claim made pursuant to a provision of the *Corporations Act 2001* (Cth) will naturally be a federal matter.

29 It is also not uncommon in commercial matters for a claim of misleading or deceptive conduct under the *Competition and Consumer Act 2010* (Cth) (including the *Australian Consumer Law*) to be raised, giving rise to federal jurisdiction. Similarly, there are related claims under the *Australian Securities and Investments Commission Act 2001* (Cth) and other federal legislation regulating commercial behaviour.

30 Many insurance matters are litigated in the Federal Court because the claim for interest arises under the *Insurance Contracts Act 1984* (Cth), or a party makes a claim for breach of the utmost duty of good faith. Once those claims are made, the whole “matter” becomes one that is justiciable in the Federal Court.

31 There is no need to delve into this interesting area much further, but it should be noted that the Court’s jurisdiction extends to any matter where, in the course of disputation between the parties, one has relied upon a right or claim arising under federal law. For instance, if, in the usual pre-litigation war of correspondence between solicitors, one party raises a right or entitlement under the *Australian Consumer Law*; that is, they raise a claim that the other party has engaged in misleading or deceptive conduct; the whole controversy or matter will have developed a federal characteristic entitling the Federal Court to determine it, even if the misleading or deceptive conduct claim is not actually raised in the course of litigation.

32 Similarly, if a right that is the subject of competing claims exists by reason of federal law, the matter is within the Court’s jurisdiction. This was made clear many years ago by the High Court in *LNC Industries Ltd v BMW (Australia) Ltd*<sup>2</sup> where the majority said (at 581):

A claim for damages for breach or for specific performance of a contract, or a claim for relief for breach of trust, is a claim for relief of a kind which is available under State law, but if the contract or trust is in respect of a right or property which is the creation of federal law, the claim arises under federal law. The subject matter of the contract or trust in such a case exists as a result of the federal law ...

33 So, a contractual dispute between parties in respect of a right arising under federal legislation is justiciable in the Court, even though the cause of action is purely contractual. Therefore, a contractual dispute over the sale of shares is a federal matter, and even the construction of a Will that purports to distribute shares in a company is within the Court’s jurisdiction. The reason is, in both cases, that one of the rights in question is the creation of federal law.

34 It is difficult to think of many commercial matters that, on proper examination, will not be seen to involve some federal element, which might be used as a hook to attract federal jurisdiction. That is not to say that any colourable attempts ought be made to do that.

### **Conducting the litigation**

35 Once a litigant is before the Federal Court, how can they conduct the litigation from locations outside of Brisbane?

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<sup>2</sup> (1983) 151 CLR 575.

36 The reality, at least in many practice areas, is that litigation may be conducted up to, at least, the point of a trial or a hearing from a practitioner’s desktop computer. The filing of documents is electronic, the appearances at any interlocutory or case management hearing can be done via online platforms, and all of the documents that have been filed in the proceedings are available for easy access.

### **Getting started**

37 The key to effective remote litigating in the Federal Court is undertaking an appropriate perusal of the Federal Court’s website. It contains an enormous amount of information to assist with litigation and everything a practitioner needs to know about Federal Court practice. In particular, it contains Practice Notes specific to each area of law within the Court’s jurisdiction which provide guidance as to how a matter is to be litigated.

### ***The Commonwealth Courts Portal***

38 For practitioners involved in the practical day-to-day conduct of litigation, it is important to create an account for use of the online services provided by the Commonwealth Courts Portal.<sup>3</sup> Once set up, the account can be used to:

- lodge court documents, including initiating and supporting documents, on new or existing files;<sup>4</sup>
- receive stamped, “service ready” documents;
- monitor the progress of lodgements;
- view the history of lodgements;
- view your files with the Court;<sup>5</sup>
- filter files to show only those files that are being worked on;
- view recent activity on files, including documents lodged by the parties;
- set up notifications via email of activity on particular files;
- view court diaries, events, orders, judgments and documents lodged in relation to specific files; and

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<sup>3</sup> See [eLodgment Service](#) and [Commonwealth Courts Portal](#).

<sup>4</sup> Through the [eLodgment Service](#).

<sup>5</sup> Through the [Commonwealth Courts Portal](#).

- share access to the files with all persons involved in the litigation, including solicitors, barristers and others.

39 The creation and lodgement of all documents necessary for the proceedings can in this way be achieved via a desktop computer. Moreover, a practitioner can remain aware of everything that is occurring on their files by simply setting up relevant notifications.

40 Once the proceedings are up and running, how then is the matter progressed remotely? Necessarily, that will depend upon the nature of the matter. To a degree, short matters will be dealt with quite differently to longer, substantive matters in respect of which a trial is required.

### **Winding up applications**

41 To explain how short matters are dealt with, it is useful to take the example of winding up applications.

42 On the Court's website, there are step-by-step instructions as to how such an application is made, and helpful information is given in relation to the current law and the documents required. It is called the "Corporations Information Sheet 1".<sup>6</sup>

43 In accordance with the usual practice, the application and supporting affidavits are all filed electronically. Any communication with the Court is usually via email, though there is an enquiry desk that can be contacted by phone.

44 Once an application is filed, it will be given a hearing date and emails will be sent from the Court providing the relevant details.

45 Usually, it will be heard by a Registrar of the Court on a Friday, and it will be via video link. The Friday winding up list, in particular, involves matters from Victoria and Queensland (and sometimes from other States as well), with the latter being heard from 10:30 am. The Registrar may be physically located in Victoria or Queensland, but their location is actually irrelevant.

46 As a matter of general policy, the Court does not wish for practitioners to attend the Court in person for these applications. It is preferred that all parties appear via video link. That is not because the Court dislikes the presence of practitioners, or that there is a hangover from COVID-19. Rather, it is that the standard procedure for a winding up is that the hearing is to

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<sup>6</sup> [Corporations Information Sheet 1: Winding up proceedings based on an unsatisfied Statutory Demand \(fedcourt.gov.au\)](https://www.fedcourt.gov.au/court-services/corporations-information-sheet-1).



be conducted via the internet, and no one party obtains an advantage over others by appearing in person in Court.

47 So, a practitioner can appear in the virtual winding up Court from their Chambers, or office, via Teams at the appointed time. If the application is not contested and the material satisfies the relevant requirements, an order will be made and it will be sent to the practitioner by email.

48 If the matter becomes contested and needs to proceed to a hearing, the Registrar might conduct a case management hearing. It may be that directions are made for the exchange of material and written outlines, and the matter adjourned to a specific date for further hearing. Alternatively, it might be able to be heard later that day and a virtual hearing will take place.

49 Even where the matter is referred to a judge, the Court's intention is that it continues to be heard via an online platform where the parties are, or at least one of them is, not in Brisbane. For the most part, such matters involve questions of law and the interpretation of essentially uncontentious facts, such that no cross-examination is required.

50 Those who are unfamiliar with the process can witness it in action by accessing the Daily Court List on a Friday, via the Court's website, and following the instructions to view the Registrar's proceedings. A web address is given from which one can join the hearings and observe the applications as they are dealt with.

51 It is, of course, conceivable that issues in relation to the internet connection will arise in the proceedings before the Registrars and, if they do, appropriate enquiries can be made. On the Court's website, there is a phone number for making general enquiries. Specific enquiries about Queensland matters can be made by email to the Queensland Registry at [qldreg@fedcourt.gov.au](mailto:qldreg@fedcourt.gov.au).

52 Before enquiries are made, however, a practitioner should consider the plethora of information provided on the Court's website and, in particular, the Guide to Judicial Registrar Corporations Matters.<sup>7</sup>

53 The Bankruptcy List is conducted in a similar fashion, and the whole of a sequestration action can be conducted from beginning to end without the need to physically attend the Court.

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<sup>7</sup> [Guide for practitioners and parties in in corporations matters listed before a Judicial Registrar \(fedcourt.gov.au\)](#).

### **Larger corporations matters**

54 This reference to winding up applications is merely to give you an idea about how matters can be dealt with electronically by the Court.

55 However, even if the matter is more substantial, and one which therefore proceeds before a judge, the procedure can be much the same. Reference, here, to corporations matters of a more substantial nature again offers a useful example by which to explain how litigation in the Federal Court can be conducted remotely.

56 So, if a party seeks to make an application under the *Corporations Act* in relation to a company, for instance, that application can be dealt with on the Corporations List. Again, the matter can be commenced and all material filed from the practitioner's desktop, without any need for a person to attend at the Court.

57 Like the winding up list, the Corporations List matters are heard every Friday by a corporations judge. Matters filed before 12 noon on a Thursday in any week will be returned in the Corporations List for the Friday of the following week. That is, of course, subject to circumstances of urgency.

58 There is no requirement that parties not attend Court for the Corporations List matters, but there is no impediment to having the matter dealt with via video link. All that is required is that a request be made to the associate to the judge hearing the list, and a time and Microsoft Teams link will be provided. A link may also be provided in the Daily Court List for the relevant day. If there are difficulties, the telephone number of the judge's associate is provided in the Daily Court List, and any issues can be resolved by that avenue.

59 In the ordinary course, about one third of the matters heard on Fridays in the Corporations List are heard via Teams.

60 The proceedings dealt with on the Corporations List concern short matters, or the commencement of substantial matters. Short matters are dealt with by way of hearing and may involve things such as the appointment of receivers, extension of convening periods, injunctions in the course of liquidations, and the like. If the matter is more substantial, the first hearing on the Corporations List is an opportunity for the Court to give case management directions for its further conduct.

61 Again, there is a Note to Practitioners on the Court’s website about the operation of the  
Corporations List, which also gives links to relevant Practice Notes and other requirements.<sup>8</sup>

62 The short point is that corporations matters, apart from substantial proceedings, can very often  
be dealt with by a practitioner remotely and without the necessity of them leaving their office.  
The steps required to commence the proceedings can all be performed from the desktop, as can  
the subsequent filing of affidavits and other documents. Communications with the Court can,  
likewise, take place from the practitioner’s office, and any appearance can occur via Teams.

63 Although reference has been made specifically to Corporations List matters, the same applies  
to similarly short matters across the breadth of the Court’s jurisdiction.

64 The essential point is that facilities are available by which any practitioner in Australia can  
conduct such matters in the Federal Court, regardless of where they are located. Indeed, there  
is a growing tendency for practitioners who are overseas, for whatever reason, to appear  
remotely in hearings.

65 None of this should be seen as diminishing the importance of face-to-face oral hearings. They  
are, on many occasions, important, if not vitally so. Nevertheless, although there are limitations  
in a virtual court hearing, there are many matters where those limitations feature either very  
little or not at all.

### **Ordinary matters leading to a trial**

66 The new electronic accessibility of the Federal Court enables regional practitioners to  
undertake even more substantial litigation in that forum, and to prosecute that litigation  
remotely.

67 Again, in relation to the filing of documents, the key is the electronic functionality of the  
Court’s systems. There is no need to send documents to a Registry for filing. That can be done  
instantaneously from any office, or even from your phone.

68 Similarly, discovery in the Federal Court is now undertaken electronically and there is no need  
to produce reams of documents for delivery to the other side.<sup>9</sup>

69 In many substantive matters before the Federal Court, it is not uncommon that the parties are  
in different locations. Regularly, these matters involve interstate practitioners, the consequence

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<sup>8</sup> [Corporations List: Notice to Practitioners \(fedcourt.gov.au\)](https://www.fedcourt.gov.au/Corporations-List/Notice-to-Practitioners).

<sup>9</sup> Central Practice Note: National Court Framework and Case Management (CPNI), Part 10.

being that case management hearings, which are a feature of Federal Court litigation, are routinely conducted via Teams. The Court recognises that it would be unduly burdensome and inefficient to require parties who are not in Brisbane to personally attend at the Court for case management hearings. It is now relatively common for such hearings to have one or more of the parties attending via Teams.

70 The usual practice of the Court is that, where one such party is in a remote location and wishes to appear by Teams for a directions hearing, all parties will appear remotely.

71 The point to be made is that, in large matters, it is standard practice for case management hearings to take place via the Teams platform where one of the parties is not present in Brisbane.

### ***Interlocutory applications***

72 The same applies for interlocutory applications. In general terms, where one party wishes to appear via the internet from a remote location, and it is appropriate, all parties will appear in the Court in a virtual hearing. In the vast majority of interlocutory applications, there is little disadvantage in proceeding this way. Unlike in some States in Australia, cross-examination on interlocutory applications in Queensland is rare or, at least, uncommon.

73 However, some alteration to ordinary practice by the practitioner is required, including greater preparation. That is particularly so in relation to documents to be tendered in the course of a hearing. It is no use seeking to tender such a document at the last minute in an interlocutory hearing via Teams. The Court cannot wait while someone finds the appropriate equipment to scan a document and then send it. So, if there are documents that are intended to be given to the judge in the course of a hearing, they should be scanned and ready for sending to the judge's associate if and when required. That issue should not normally arise as, in the ordinary course, all material to be relied on in the hearing, including written submissions, will have been filed beforehand.

74 Again, the takeaway message is that no matter where you are located you can conduct most interlocutory applications via the internet, so long as adequate preparation occurs.

### ***Document preparation***

75 As the matter before the Court becomes larger or more complex, the documents filed become so as well. This raises important considerations for practitioners in a Court where electronic

filing is standard and, more particularly, for those practitioners who wish to appear via the internet.

76 The electronic documents should be filed in a form that facilitates their use by the Court. Some, like myself, may be unaware of the different ways in which electronic documents can be formatted. However, from the perspective of a judge who works from the electronic file, it has become apparent that it is vital that electronic documents be appropriately formatted. It is, seemingly, not a demanding process, and the benefits of it are great. An electronic document, especially a large one, which can be easily navigated is greatly beneficial for the Court as well as for the practitioner.

77 On the Federal Court website, in the section headed Guidelines and Practice Notes, one can find the eBooks Practice Note (GPN-eBOOKS).<sup>10</sup> It identifies, amongst other things, the Court's requirements in respect of court books, appeal books, books of authorities and other documents, such as affidavits, that are to be provided in electronic format.

78 The requirements include that documents be in a form where the text can be searched and copied, that attachments to the document be independent documents so that they can be opened separately from the main document, and, especially in relation to affidavits, that the exhibits be bookmarked. It is also preferable that bookmarked exhibits be capable of being opened at the same time as the substantive body of the affidavit itself.

79 None of this is for reasons of pedantry. It is simply on account of the fact that, when the Court is confronted with multiple documents, some of which are thousands of pages long, it should be possible for it to navigate those documents with sufficient ease.

80 Books of authorities should be dealt with similarly. There is nothing more problematic than having 50 cases incorporated into the one electronic document, without the ability to search it or go directly to a particular authority.

### ***Conduct of online hearings***

81 In the conduct of online hearings, it is important to follow the usual protocols of the Court to the extent that they can be maintained. There exists a simple guide on the Court's website

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<sup>10</sup> [eBooks Practice Note \(GPN-eBOOKS\) \(fedcourt.gov.au\)](https://www.fedcourt.gov.au/eBooksPracticeNote).

called the “NATIONAL PRACTITIONERS/LITIGANTS GUIDE TO ONLINE HEARINGS AND MICROSOFT TEAMS”.<sup>11</sup>

82 It usefully provides information on how to connect into a hearing, and there are illustrated step-by-step pictorial instructions of how to do that. It also describes what a party might expect in an online hearing. Indeed, there is a link to a 10 minute portion of an online hearing conducted over Teams to give an indication of how it occurs. Although it is an industrial relations matter, it provides a reasonably good example of how a hearing will be conducted in any typical matter before the Court.

83 Specific attention should be devoted to part 4.2 of the Guide, which is headed, “What is Expected of Participants”. Set out there is a number of self-evident matters that should be followed to ensure that the hearing runs smoothly. They are as follows:

#### **4.2. WHAT IS EXPECTED OF PARTICIPANTS**

- 4.2.1. The same formal etiquette and protocol of a physical Court is expected in the Online Court.
- 4.2.2. The matter will be called and the Court will ask for appearances.
- 4.2.3. Judges are to be addressed as ‘Your Honour’, and registrars are to be addressed as ‘Registrar’.
- 4.2.4. Where a judge has elected to robe, counsel must also robe.
- 4.2.5. The Court may elect to dispense with any of the usual formalities, and the parties are expected to act accordingly.
- 4.2.6. Participants are to join an Online Hearing from a quiet, secure location.
- 4.2.7. Participants are expected to ensure that there is sufficient internet coverage in their location and all devices are fully charged.
- 4.2.8. Microphones and cameras are to be tested and working prior to joining an Online Hearing. This can be managed through the Teams Device Settings.

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<sup>11</sup> [Guide to online hearings and Microsoft Teams for litigants and practitioners \(fedcourt.gov.au\)](https://www.fedcourt.gov.au/guide-to-online-hearings-and-microsoft-teams-for-litigants-and-practitioners).

4.2.9. Other than practitioners/litigants-in-person appearing, all other participants are to keep their microphones muted and cameras turned off.

4.2.10. Where possible, identify and resolve any firewall and security restrictions before the Online Hearing commences.

84 These are matters of general common sense and Court etiquette, but it is surprising how often they are not followed.

85 For instance, whilst it is not a regular feature of online hearings, it is not uncommon for practitioners to fail to don appropriate court attire and, too often, matters have to be adjourned whilst they go and find the necessary clothing.

86 In general, one should behave as you would as if you were physically in Court, albeit that you do not have to stand when the Court is opened.

### **Trials and hearings**

87 If, then, the matter is to proceed to trial, the question turns to the mode in which the trial shall occur.

88 Where, as is the case in many commercial matters, much of the evidence is to be documentary, there may be good reason for the final hearing to occur virtually. The explication of affidavit evidence and associated documents and the making of submissions can occur in an adequate way via the internet. That said, there are often good reasons for Counsel to be present before the Court. The issue is not with the evidence so much, but with the interactions between Counsel and the judge, and the ability to question and explain.

89 Where the matter is likely to be heard over less than a day, it may be financially efficient to proceed via the virtual court and avoid the expense of a hearing in person.

90 However, such matters are not that common, and it is regularly the case that, at final hearings, cross-examination is required. Whilst the Court is proficient in hearing cross-examination via the internet, as it does with many overseas witnesses, there is little doubt that the examination and cross-examination of witnesses and the reception of that evidence by a Court is best done face-to-face.

91 It is not possible to guarantee practitioners that the Federal Court will, in all cases, hear trials in-person at the location of the party who commenced the proceedings. However, it is the regular practice of the Court to do so when the balance of convenience permits.

92 For instance, where a matter involves the hearing of evidence from witnesses who are generally located in the same region, and one of the parties is located there, the Court will usually hear the matter in-person at that location so that the inconvenience to the witnesses is minimised. So much occurred in the matter of *Australian Securities and Investments Commission v Channic Pty Ltd (No 4)*.<sup>12</sup> That case was effectively and efficiently managed by Greenwood J from Brisbane. It involved the evidence from a number of indigenous witnesses from the Yarrabah Aboriginal Community. The trial, to the extent that it involved the taking of evidence from those witnesses, occurred in Cairns, where the Federal Court had made arrangements for the hire of a court room in the Supreme Court building. The subsequent addresses to the Court took place in Brisbane.

93 The holding of court hearings away from the major capital cities is now a regular part of Federal Court processes. Many will be familiar with Native Title hearings and the ability of the Court to conduct its hearings “On Country”, regardless of where that may be. Indeed, a prolonged Native Title hearing will occur in Cairns in June of this year.

94 Leaving aside those matters, the Court can usually accommodate almost any matter in any town or city. Where it is practical to do so, the trial of a matter will take place at, or near to, the location where the majority of the witnesses are located. Whether the Court hires court rooms from the State, or uses Federal Circuit and Family Court facilities, does not matter. The facilities and resources are available for the Court to hear matters anywhere in the country.

### **Conclusion**

95 The Court’s response to COVID-19 has had the consequence that it has become more accessible for practitioners and litigants than ever before. Practitioners and their clients can litigate on an even footing with others in the Federal Court from wherever they are located. For the younger practitioners, the move to virtual hearings will largely be a matter of intuition, given their familiarity with technology. For others, it does require some persistence and perseverance but, once the required skills and techniques are developed, a new avenue of

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<sup>12</sup> [2016] FCA 1174.



litigation becomes available. It is undoubtedly more efficient from a practice point of view and, I suspect, it will turn out to be more profitable.