



# Précis Paper

## Paperless Hearings

A discussion of paperless hearings as they are currently being conducted in the Land and Environment Court of New South Wales.

### Discussion Includes

- What is a paperless hearing?
- What has been the principal driver behind paperless hearings in the Land and Environment Court?
- The practicalities of paperless hearings
- Will paperless hearings be transferable to other types of environmental law matters beyond Class 3 compulsory acquisition cases
- The practicalities of using equipment and technology in the courtroom
- How have paperless hearings affected Mr Hemmings' practice?
- Will there come a time when the Land and Environment Court will direct that a matter be a paperless hearing regardless of whether or not one or both parties consent to that occurring?
- What are some of the difficulties that law firms might face in conducting or managing paperless hearings?

# Précis Paper

## Paperless Hearings

1. In this edition of BenchTV, Ian Hemmings SC (Barrister – Martin Place Chambers, Sydney) and Scott Nash (Barrister – Martin Place Chambers, Sydney) discuss the concept of paperless hearings as they are currently being conducted in the Land and Environment Court of New South Wales.

### What is a paperless hearing?

2. There is a whole range of what a paperless hearing can be. Although some of the inquiries, tribunals, and even Supreme Court courtrooms have set themselves up with very expensive technology and a lot of staff to run paperless hearings, this is not how paperless hearings are conducted in the Land and Environment Court.
3. With its paperless hearings, the Land and Environment Court has really just tried to make access to the courtroom easier simply by trying to get rid of paper. In terms of technology for running a paperless hearing, the Court has no fancy pieces of technology or equipment - the most exciting piece of technology is the video projector, so that the judge, barristers, witnesses, and especially clients, are able to see what is going on. All documents being referred to, pieces of evidence, and even opening and closing submissions, are able to be projected up onto a screen so that everyone in the courtroom can follow what is going on.
4. The technology that the advocates are using in the Land and Environment Court are things that people already have (iPads, computers, Notebooks, etc); there is no need for new technology. The only limitation is that whatever technology is used must be pen-based and touch-based, as documents must be able to be written on if they are to be used properly.

### What has been the principal driver behind paperless hearings in the Land and Environment Court?

5. If a single driver behind paperless hearings can be identified, it would be that there is a core group of people who are very keen to see them implemented.
6. Because there are a range of obvious advantages to paperless hearings, they are motivating different people in different ways:
  - (i) eliminating the need for staff members to have to wheel trolleys of documents to courtrooms;
  - (ii) benefiting the environment by saving up to tens of thousands of pages of documents per person;

- (iii) assisting advocates who are trying to develop an electronic practice and trying to influence the court to work paperless;
- (iv) improving access to justice by allowing everyone in the courtroom, particularly clients, not only to see and hear what is going on, but also to follow the evidence, submissions, and authorities.

7. In the view of Mr Hemmings, perhaps the single most important driver of paperless hearings as far as the Court is concerned is access to justice. This is equally important for Moore J in the Land and Environment Court – he frequently talks about access to justice because when everyone is able to see things on the screen, everyone is engaged, as everyone knows what is being talked about.

#### The practicalities of paperless hearings

8. At the moment, paperless hearings are still a bit of an evolving affair. To date, Mr Hemmings has run three official paperless trials, and a number of unofficial paperless trials. These included: a ten-day resumption matter; a four-day resumption matter; and thirdly, a lengthy 40-day trial.
9. There is no prescription as to the software being used in paperless hearings. It is very simple: all that is needed are good quality PDFs. Once you have a PDF document, anyone can use it with a free reader, and one can subsequently get more advanced if they wish. Mr Hemmings' preference in this regard is for Microsoft OneNote for the following reasons: it lets him write on and highlight his own documents, and if he is doing cross-examination preparation or notes for cross-examination and re-examination, it provides him with a palette of different coloured pens to enable him to indicate different things he wishes to take note of.
10. Further, the visual advantage provided by paper can be taken to the next step with OneNote, due to: its unlimited number of pages, its ability to zoom in and out of documents so that more notes can be added, or to cross-refer, or hyperlink between different parts of documents. This is favourable from an advocate's point of view.
11. Both Mr Hemmings and Mr Nash have had experience with software on sharing documents – using this software to actually collaborate on documents for preparation of submissions, and also to have live versions of transcript that they mark up as they go, something which is remarkably useful in the courtroom but not possible to do on paper.
12. According to Mr Hemmings, the initial parts of the paperless court process are working well. Fundamentally, it is a matter of ensuring that the electronic material reflects paper as much as possible, because all of us still think visually, and it will be a long time before we are able

to move away from that. In illustration of this, Mr Hemmings recounts an instance where he remembers that the part of the text he was looking for was about two thirds of the way through the document on the right hand side. As human beings, we remember things visually, so electronic versions of documents need to be able to do this as well.

13. Putting together a court book (in terms of advocates getting ready for court and getting the court ready so that all of the primary documents are there), as long as some thought is given to it beforehand, is simple. While this preparatory stage is fairly straightforward, things are still a bit of a work in progress in terms of the life of the hearing itself. Fundamentally, Mr Hemmings puts this down to two things:

- (i) a lack of Wi-Fi technology available to the public in the Land and Environment Court in which paperless hearings are being experimented with, making some sort of interactive email- or cloud-based document exchange difficult; and

- (ii) the court's concern about security (appropriately so). This means that in relation to cloud-based document sharing, the court needs to ensure that only the parties have access to these documents, and that the sharing platform is not being used as a backdoor means to get into the court system. This means that, at present, there has not been able to be established a shared system with the court, where to get documents to a court, advocates upload the documents to a cloud-based system from which the court officer can draw down the document.

Will paperless hearings be transferable to other types of environmental law matters beyond Class 3 compulsory acquisition cases?

14. The three formal paperless hearings Mr Hemmings has thus far been involved with have been resumption matters, two Sydney-based and one regional. In his view, paperless hearings are very useful for resumption trials. He cites as the best example of this the regional resumption hearing he was involved in. Though this was not a lengthy hearing, it involved consideration of comparable sales evidence – that is, inspecting land to see what price it had sold for to determine whether it is comparable to land the subject of the proceedings, in order to work out what had been paid. In this case, the land involved was cane land on the north coast. The benefit of the paperless trial in this matter was this: instead of Hemmings' instructing solicitor wheeling around two suitcases full of documents containing the brief and the comparable transaction documents, they were standing in the middle of canefield with iPads containing the entire brief, including the evidence and all the contract documents. The technology allowed them to be in a remote location like a canefield and still descend into the detail of the material.

15. In relation to merit appeals, which form a large part of the Land and Environment Court's practice, and require council instruments, bundles of documents, expert reports, 46 applications, etc, actually onsite, as one is walking around surveying the land – the advantages of going paperless in such situations are a no-brainer. The one limitation with going paperless with merit appeals at the moment is speed and power. As soon as one starts getting into the more detailed plans, it gets more and more difficult to flip through the pages of a plan, like one needs to do onsite, if one is trying to do it on a Notebook or an iPad. This is a matter of technology catching up with the situation at hand.
16. In relation to Class 5 criminal matters, Mr Hemmings believes that it is unlikely that paperless trials will take hold, and if they do, it will be the last cab off the rank. He attributes this to the natural reluctance for change when dealing with matters involving criminal sanctions.
17. In relation to Class 4 matters, concerned with administrative law and civil enforcement jurisdiction, both Mr Hemmings and Mr Nash are of the view that these are probably the most appropriate for paperless hearings because most of the time, they are entirely document-based. He sees this as a very clear next stop for paperless hearings following resumption matters, which are currently the focus.
18. Hemmings believes that the reason resumption matters were the first point of application for paperless hearings, is due to their voluminous nature in terms of documents, therefore, they were the most obvious saving in terms of the environment and convenience.

#### The practicalities of using equipment and technology in the courtroom

19. One of the clearest advantages of using the video projector is that the audience can see what is going on. Probably the next best advantage of the projector is that it allows advocates to be confident that the Bench is paying attention to the same document that they are, that the Bench is following a submission the advocate is attempting to make, that the Bench is at the same page and paragraph of an authority that the advocate is trying to take them through. This can be done electronically by having a Tipstaff bring up the relevant document on screen, and if the advocate wants to draw everyone's attention to specific parts of their written submissions, they can ask the Tipstaff to pause, or use the laser pointer to point out those parts.
20. As a cross-examination tool, Mr Hemmings is in great favour of the video projector, as it gives advocates the ability to do several things with a witness. Firstly, it allows the advocate to ensure that the witness is focusing on the material that they want to take the witness to. This allows the advocate to more easily control the witness who thinks they know where the advocate is going, and so starts trying to find the answer to the question they may want the

advocate to ask somewhere in the bundle, rather than the question the advocate is asking them. If the advocate has a document up on screen about which they are asking a question of the witness, that makes it much easier to control the flow of information they are trying to adduce through the cross-examination. Secondly, if an advocate is trying to join the dots, as is often the case in cross-examination, to have the laser pointer with the material onscreen where the advocate is trying to draw a witness to a conclusion, and not only trying to get the witness to follow them verbally, but also trying to get the court and the witness to follow the laser pointer on the screen to identify a certain point the advocate is trying to make – the video projector and laser pointer are very useful tools. It does not allow an advocate to trap a witness, however, it allows an advocate to get from point A to point B much faster because they are able to better control the flow of the information.

21. Another benefit of the video projector and laser pointer, especially where lengthy written documents are concerned, is where an advocate is trying to draw a witness's or a judge's attention to a specific part of a plan or a photograph or words on a page. It is faster and more efficient for this to be done electronically instead of on paper, and the advocate can be certain that their opponent, the witness, and the judge are all paying attention to the same piece of information. It is clearly and obviously a much better way of getting evidence out of a witness, and producing evidence to the court.

#### How have paperless hearings affected Mr Hemmings' practice?

22. The best thing about paperless hearings is that more solicitors are embracing the possibility of the use of paperless hearings. This means that they are all becoming better equipped to deal with electronic documents. This is reflecting itself in Hemmings' practice, close to 90% of which is paperless. It is also reflected in the way solicitors are changing the way they are providing materials to Mr Hemmings. This is an area where security causes the biggest concerns with solicitors. There is a whole host of commercially-available cloud-based sharing services (for example, iCloud, DropBox, etc), and each of them have security issues as far as different people are concerned, and inevitably, the more security-conscious they are, the worse they are.
23. Delivery of an electronic brief or bundle is important, and this is probably the teething phase we are currently at with paperless hearings. This is because it is very easy for someone to take a document, produce it as a PDF, and supply it, but to supply a brief via a series of emails with attachments is not an efficient use of time. Therefore, in Hemmings' view, using software like iCloud and DropBox to deliver an electronic brief or bundle is clearly the way to go. This eliminates a number of problems such as limitations on size for email servers and losing documents.

24. Paperless hearings have also created an advantage for Mr Hemmings' practice in terms of research. Every time he gets an authority that he needs to review for whatever purpose, rather than getting out the relevant volume or printing himself a hard copy off the internet, he prints the electronic copy, highlights it, marks it up, and saves it. Through this method, he has now accumulated 22 years' worth of research on OneNote, so that when he comes across a topic he has dealt with before but which was some time ago, he can pull out from OneNote his own authorities that he has highlighted and marked up. He likens this to the modern equivalent of the old judgments in the cupboard, the difference being that he can Word Search across them, and also across any notes he has made on these authorities, and he can cross-refer between documents. Importantly, because he has done this research task, once he gets in court, if an opponent has neglected to provide him with a list of authorities, and the opponent begins referring to a particular case, for example, most of the time, Mr Hemmings will have his own copy of the authority being referred to. This not only means that he has it with him, but also that he has a marked up version with him.
25. Mr Hemmings is now able to move the paperless methodology beyond just research. Every opinion he has ever written goes into an electronic file, for example. It becomes a much easier way to store and get to information. He is insistent that the visual aspect that is so much a part of paper must be retained in order for people to get the information in their heads.

Will there come a time when the Land and Environment Court will direct that a matter will be a paperless hearing regardless of whether or not one or both parties consent to that occurring?

26. Mr Hemmings has absolutely no doubt that in as little as a few months, the Court will firstly direct that resumption matters be dealt with via paperless hearing (taking note that there will always be the ability for an exception – for example, someone whose counsel cannot cope with a paperless hearing, a small firm that does not have the ability to cope with a paperless hearing, or a litigant in person who simply does not want to deal with a paperless hearing), although there will always be the ability to opt out.
27. Mr Hemmings predicts that the Court will use the resumption matters as a testing ground for these paperless hearing directions, and the Court is already preparing standard directions in paperless trials to be used in Class 3 matters. There is no magic in these directions; it is just a matter of making sure that advocates have things set up properly, such as, for example, not having 500-page PDFs, making sure they are good quality and searchable, and making sure that page 73 of the PDF is also page 73 of the document.

28. Once resumption matters have been used as the teething ground for paperless hearing standard directions, it will be interesting to see where to from there. Mr Hemmings anticipates that Class 4 matters or merit appeals might be the next stop for paperless hearings. Colleagues of Hemmings with large merit appeals practices have expressed a very big interest in embracing paperless hearings because of the ease with which they can then deliver briefs, carry around different briefs to trials, etc.
29. Paperless hearings do not just influence the running of large litigation, but also changes and makes easier how one prepares for litigation, how one gets to court, and how one presents in court.

What are some of the difficulties that law firms might face in having to conduct or manage a paperless hearing?

30. Because the approach being taken by the Land and Environment Court to paperless hearings is not the expensive, technology-based approach, there are no real great barriers in conducting or managing a paperless hearing, and even if barriers do present themselves, it is unlikely that they will be unable to be met by technology that the law firm already has, such as converting Word documents to PDFs, converting paper documents to PDFs, buying access to a cloud-based delivery service.
31. Then comes the question of delivery. Email is probably the most inefficient way to do this due to size limitations and the potential for documents to get lost. This can be overcome by a law firm purchasing access to some cloud-based delivery service.
32. The most expensive single barrier, in Mr Hemmings' view, is ensuring that the firm's professional staff have a laptop or an iPad, or both, which must be both pen- and touch-based. Although this adds to cost, Mr Hemmings believes that this is a cost the firm will see benefits from almost immediately and inevitably, because of the general efficiencies they will pick up operating day to day.

## **BIOGRAPHY**

### Ian Hemmings SC

Barrister – Martin Place Chambers, Sydney

Ian was admitted to the NSW Bar in 1996, before taking silk in 2013. Prior to this, he worked as a solicitor at Allen Allen & Helmsley and was tipstaff to Justice Noel Hemmings at the Land and Environment Court of NSW. His main areas of practice are environment and planning, resumption and valuation, administrative law, and property law. Ian's practice sees him appear regularly in the NSW Land and Environment Court and the Court of Appeal. He is the past President of the Environment and Planning Law Association. Doyle's Guide recognises Ian as one of NSW's "pre-eminent" Planning and Environment Barristers.

### Scott Nash

Barrister – Martin Place Chambers, Sydney

Scott was admitted as a barrister in 2010. Before coming to the Bar, he worked as a lawyer for six years. Scott's main practice areas include administrative, environmental law, equity, and property law. He also works as lecturer and course leader at the University of Technology, Sydney in Environmental Planning and Development Law. Since 2013, Scott has been acknowledged in Doyle's Guide as one of the Leading Planning and Environment Barristers in NSW.