

# Tips for the day of the hearing

## Fact Sheet



### This fact sheet covers:

- ✔ What happens during the hearing
- ✔ Examining, cross-examining and re-examining a witness
- ✔ Objecting to witness evidence
- ✔ Judgement

## 1. What happens during the hearing?

Before the day, you should prepare what you are going to say and the questions you are going to ask witnesses.

The applicant presents their side of the story first. The respondent is then given an opportunity to respond.

Both sides can call witnesses to support their case. The judge will usually order the parties to lodge affidavits or witness statements before the hearing from all witnesses the parties want to call.

The questioning of witnesses happens in three stages:

1. the party who called the witness will ask questions ('examination-in-chief')
2. the other party will then have a chance to ask the witness questions to challenge their story ('cross-examination')
3. if necessary, the party who called the witness will be able to ask a few more questions about what was covered in cross-examination ('re-examination').

The applicant's witnesses will be called first, and then the respondent's witnesses. Witnesses are required to sit outside the courtroom until their name has been called to enter the court and give their evidence.

### 1.1 Questioning your own witness

When questioning your own witness, you should ask open questions that allow the witness to tell their story in their own words. Try to start your questions with 'who', 'what', 'when', 'where' or 'why'. Write down some sample questions.

When questioning your own witness, be careful not to ask questions that suggest the answer to the witness, which are known as 'leading questions'. For example, a question that begins with 'Isn't it true that...' is likely to be a 'leading' question and may be objected to by the other party.

Make notes about what information you would like the judge to hear from the witness, and tick off each point as you question the witness.

Remember, if the witness doesn't give particular information, the judge cannot consider that information when making their decision.

It is important to be polite to everyone in the court room, even if you disagree with what they are saying. You shouldn't interrupt anyone speaking in court but you should take notes and assert your disagreement with what they say when it is your turn to speak or question a witness.

## 1.2 Cross-examining witnesses

If you have filed affidavits or witness statements by witnesses who support your case, then the other party may wish to cross-examine those witnesses. Cross-examination is when a witness is asked questions by the opposite party or lawyer to challenge or test the witness's evidence.

You should think carefully about the questions you would like to ask the other party's witnesses. The answers should either help your case or weaken the other party's case. One way you can do this is to suggest a different version of events to the witness. You can do this by asking questions such as: 'I put to you that you said X to me' or 'I put to you that you did X'.

In cross-examination you are allowed to ask leading questions, or questions that suggest an answer, to the other party's witnesses. However, you should not ask any rude questions or argue with the witness.

## 1.3 Re-examination

After your witness is cross-examined by the other side, you will have an opportunity to ask a few more questions on topics raised during cross-examination. With these questions, you can give the witness an opportunity to explain or correct anything raised during the cross-examination questions.

The questions you ask in re-examination should also be open (i.e: start your questions with 'who', 'what', 'when', 'where', or 'why'). Your questions cannot suggest an answer or 'lead' the witness.

## 1.4 Objections during witness examination

Objections generally arise when the opposing party asks a question which may be prejudicial or unfair. The other party may try to formally complain about the evidence a witness gives, the questions you ask a witness or something else that occurs during a hearing. This is known as an objection. You are also able to object to evidence or questions (by standing and saying 'objection') if you think they are against the rules of evidence. Some common objections include:

- **Relevance:** any question asked in a court hearing must be relevant. This means that the answer to the question must somehow relate to an issue that is in dispute between the parties.
- **Hearsay:** a witness can only give evidence about things they have personally observed or have direct experience of. Hearsay evidence is evidence given by a witness that the witness hasn't

observed or doesn't have direct knowledge of. For example, if a witness says they were told a piece of information by another person, that piece of information is not evidence, because the witness did not have direct experience, but was only told about it. Hearsay evidence is not admissible (or allowed) in court proceedings except in rare circumstances.

- **Opinion evidence:** generally, a witness can only give evidence about things they observed, and are not allowed to give their opinion on what occurred or what that evidence means. There are certain exceptions to the opinion rule – for example, in certain cases expert opinions will be allowed.
- **Improper, offensive or repetitive questions:** a party cannot ask questions that are misleading, confusing, annoying, harassing, intimidating, offensive, rude or inappropriate.
- **Privileged evidence:** some evidence cannot be used in court because it is 'privileged'. Privileged evidence includes legal advice, evidence about what the parties have said in trying to settle the dispute (such as offers of money to settle) and evidence given by a witness about a crime they may have committed.

#### NOTICE OF INTENTION TO CROSS-EXAMINE

It is your responsibility to tell the other party, in writing, which of their witnesses you want to cross-examine.

If the other party or parties want to cross-examine one of your witnesses, they must give you written notice. It is your responsibility to make sure that person comes to court. If your witness doesn't show up to court, you might not be able to rely on what they have said in their affidavit to support your case.

If a witness that you are calling cannot come to court unless ordered to, then you need to ask the court to issue a subpoena. Serve the subpoena in plenty of time so the witness can organise to be there.

## 1.5 When is judgment given?

When your final hearing has finished, the court either makes orders or puts off making a decision until later.

If a decision is made on the day of your hearing, write down what has been decided, and what you have to do or not do. Ask the court to repeat anything you have not been able to write down or that you don't understand. A copy of the court's decision and orders should be given to you on the day or sent to you.

If a decision is not made on the day of your hearing, this is called a reserved judgment. The court will contact you later to let you know when the decision or judgment will be given (also known as 'handed down' or 'delivered').

#### USEFUL INFORMATION

- Attorney-General's Department – [The Courts](#)
- Federal Court – [Commencing an Action in the Federal Court](#)
- [Federal Circuit and Family Court of Australia \(Division 2\) \(General Federal Law\) Rules 2021](#)
- [Federal Court Rules 2011](#)
- Federal Circuit and Family Court of Australia – [First court event – helpful information](#)