



## THE RULES COMMITTEE

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11 November 2003

Minutes/7/03

### **CIRCULAR NO 99 OF 2002**

#### **Minutes of the Meeting held on Monday, 10<sup>th</sup> November 2003**

The meeting called by Agenda/7/03 was held in the Chief Justice's Chambers, High Court, Wellington, on Monday, 10<sup>th</sup> November 2003, commencing at 10.05 am.

#### **1. Preliminary**

##### *1.1 In attendance*

The Hon Justice Baragwanath (in the Chair)  
The Hon Justice William Young  
The Hon Justice Venning  
Judge Doherty  
Judge Joyce QC  
Chief Parliamentary Counsel (Mr. G E Tanner QC)  
Mr A Beck  
Mr. K McCarron (for the Chief Justice)  
Mr. R Gill  
Miss. H Lee (Clerk to the Rules Committee)

##### *1.2 Apologies*

The Chief Justice (the Rt. Hon Dame Sian Elias GNZM)  
The Hon Justice Chambers  
The Solicitor-General (Mr. T Arnold QC)  
Mr. T C Weston QC  
Mr. C Finlayson

### 1.3 *Confirmation of Minutes*

The minutes of the meeting held on Monday, 29<sup>th</sup> September 2003 were taken as an accurate record and were confirmed.

## **2. Papers tabled at the meeting**

Mr Tanner tabled High Court Amendment Rules (No 2) 2003 (PCO 5555/3), which amend the daily recovery rates in the HCR. Please attach circular 98, Costs/5/03 to these rules.

## **3. Personnel**

The Chairman welcomed Mr Beck to the meeting, who attended in place of Mr Weston and Mr Finlayson.

## **4. Omnibus 4**

The Committee considered the submissions (Amendments/25/03 and Amendments/26/03) received in response to the Committee's consultation paper issued 19 September 2003 (Amendments/18/03 and Amendments/21/03).

### *Format of the first page*

The Committee agreed to delete the words "the date of any forthcoming hearing or case management conference" in proposed HCR 33(a)(iii) and substitute the words "the next event date". It requested that Mr Hoffmann give consideration to including a definition of the term "next event date".

The Committee agreed to insert the words "or Master" after the reference to "Judge" in proposed HCR 33(a)(iv). It agreed that, particularly for Auckland registry purposes, it is unhelpful to require the specification of the case officer's name on the first page of a filed document.

The Committee otherwise approved the proposed amendments to HCR 33(a).

### *Memorandum to be subscribed to first document filed by party*

The Committee agreed to delete proposed HCR 44(1)(ca). Instead, it agreed to consult on whether "email address" should be included in HCR 44(1)(e) as an address for service.

### *Calderbank offers and payment into Court*

The Committee approved proposed HCR 48G, 48GA and the associated transitional provision (rule 7). The Committee rejected the proposal to revise

the payment into court rules. Instead, the Committee approved the deletion of the payment into court rules (rules 12 and 13).

#### *Defamation*

The Committee approved proposed HCR 285.

#### *Discovery*

The Committee agreed with the submissions challenging the proposed adoption of a "directly relevant" test for discovery purposes. The Committee found particularly persuasive the argument that the new test would not address the cost of discovery since relevance of all documents will still need to be tested, possibly by a more experienced solicitor than the current test requires.

The Committee was attracted to the submission that the listing requirements for non-privileged documents should be relaxed to reduce costs. In particular, it supported the retention of the listing requirements for privileged documents and documents whose nature is not evident on their face but only requiring the numbering, for example, of all other documents. It directed Miss Lee to prepare a paper setting out the arguments in favour of the *Peruvian Guano* approach with modifications to current listing requirements. The paper should consider the possibility of using examples for the rules concerning listing and review the approach adopted in Australia and the United Kingdom. The Committee agreed to consider this paper at the next meeting.

The Committee acknowledged Mr Beck's concern that the HCR was not the appropriate location for proposed rule 296 (Solicitor's obligations on discovery). Nonetheless, the Committee approved the rule, regarding it as *intra vires* and being unanimous as to its terms.

The Committee agreed that rules regulating electronic discovery, particularly the associated costs, should be developed. For that purpose, the Committee formed an Electronic Discovery Sub-Committee, to which it tentatively appointed Justice Venning, Judge Harvey and (subject to its agreement) the Law and Technology Committee of the ADLS.

The Committee did not support the introduction of pre-action protocols.

The Committee directed Miss Lee to draft a letter querying the effective prohibition against requiring non-party discovery from the Crown contained in the Crown Proceedings Act 1950, s 27. The letter should be directed to the Solicitor-General and Justice Chambers for their consideration.

#### *Originating Applications*

The Committee approved the proposed amendments to HCR 458.

#### *Liquidated Demands*

The Committee agreed that proposed HCR 460(1)(b) should be amended to read "costs and disbursements of an amount fixed by the Registrar". The Committee further agreed that HCR 48H(3) should be amended to include an exception with respect to the Registrar's power under HCR 460(1)(b).

#### *Swearing of affidavits*

The Committee approved proposed HCR 520 and 522 and the proposed amendments to HCR 521. It agreed that the equivalent amendments to the DCR should define "Registrar" to include a Registrar of the High Court and Deputy Registrar of the High Court. It directed Miss Lee to ensure that the definition of "solicitor" in proposed HCR 521(2) captured those who had enrolled only as a solicitor under earlier Acts.

The Committee agreed that provision should be made permitting the recognition of foreign statement verification processes similar to that contained in the Extradition Act 1999. Mr Tanner undertook to draft an appropriate rule in conjunction with the Ministry of Foreign Affairs and Trade.

The Committee considered that Justice Chambers should be invited to write to the Ministry of Foreign Affairs and Trade clarifying the actual effect of the proposed rules.

#### *Time and mode of giving judgment*

The Committee agreed that proposed HCR 540(4) should be amended to provide that the delivery time must be nominated "in accordance with any direction from the Judge if so given". The Committee otherwise approved the proposed amendments to HCR 540.

The Committee noted that judgments should be electronically distributed in PDF format, not Word, to avoid the inclusion of metadata.

#### *Sealing judgments*

The Committee agreed that proposed HCR 541(5) should be amended to require service of a sealed judgment on any non-party affected by the judgment.

#### *When judgment takes effect*

The Committee noted that existing HCR 540(6) is replaced by proposed HCR 542(3). It agreed that PCO should insert a new provision preventing the sealing of a judgement pending the disposal of an application to recall a judgment unless leave to seal the judgment is obtained. The Committee otherwise approved proposed HCR 542.

#### *Bankruptcy*

The Committee approved proposed amendments to HCR 827 and 831. However, it agreed that proposed Forms 90 and 94 should require costs to be calculated on a 2B basis and specify a standard service fee (perhaps \$100) that may be claimed. The Committee also agreed that proposed Forms 90

and 94 should mention that a failure to pay or dispute the claimed costs constitutes an act of bankruptcy or allows them to be adjudicated bankrupt.

#### *Part IV*

The Committee considered the submissions recommending the abolition of Part IV and, in particular, the arguments that Part IV has random application and overlaps Part IVA. While it considered that a presumption in favour of early service of affidavit evidence for certain proceedings is helpful, it agreed that a rationalisation of Parts IV and IVA is required. For that purpose, the Committee formed a Part IV Sub-Committee comprising Justice Venning and Mr Beck.

#### *Court of Appeal (Civil) Amendment Rules 2003*

The Committee agreed that the proposed rules should contain an appropriate transitional provision to cater for judgments given prior to the date the proposed rules come into force. Mr Tanner undertook to draft the transitional provision.

The Committee otherwise approved the Court of Appeal (Civil) Amendment Rules 2003. It directed Miss Lee to ensure that the amendments to the Court of Appeal (Civil) Rules 1997 be notified in *Law Talk* and the *New Zealand Law Journal*.

#### *Omnibus 4 redraft*

The Committee asked PCO to redraft the High Court Amendment Rules and the Court of Appeal (Civil) Amendment Rules 2003 incorporating the amendments identified above. It agreed that the discovery rules should be omitted from the High Court Amendments Rules.

### **5. Daily Recovery Rates**

Mr Tanner explained the operation of the transitional provisions contained in the High Court Amendment Rules (No 2) 2003 (Costs/5/03).

The Committee approved the High Court Amendment Rules (No 2) 2003 (PCO 5555/3) and the concurrence process was commenced.

### **6. District Court Omnibus**

Mr Tanner informed the Committee of potential policy level involvement from the Ministry of Justice with the District Court Omnibus. This prospect is to be further investigated by Justice Chambers.

Judge Doherty undertook to make arrangements for the involvement of a suitable practitioner in the District Court Omnibus. The Committee directed Miss Lee to pursue the possibility of Justice Keane's involvement.

## **7. Construction Contracts Act 2002**

The Committee noted that the District Court Amendment Rules (No 2) 2003 are based on an adaptation of existing procedure in the DCR. The Committee expressed concern about the wide variety of ad hoc procedures currently contained in the DCR. It invited the Chairman to approach the President of the Law Commission with a proposal that the Commission consider conducting an overview of the law specifying differing procedural approaches and investigate the possibility of introducing one overarching procedure.

The Committee requested Mr Guzman to consider, in consultation with Judge Doherty, whether service should proceed the fixing of the hearing date in proposed DCR 461ZZR. Once that matter had been addressed, the Committee directed that a consultation paper on District Court Amendment Rules (No 2) 2003 be distributed for feedback as discussed in Minutes/6/03, item 3.

## **8. Weathertight Homes Resolution Services Act 2002**

The Committee noted that because of work pressure Mr Guzman has not yet been able to draft these rules.

## **9. Maori language in legal proceedings**

The Committee considered proposed HCR 65A concerning the use of Maori language in legal proceedings (General/9/03). The Committee queried whether it was appropriate to narrow the choice of Maori interpreters by reference to iwi, especially since the Maori Language Act 1987 makes no reference to iwi. It noted that any member of a court or tribunal could speak Maori in legal proceedings and that proposed HCR 65A might inappropriately require them to give notice.

The Committee agreed that advice on proposed HCR 65A should be sought from the Ministry of Justice, the Maori Language Commission and the Clerk of the House. Mr Gill undertook to correspond with the Ministry. Mr Tanner undertook to correspond with the Clerk of the House.

The Committee noted that HCR 62 to 65 (Translations into Maori) could be amended to achieve a racially neutral approach. The Committee directed Miss Lee to arrange for further consideration to be given to this option.

## **10. Applications to prevent early lapse of caveats**

The Committee considered and agreed with Miss Lee's proposed amendment to HCR 458D(1)(a)(xii) to insert reference to new s 145A, Land Transfer Act 1958. The amendment will authorise applications to prevent the early lapse of caveats to be made by way of an originating application.

## **11. Rulemaking for the District Courts**

The Committee is awaiting Miss Lee's paper on this topic.

**12. Alternative dispute resolution and the judiciary**

The Committee is awaiting the summarised results of the survey the NZ Bar Association conducted on judicial settlement conferences.

**13. Part VI - Reform**

The Committee gave preliminary consideration to Mrs Palmer's paper, which proposes various reforms to Part VI of the HCR (Execution/2/03). The Committee approved the structure of the Queensland Uniform Civil Procedure Rules 1999. However, it expressed concern that the proposed treatment of contempt risked inappropriately limiting the Court's inherent jurisdiction.

The Committee directed Miss Lee, in consultation with Justice William Young, to prepare a set of execution rules based on the Queensland Uniform Civil Procedure Rules with appropriate amendments taking into account the Committee's position on contempt. It also instructed Miss Lee to provide the Committee with a synopsis of those rules.

**14. Exchange of Evidence**

This matter was deferred to the next Rules Committee meeting.

The meeting closed at 2:50pm.

The next meeting will be held on Monday, 16th February 2004.

Heidi Lee  
Clerk to the Rules Committee