



## THE RULES COMMITTEE

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Tuesday 1 May 2007

### **Circular No. 35 of 2007**

#### **Minutes of Meeting held on Monday 2 April 2007**

The meeting called by Agenda/2/07 was held in the Chief Justice's Boardroom, High Court, Wellington, on Monday 2 April 2007 at 10am.

#### **1. Preliminary**

##### *In Attendance*

Hon Justice Baragwanath (in the Chair)  
Hon Justice Chambers  
Hon Justice Randerson, Chief High Court Judge  
Judge Joyce QC  
Judge Doherty  
Dr David Collins QC, Solicitor-General  
Mr G Tanner QC, Chief Parliamentary Counsel, Parliamentary Counsel Office  
Ms L Sinclair, Deputy Secretary, Ministry of Justice  
Mr A Beck, New Zealand Law Society representative  
Mr J Orr, Chief Legal Counsel, Ministry of Justice  
Dr D Mathieson QC, Special Parliamentary Counsel, Parliamentary Counsel Office  
Mr K McCarron, Judicial Administrator to the Chief Justice  
Mr Peter Crabtree, Public Law Group, Ministry of Justice  
Ms Michelle Vaughan, Public Law Group, Ministry of Justice

Ms G Smith, Secretary to the Rules Committee  
Dr Heather McKenzie, Clerk to the Rules Committee

##### *Apologies*

Rt. Hon Dame Sian Elias GNZM, Chief Justice of New Zealand  
Mr Charles Chauvel MP  
Hon Justice Fogarty

### *Confirmation of minutes*

The minutes of the meetings held on Monday 12 February 2007 and Friday 2 March 2007 were confirmed.

### *Other matters arising*

#### i. District Courts Rules

Judges Joyce QC and Doherty met with Ian Jamieson who will incorporate into the District Courts Rules matters decided at the meeting of 2 March.

It is anticipated that a draft consultation paper will be circulated to Committee members for discussion at the next meeting on 11 June 2007.

#### ii. Incapacitated persons

Suzanne Giacometti is working on the amendments to the District and High Courts Rules concerning incapacitated persons. Progress has been delayed by provisions in the District Courts Rules concerning harassment by minors. Another draft of the amendments will be circulated for discussion at the next meeting.

## **2. Rules reform**

The Chair thanked Dr Mathieson for his report summarising the changes.

### *Anton Piller and Mareva orders*

Anton Piller and Mareva orders have been integrated into the Rules, though the related forms have not.

The Committee discussed whether the practice notes in the Australian orders should feature in the Rules. The predominant opinion was not to use practice notes. Dr Mathieson will integrate material in the Australian Practice notes into the Rules, with explanatory material included only where necessary.

### *Transitional provisions*

Transitional provisions will be in the Act.

### *Electoral Petition Rules*

Mr Beck identified the anomaly arising from the Electoral Petition Rules not being in the High Court Rules. The reasons for their exclusion were identified, namely that they comprise a large, stand-alone volume and are not often used. The Committee did not support revisiting whether they should be included.

### *Insolvency rules*

The insolvency provisions in the new Rules were prepared in consultation with Andrew Borrowdale. They aim to be consistent with the Insolvency Act 2006, which the Ministry of Economic Development expects to come into force in October or November 2007, and with the Insolvency (Cross-border) Act 2006.

Given that the Insolvency Act 2006 will significantly pre-date the Rules, it was suggested that Part 24 of the new Rules be lifted out and released for immediate consultation as a proposed amendment to the existing Rules.

A sub-committee will work on this. Subject to the consent of the two judges, it will comprise Dr Mathieson (Chair), Justice Heath, Associate Judge Faire, Mr Tanner, and Mr Borrowdale.

#### *Ministry of Justice's Public Law Group and the Rules*

Mr Crabtree and Ms Vaughan outlined the Public Law Group's approach to consultation on the Rules. David Goddard will lead input. Areas of particular substantive interest include the extent to which the rules

- Overlap with other policy projects underway, such as Trans-Tasman working group;
- Improve access to justice;
- Impose costs on the profession; and
- Speed the process up.

The Group will advise the Minister on issues including Anton Piller and Mareva orders, commencement of proceedings, cross-border matters, probate, electronic filing, and the conduct of trials.

The Ministry would be concerned should there be too many further changes to the Rules after they came into force given the need for stability.

It was noted that the project is essentially a major tidying up exercise, and it would be concerning if the Ministry had significant reservations or suggested major changes as it is represented on this Committee.

#### *Impact on Higher Courts Operations*

Ms Sinclair tabled a document outlining the Ministry's findings on the impact of the proposals (excluding forms) on the Higher Courts Operations ('Reform of High Court Rules: Impact on Operations'). The Ministry is presently assessing the impact that the proposed e-filing regime will have; and would like the opportunity to have further input into the Forms before they are finalised.

The Chief Judge questioned the accuracy of the paragraph concerning judicial review. The paragraph states that '[t]he changes essentially move Judicial Review processes from legislation to the Rules.' However, there have been no changes to the legislation. Ms Sinclair will ask the authors what they meant.

Concerning search of Court records, the Chair queried whether there had been adequate consideration of the difference between the status quo and new electronic search provisions.

#### *Overview document*

It was suggested that paragraph K on page 3 of Dr Mathieson's overview of the revision project be rephrased to make it clearer that while the provisions regarding electronic filing will go out for consultation, their status is unclear.

#### *Other points*

The Chair identified a need to incorporate procedural provision for the enforcement of judgements at common law, and to include e-mail provisions in rules 23.36 and 23.37. Dr Mathieson will make the amendments.

#### *Forms*

The forms have now been integrated, excepting those relating to Anton Piller and Mareva orders. The Chair noted their elegance and the improvement they represent of the previous set.

#### *Scope of consultation*

The draft revised Rules will be sent out to:

- District law societies

- New Zealand Bar Association
- New Zealand Society of Accountants
- Arbitrators and Mediators Institute of New Zealand
- New Zealand Business Round Table
- Commerce Commission
- Judge Johnson, Chief Judge of the District Court
- Ministry of Economic Development

It will also be advertised in the New Zealand Law Journal and on the Rules Committee web site. Dr Mathieson will write a column for Law Talk indicating that the consultation process is underway, and will draft an invitation to consultees. This will be forwarded to the Chair to revise and will be circulated with the consultation papers.

Note: The paper went out on Thursday 5 April. Submissions are due to the Clerk on 1 June 2007, and will be summarised by Dr Mathieson.

*Record of thanks*

The Chair proposed, and the Committee endorsed, a record of thanks to Dr Mathieson for his work on the Rules.

**3. Management of cases stated**

The Chief Judge will consult the rules relating to ordinary appeals and compare what would be necessary to include in cases stated.

**4. Case management conferences**

The Committee supported endorsing Justice Venning's proposal of case management conferences to consider pre-trial issues at a date around 10 working days after the delivery of the first brief of evidence is due. The purpose is to avoid unnecessary applications for adjournments due to the process for serving briefs not being followed, and to avoid the difficulties which arise when a case runs over the allocated time. It will apply to cases lasting 5 days or longer.

The proposal will be added to the existing Rules, and integrated into the new Rules.

**5. Management of appeals**

*Contents of initial conference memorandum*

The Committee endorsed Justice Winkelmann's proposal that rule 430 be amended to require that the appellant file with the appeal a copy of the decision being appealed from (where available), and that rule 430 (4) include a requirement that the memorandum filed describe the issues raised by the appeal.

*Security for costs*

A new sub-clause will be added to 20.13 as follows: 'Except in the case of an appeal under the District Courts Act 1947 (under which non-compliance with the security order results in a deemed abandonment of the appeal under s 74 (2)), if the security is not paid within the time specified under sub-clause (4) the respondent may apply for an order dismissing the appeal.'

*Interim implementation*

Dr Mathieson will include a note with the consultation paper indicating that certain changes are already in the process of being implemented.

## **6. Proposal by Chief Judge for amendment of search rules – amendment to rule 66**

The existing rule will be included in the consultation paper, with a note that changes are being considered. Further action will be deferred until the Committee knows the Government's response to the New Zealand Law Commission's report. It is expected that this will be known by the next meeting.

## **7. Amendment to schedule Five of the High Court Rules**

The amendment suggested by the Steering Committee at its meeting on 6 March 2007 was accepted by the Committee, and will feature in both the current and new Rules. The amendment concerns 'Matters to be considered at case management conferences for proceedings other than appeals,' and reads: 'Notify the Solicitor-General where any significant issue arises under the New Zealand Bill of Rights Act 1990, international obligations, Treaty of Waitangi obligations, or any other issues of significant public interest.'

## **8. Appearance in lieu of ex parte applications by lay persons**

There was lengthy discussion concerning whether lay people should be able to make use of the ex parte procedure. It concerned the desirability of enabling them to take full advantage of court procedures and the problem of compliance with the obligation of ensuring informed and candid disclosure of the opposing case. The Clerk will research current practice in Australia and Britain.

## **9. Sign language**

Proposed rule 1.16 provides for sign language, which will also be factored into the present Rules. Dr Mathieson, Mr Tanner, and Ms Sinclair will investigate aligning the sign language rules with those concerning speaking Maori, as well as various issues raised surrounding translations.

## **10. Authorities**

Committee members will talk with Judges to gauge their opinion on the provision of authorities. If warranted, the Committee may subsequently issue a discussion paper. The Clerk will research United Kingdom and Australian practice notes.

## **11. Charging orders – High Court draft rule 17.53**

The Chair brought to the Committee's attention the letter from Justice Blanchard endorsing changing draft rule 17.53 so that it covers all personal property plus land held in trust for the liable party. It confirms the position taken in the draft new Rules.

## **12. Non-conformity with rules 7.20 and 7.25 (Affidavit to the filed with application; Affidavit to be filed with notice of opposition)**

It was considered that the Rules do not need to provide for the consequences of non-conformity.

**13. Penalty under draft rule 17.90 (Security by absconding debtor)**

The question of whether there is an ongoing need for this rule or whether it should be repealed will be flagged in the consultation paper.

**14. Costs consultation paper submissions**

Discussion was limited because of time constraints. Several issues were raised which will each require further analysis and debate. To that end, a sub-committee will prepare an issues paper.

Areas of particular concern centred upon how the 'necessary and reasonable' test should be applied, and by whom; and included gauging the necessity of evidence and the balance between the Judge's and parties' perception of its usefulness.

The Chair, Justice Chambers, the Chief Judge, and Mr Brown will work on the issues. The Clerk will research practice in foreign jurisdictions.

**15. Allocation of duties between the Secretary and Clerk**

Discussion was deferred until the next meeting.

The meeting closed at 2.20pm.