



THE RULES COMMITTEE

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Wellington

16 March 2000

Minutes 1/2000

CIRCULAR NO 16 OF 2000

Minutes of the Meeting held on Friday 25 February 2000

The meeting called by Agenda/1/2000 was held in the Chief Justice's Chambers, High Court, Wellington on Friday 25 February 2000 commencing at 9.30am.

1. Preliminary

In attendance

The Hon Justice Fisher (in the Chair)
The Hon Justice Chambers
The Hon Justice Wild
Master G J Venning
Ms E D France (for the Solicitor-General)
Mr K McCarron (for the Chief Executive, Department for Courts)
Mr T C Weston QC
Mr G E Tanner (Chief Parliamentary Counsel)
Miss M A Soper (Secretary)

(a) *Apologies*

The Chief Justice (the Rt Hon Dame Sian Elias GNZM)
Chief District Court Judge Young
Judge Doogue
The Attorney-General (the Hon Margaret Wilson)
Mr C F Finlayson

(b) *Confirmation of minutes*

On the motion of Justice Fisher, seconded by Justice Chambers, the minutes of the meeting held on Thursday 25 November 1999 were taken as an accurate record and were confirmed subject to the insertion on page 2, third paragraph from the end, after the words "already made" the words "where appeals have not yet been filed" and on page 13, second last line the deletion of the words "need to update" and substitution of the words "recent inclusion of".

(c) *Matters arising from the minutes*

On page 5, fourth paragraph, there is a wider question about the distinction between a Judge's reasons for a decision and the actual giving of judgment and it is desirable that sometime in the future the Committee look at a broader redrafting of r 540 with that in mind. The Committee agreed that that proposal, along with others which might arise, be categorised as "non-urgent" and referred to the Rules Committee Clerk for research and not otherwise appear in the next agenda.

Without arriving at any final conclusion as to minute taking, the Committee provisionally decided that the minutes should record the discussion on two different levels. One level will be an attempt to summarise the general discussion without attributing authorship to any individual speaker, and the other part will be an attempt to express the actual conclusions of the Committee. This approach is to be reviewed at the next meeting.

2. **Matters referred to Parliamentary Counsel for drafting**(a) *The High Court Amendment Rules 2000 (PCO3386/7)*

Rule 14, Judgments to be sealed and dated - The Committee agreed to delete from r 541(3)(a) (as inserted) the words "after it is given" in order to avoid any potential ambiguity.

Rule 541(4)(a) should refer in the text to r 540.

Rule 3, Review of Decisions of Masters – the Committee agreed to delete from r 61C(7) the words "on the application to review the order or decision of the Master" on the basis that r 61C(6) already makes it clear.

Rule 9, Application of Part IVA – the Committee agreed that r 458D(1)(v) and (vi) should be amended by inserting references to ss 209O(1)(c) and 228(1). The rationale is that applications by creditors or shareholders for the leave of the High Court to propose a compromise should be made by the originating application procedure in Part IVA rather than under the Part IV procedure in the High Court Rules.

Rule 13, New r 540 substituted – in r 540(2) second line, the Committee agreed to insert the word "affected" before the word "parties" on the grounds that there may be a number of parties, not all of them with an interest in the judgment, particularly on interlocutory matters.

In Rule 540(4) the Committee agreed that a written judgment is given when it is signed by the Judge and bears the date on which it is signed. The Committee agreed that this wording would accommodate the situation where an already dated judgment is signed by the Judge and the situation where it is not the Judge who adds the date to the judgment. The Committee noted that the amendment to this rule will mean that judgments will always need to be dated.

Schedule, New forms inserted in First Schedule of High Court Rules, Form 64N – the Committee agreed to leave to Mr Tanner the issue of whether the phrase “delete if inapplicable” is appropriate when making a choice between two alternatives. The suggested wording was “deleting whichever is inapplicable”.

Forms 64O to 64R – in all of the forms the Committee agreed that the reference to the Companies Act and relevant section in the information can be deleted on the basis that there is now a specific form for each transaction and the forms are no longer multi-purpose.

Form 64C (in the existing Rules) – the Committee noted that paragraph 1 of the advice in the memorandum of form 64C contains a reference to a company having no right to carry on proceedings except by a solicitor and no right to appear except by counsel. The Committee agreed that this advice should be repeated in the information part of forms 64O to 64R as paragraph 2.

The Committee agreed that the rules should commence on 1 May 2000.

Justice Wild agreed to write or supervise a short item for “Lawtalk”.

The Committee agreed that as a matter of general practice new rules would be made available to Andrew Beck so long as he continues with his updating rules/articles in the New Zealand Law Journal.

3. **Matters referred for statutory amendment**

(a) *Masters jurisdiction*

This matter has been addressed by the Ministry of Justice and referred to the Minister.

4. **Review of Rules Committee**

(a) *Copies of Rules without annotations*

Mr Tanner tabled a copy of the Judicature Act reprinted as on 31 December 1999.

(b) *Preparation of Manual*

Paragraph 3.1.2 – Mr Weston advised that the New Zealand Law Society has concerns about the boundaries between practice notes and the Rules. The general concern is that too much is dealt with in practice notes. This issue, together with the question of the nature and extent of the inherent jurisdiction should be revisited after further research is done on both New Zealand and overseas materials.

Paragraph 3.4, Scope of Rule-making powers for the Court of Appeal – the Committee agreed to insert a statement to record the procedure for vetting and consultation for amendments to the Court of Appeal Rules.

Paragraph 3.5, Scope of Rule-making Powers for the District Court – provisionally (subject to input from the Chief District Court Judge and District Court Judge members of the Committee) the Committee considered that there should be a District Court subcommittee of the Rules Committee. A possible membership would be the two District Court Judge members of the Rules Committee, one of whom would be the convenor, a High Court Judge and a practitioner. Mr Weston suggested that the practitioner would be one who practises heavily in the District Court and he and Mr Finlayson agreed to arrange for a suitable member to be proposed.

Paragraph 3.7, Other Committee Functions - the Committee agreed that the introductory phrase should read “recommendations for statutory change”.

Paragraph 4.1, Origin of Rule Changes – the Committee noted that rule changes may also result from the passage of particular statutes or a decision of the Courts. The Committee also considered that the best use of its time on systematic reviews would be a high level conceptual approach to complete parts of the rules and their relationship to the rules as a whole rather than an attempt to comprehensively wade through each rule in detail. With that in mind the Committee agreed provisionally to ask members of the Committee to conduct a conceptual overview of this kind for discussion at appropriate stages throughout each year.

Paragraph 4.2.1, First Rules Committee Meeting for a Given Rule Change Suggestion – the Committee agreed that new material be screened by individual members and suggested projects be put into three categories of; “pursue immediately”, “noted for consideration at a finite future date” (and to be worked on by the Committee Clerk) and “not pursue”.

(c) *Servicing of the Rules Committee*

Mr McCarron advised that the Department has approved the appointment of a Judge’s Clerk and the next step is to settle a job description and advertise.

5. **Appeals**

(a) *Practice note on appeals in civil contested cases*

The proposal from the Chief Justice is to consolidate all existing High Court practice notes. The Committee considered that some practice notes should be in the Rules but that the Committee needs time to consider those. Mr Weston and Master Venning agreed to take responsibility for that exercise. The Committee agreed that Justice Fisher should write to the Chief Justice asking her not to promulgate the consolidated practice note in the meantime.

6. **Case Management**

(a) *Case Management practice note*

The Committee agreed that Master Venning and Mr Weston would take responsibility for this as part of the practice note project (see item 6(c) above). The Committee noted that there may need to be a larger

subcommittee for the purpose and that there will need to be assistance from the new Rules Committee Clerk.

7. District Courts' Rules

(a) *Alignment of High Court and District Court Rules*

The Committee proposed a subcommittee with Judge Doogue, Judge McElrea, Parliamentary Counsel and the Rules Committee Clerk. It was also suggested that practitioner representation could come either from Keith De Ridder from Palmerston North or Peter Whiteside from Christchurch.

The Committee endorsed the process and membership suggested in paragraph 2 of Justice Fisher's memorandum of 10 February 2000. Mr Tanner confirmed that Parliamentary Counsel could be made available for this purpose. It is now envisaged that the Committee will have its own clerk to participate. Mr Weston agreed that although a practitioner should certainly be involved on the standing District Court subcommittee it is not necessary that there be a practitioner on the transitional subcommittee bearing in mind that its proposals will in any event come before the full Rules Committee for final consideration.

8. Evidence

(a) *Expert witnesses*

Discussion

It was suggested that there are three key issues – what sort of consultation should there be between the experts pre-trial, to what extent should experts be required to disclose the instructions they have received (raising issues of privilege) and by what process should experts give evidence at trial.

Decisions

Mr Weston agreed that he and Mr Finlayson would expand their paper so that it can be used as a discussion document and bring a draft back to the next meeting.

Justice Fisher agreed to write to Justice Lindgren in Australia to ascertain his comments.

9. Extraordinary remedies

(a) *Judicial Review Rules*

Discussion

The Law Commission is proposing to repeal the Judicature Amendment Act 1972 and replace it with legislation which would empower the grant of injunctions against the Crown and retain the power of the Court to direct the

decision maker to reconsider. The Commission is also recommending that Part VII of the High Court Rules be redrafted.

The Committee agreed with the concerns raised by the Commission that it is confusing to still have recourse to the old extraordinary remedies. The Commission proposes that further developments in the jurisdiction be a matter for the Courts while the High Court Rules set out the procedures.

The Committee agreed that the statutory threshold in the 1972 Amendment Act is too high and out of date being now some 30 years old (see for example developments in the law about public duties). The Committee noted that there is a lot of case law as to whether matters are reviewable.

Members thought that, for the avoidance of doubt (the point is not clear in the Commission's paper) that s 8 should not be repealed given the doubt whether without it the Court would have the power to make an order binding on the Crown.

Members thought that the jurisdiction to review a public law decision should be defined in statute but that the procedures dependent thereon should be in the rules. The Committee also agreed that the substantive remedies should be in the statute.

Members agreed that any change to the statute should not diminish the judicial review jurisdiction of the courts. They also agreed that the place for procedural provisions is in the Rules.

Decisions

The Committee agreed that there needs to be a tidying up of the relationship of statutory review under the Judicature Amendment Act 1972 and Part VII of the High Court Rules.

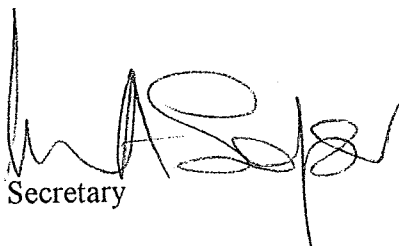
The committee is happy to undertake the latter task either accepting sole responsibility or in consultation with the Law Commission.

Ms France agreed to write to Justice Baragwanath.

All other items on the agenda were deferred.

The meeting closed at 3.20pm.

The next meeting will be held on Friday 2 June 2000.


Secretary

**ADDENDUM TO THE MINUTES OF THE MEETING HELD
ON 25 FEBRUARY 2000**

Action required by:

The Hon Justice Fisher	Write to Chief Justice re practice notes
	Write to Justice Lindgren re Expert Evidence
The Hon Justice Wild	Item for "LawTalk" on High Court Amendment Rules
Master G J Venning	Consider what practice notes should be in the Rules
Judge Doogue	Provide input for District Court sub committee
Ms E D France	Write to Justice Baragwanath re Judicial Review
Mr T C Weston	Propose practitioner member for District Court sub-committee
	Consider what practice notes should be in the Rules
	Expand paper on Expert Evidence
Mr C F Finlayson	Propose practitioner member for District Court sub-committee
	Expand paper on Expert Evidence