



# The Rules Committee

CONSULTATION ON

## Without notice applications

**Date of issue:** 8 June 2015

**Date submissions are due:** 24 July 2015

**Address for submissions:** Ms Harriet Bush  
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### Introduction

1. The Rules Committee (“the Committee”) is reviewing the rules for making an application without notice in the High Court and District Courts.
2. This review arose out a submission from a member of the profession concerning the procedure when an unrepresented applicant applies for a without notice application. The Committee considers that it is appropriate to revise the rules due to the recent rise in unrepresented litigants. The Committee considers that it would be helpful to redraft the entire rule to provide more guidance to both lay litigants and counsel as to when without notice applications should be made and the substantial requirements for making these applications.
3. This consultation paper sets out the current rules, identifies aspects of the rules where reform may be necessary, and sets out the proposed reforms. The Committee invites submissions on the effectiveness of the current rules and on the proposed rules. Please provide submissions or comments to Harriet Bush, the Clerk to the Committee, by **24 July 2015**.

## The existing rules

4. Rule 7.16 of the District Court Rules (“DCR”) and r 7.23 of the High Court Rules (“HCR”) govern applications without notice. Rule 7.23 of the HCR provides:

### **7.23 Application without notice**

- (1) If the applicant wishes the application to be determined without any other party being served (in these rules referred to as an **application without notice**), the applicant must use form G 32.
  - (2) An application without notice must contain a certificate that—
    - (a) uses the words “I certify that this application complies with the rules”; and
    - (b) is personally signed by the applicant’s lawyer.
  - (3) The lawyer who signs the certificate must, before signing it, be personally satisfied that—
    - (a) the application and every affidavit filed in support of it complies with these rules:
    - (b) the order sought is one that ought to be made:
    - (c) there is a proper basis for seeking the order in an application without notice.
  - (4) The lawyer is responsible to the court for those matters.
  - (5) Despite subclause (2), a Judge may dispense with the certificate if the applicant is unrepresented and justice so requires, and if dispensation is sought, the applicant must state the reasons for the absence of a lawyer’s certificate.
5. Rule 7.16 of the DCR is the same.
  6. Under the current rule, a without notice application must be certified by the applicant’s lawyer. However, where the application is made by an unrepresented litigant, that person may apply to the Judge to dispense with the certification requirement. The Committee considers that it does not make sense for an unrepresented litigant to have to seek dispensation from the obligation to certify the application, where, according to the rule, they are not capable of certifying the application in the first place. Where the certification requirement is dispensed with, it is not clear whether any obligations remain on an unrepresented applicant.
  7. Additionally, the Committee considers that the current rule provides little guidance to applicants as to what a lawyer is actually certifying. Rather than stating that the application complies with the rules, the Committee believes that it would be more helpful if the rules substantiated upon when without notice applications ought to be made and the obligations owed to the court when making a without notice application. In the view of the Committee, the most important requirements on a person making a without notice application is that they disclose to the court all the relevant material and that there is a basis upon which the

order should be granted without notice. The Committee considers that these obligations should apply equally to unrepresented litigants.

### **Proposed Amendment**

8. With these considerations in mind, the Rules Committee has proposed the amended wording **attached** at the end of the consultation document.

#### *Discussion of the proposed amendment*

##### *Rule 7.23*

9. Proposed r 7.23(2)(a) lists the situations in which an application without notice may be made. This list is taken from r 7.46, which sets out an exhaustive list of circumstances in which a Judge may determine that an application can properly be dealt with without notice. In order to deal with the application without notice, the Judge must be satisfied that one of these situations exists.
10. Rule 7.23(2)(b) explicitly states that an applicant must make all reasonable inquiries and take all reasonable steps to ensure that the application contains all relevant material. This requirement is taken from existing case law. Case law repeatedly emphasises that a lawyer making a without notice application must:<sup>1</sup>

Make the fullest disclosure to the Court of all matters relevant to such an application, whether or not such solicitor considered any such matter unimportant. He has a duty to disclose to the Court the defence to the action if he knows it, and the facts on which it is based, so that the Court can judge for itself whether they are material or not.

11. The Committee considers that it is necessary to specifically set out this obligation because the court is reliant on the party applying accurately informing the court of the situation so that it can reach a fair decision.
12. Rule 7.23(3) requires an applicant to file a memorandum setting out the background to the proceedings and the grounds upon which the order is sought. This requirement has been added due to concern that applicants often do not set out the basis for making the application without notice, meaning that the Judge is left to guess the relevant basis.<sup>2</sup>
13. Finally, r 7.23(4) states that failure to disclose all relevant matters to the court may result in the court dismissing the application or, where one or more orders have been made in reliance of the application, rescinding the orders. Although r 7.49 already allows a party to apply for an interlocutory order to be rescinded or amended, the Committee considers it useful to set out the potential consequences of non-disclosure in r 7.23, to alert applicants, in particular lay applicants, to the potential consequences of non-disclosure and the importance of full disclosure.

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<sup>1</sup> *United People's Organisation (Worldwide) Inc v Rakino Farms Ltd (No 1)* [1964] NZLR 737 at 738. See also *Lala v Preliminary Proceedings Committee* (1993) 7 PRNZ 101 at 105; and *Automatic Parking Coupons Ltd v Time Ticket International Ltd* (1996) 10 PRNZ 538 (HC) at 540.

<sup>2</sup> See for example the comments in *Re Estate of Blakie* HC Dunedin CIV-2011-412-465, 19 August 2011 at [8].

14. The proposal also amends the relevant form by requiring the applicant to specify why the application is made without notice and to certify both that counsel believes that there are grounds for making the application without notice and that all reasonable steps have been taken and all reasonable inquiries have been made to ensure the application contains all relevant material.
15. The Committee considers that this requirement is substantially the same as the current requirement to certify that the application complies with the rules. However, the Committee considers that the two factors that an applicant must certify in the amendments are the most important factors for the court to be able to determine the application.
16. As noted above, this certification requirement will apply to both lay applicants and counsel.
17. The Committee invites submissions on the effectiveness of the current rule and the proposed amendments to the rule.

### **Return of Submissions**

18. Please return submissions or comments on the proposed changes to Harriet Bush, the Clerk to the Rules Committee, by **24 July 2015** by post to:

Ms Harriet Bush  
Clerk to the Rules Committee  
Auckland High Court  
PO Box 60  
Auckland 1010

Or by emailing the submissions to: [harriet.bush@courts.govt.nz](mailto:harriet.bush@courts.govt.nz)

19. Submissions that are received may be posted on the Rules Committee website.

The Rules Committee would like to take the opportunity to remind members of the profession that feedback from the profession is a valuable way of ensuring that the rules are working well. If you have any concerns about a particular rule or its application, please raise this with the Committee by emailing [RulesCommittee@courts.govt.nz](mailto:RulesCommittee@courts.govt.nz)

# CONSULTATION DRAFT

## High Court Amendment Rules (No 2) 2015

Governor-General

### Order in Council

At Wellington this                      day of                      2015

Present:  
in Council

Pursuant to section 51C of the Judicature Act 1908, His Excellency the Governor-General, acting on the advice and with the consent of the Executive Council, and with the concurrence of the Right Honourable the Chief Justice and at least 2 other members of the Rules Committee established under section 51B of the Judicature Act 1908 (of whom at least 1 was a Judge of the High Court) makes the following rules.

### Contents

		Page
1	Title	1
2	Commencement	2
3	Rule 7.23 replaced (Application without notice)	2
	7.23 Application without notice	2
4	Schedule 1 amended	2
	<b>Schedule</b>	<b>3</b>
	<b>Form 32 replaced</b>	

### Rules

#### **1 Title**

These rules are the High Court Amendment Rules (No 2) 2015.

## 2 Commencement

These rules come into force on [to come].

## 3 Rule 7.23 replaced (Application without notice)

Replace rule 7.23 with:

### 7.23 Application without notice

- (1) If the applicant wishes the application to be determined without any other party being served (in these rules referred to as an **application without notice**), the applicant must use form G 32.
- (2) An application without notice may be made—
  - (a) only if—
    - (i) requiring the applicant to proceed on notice would cause undue delay or prejudice to the applicant; or
    - (ii) the application affects only the applicant; or
    - (iii) the application relates to a routine matter; or
    - (iv) an enactment expressly permits the application to be made without serving notice of the application; or
    - (v) the interests of justice require the application to be determined without serving notice of the application; and
  - (b) the applicant has made all reasonable inquiries and taken all reasonable steps to ensure that the application contains all material that is relevant to the application, including any defence that might be relied on by any other party, or any facts that would support the position of the other party.
- (3) An applicant who makes an application without notice must file with the application a memorandum setting out—
  - (a) the background to the proceedings (including the factual basis for the proceedings); and
  - (b) the grounds on which each order is sought.
- (4) Failure to disclose all relevant matters to the court may result in the court—
  - (a) dismissing the application; or
  - (b) if 1 or more orders have been made by the court in reliance on the application, rescinding those orders.

## 4 Schedule 1 amended

In Schedule 1, replace form G 32 with the form G 32 in Schedule 1 of these rules.

**Schedule**  
**Form 32 replaced**

r 19

Form G 32  
Interlocutory application without notice

rr 7.19(4), 7.23(1)

**To** the Registrar of the High Court at *[place]*

**This document notifies you that—**

1 The applicant, *[name, place of residence, occupation]*, applies for an order/orders\* *[specify orders sought, numbering them if more than 1]*.

\*Select one.

2 The grounds on which each order is sought are as follows: *[specify concisely the grounds on which each order is sought]*.

3 The application is made in reliance on *[specify any particular provision of an enactment, principle of law, or judicial decision relied on]*.

4 The application is made without notice to any other party on the following ground(s)\*:

(a) requiring the applicant to proceed on notice would cause undue delay or prejudice to the applicant; or

*[if applicable specify the reasons why this ground applies]*

(b) the application affects only the applicant; or

*[if applicable, specify the reasons why this ground applies]*

(c) the application relates to a routine matter; or

*[if applicable, specify the reasons why this ground applies]*

(d) an enactment expressly permits the application to be made without serving notice of the application; or

*[if applicable, specify the reasons why this ground applies]*

(e) the interests of justice require the application to be determined without serving notice of the application.

*[if applicable, specify the reasons why this ground applies]*

\*Select whichever ground or grounds are applicable.

5 I certify that—

(a) the grounds set out in paragraph (4) on which the application relies are made out; and

(b) all reasonable inquiries and all reasonable steps to ensure that the application contains all material that is relevant to the application, including

any defence that might be relied on by the other party, or any facts that would support the position of the other party.

Date:

Signature:

(of applicant or solicitor/counsel for the applicant)

[*Telephone number*]

Clerk of the Executive Council.

### **Explanatory note**

*This note is not part of the rules, but is intended to indicate their general effect.*

[to come]

### **Regulatory impact statement**

The [name(s) of agency/agencies] produced [a regulatory impact statement/regulatory impact statements] on [date] to help inform the decisions taken by the Government relating to the contents of this instrument.

[A copy of this regulatory impact statement/Copies of these regulatory impact statements] can be found at—

- [Insert URL link(s) to the RIS on the agency's/agencies' Internet site(s)]
- <http://www.treasury.govt.nz/publications/informationreleases/ris>

Issued under the authority of the Legislation Act 2012.

Date of notification in *Gazette*:

These rules are administered by the .