



THE RULES COMMITTEE

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9 October 2008

Minutes/06/08

Circular No. 140 of 2008

Minutes of meeting held on Monday 6 October 2008

The meeting called by Agenda/06/08 was held in the Chief Justice's Boardroom, High Court, Wellington, on Monday 6 October 2008 at 10am.

1. Preliminary

In Attendance

Hon Justice Fogarty (in the Chair)
Rt. Hon Dame Sian Elias GNZM, Chief Justice of New Zealand
Hon Justice Randerson, Chief High Court Judge
Hon Justice Asher
Dr Don Mathieson QC, Special Parliamentary Counsel, Parliamentary Counsel Office
Mr Brendan Brown QC
Mr Andrew Beck, New Zealand Law Society representative
Mr Jeff Orr, Ministry of Justice
Mr Ian Jamieson, Parliamentary Counsel Office
Ms Paula Tesoriero, Ministry of Justice, for Ms Liz Sinclair and Mr Andrew Hampton
Mr K McCarron, Judicial Administrator to the Chief Justice

Ms Dolon Sarkar, Secretary to the Rules Committee
Dr Heather McKenzie, Clerk to the Rules Committee

Apologies

Hon Justice Chambers
Hon Justice Stevens
Judge Joyce QC
Judge Doherty
Dr David Collins QC, Solicitor-General

Confirmation of minutes

The minutes of the meeting of 6 August 2008 were confirmed as a true and accurate record.

2. Enactment of the High Court Rules

The Chair noted the passage of the Judicature (High Court Rules) Amendment Bill, and that the High Court Rules are expected to come into force on 1 February 2009.

The Committee recorded its thanks to: Justice Baragwanath for leading the project; Dr Mathieson QC for his expertise and ongoing work; and Messrs Hofmann and McCabe for ongoing work and seeing the Rules progress through the legislative stages.

3. District Courts Rules 2008

Mr Jamieson spoke to the memorandum of 2 October updating progress on the Rules.

The Judicial Reference Group proposed a timetable for implementation of the Rules and is working on the Forms. As has been noted before, there are approximately 6 or 7 new forms; others are either existing District Court forms with minor amendments to align with the plain English revision and High Court forms, or forms directly carried over from the High Court Rules.

Currently the High Court forms are incorporated by way of cross reference rather than by replication. The forms could be replicated if need be, and this might be more convenient for practitioners and Judges. However, in the main body of the Rules High Court Rules are incorporated by cross reference because this facilitates updating: updates to the High Court Rules will generally flow automatically to the District Court Rules. Publishers have indicated that commentary on the District Court Rules will be in one volume to avoid the need for two volumes of commentary. Moreover, practitioners usually bring to Court copies of only those rules and associated commentary they are working with rather than entire volumes.

4. Access to Court records

The Chief High Court Judge spoke to his memorandum of 16 September summarising changes from the last draft the Committee considered.

Randerson J and Mr Hoffmann or Mr Jamieson will consider a memorandum from Mr Earles relating to technical matters. They will make any necessary amendments and circulate to the Committee for approval. The Committee did not consider further consultation was necessary as the changes are not of such magnitude to warrant it and, in any event, tend to address concerns raised by submitters.

The Committee did not see its work as frustrating the wider enquiry of the Law Commission. The Chair will send a copy of the Rules to the Commission with a letter of explanation.

The revised civil access rules will come into force shortly after the High Court Rules. The criminal counterparts can be treated separately. The current High Court Rules cannot be changed because revoked rules cannot be amended.

The Chair thanked Randerson J, Messrs Hoffmann and McCarron, and members of the Sub-Committee for their work.

5. Supreme Court Amendment Rules 2008

The major driver behind the proposal to tie submission dates to the date of leave is to enable the Supreme Court to read widely around the case before it is heard to help ensure an effective and focussed use of trial time. It is not a punitive measure on the profession. Under the current regime there is often inadequate time to do research prior to a hearing. This is magnified where the Court is sitting in the days leading up to a hearing. Another issue was problems with fixtures.

Submissions to the Supreme Court are at times inadequate. Senior Counsel should be involved in their preparation and familiar with the issues given the case has already progressed through lower courts. Counsel should be able to focus early and produce full submissions at the outset.

On the other hand, while other jurisdictions require submissions well in advance of hearing (for example, England's Privy Council and the United States of America), the arguable reality is that Counsel will not have time to present written submissions of the calibre required for the Supreme Court if the proposed rules are adopted. Junior Counsel might submit a somewhat rushed 'draft' to comply with timetable requirements which senior Counsel will later amplify and hand up to the Bench in the guise of 'Counsel notes.' The versions can often be quite different. An effective way of helping raise the standard of submissions might be to limit the ability of Counsel to submit extra submissions.

The Committee discussed revoking the Supreme Court Rules 2004, leaving the Court to issue a practice note. While arguably Rules are more accessible and practice notes can be ignored or become out of date, the latter would be kept current and enforced by the Supreme Court. Care must be taken however to distinguish between regulations properly contained in Rules and material suitable for practice notes.

The Chief Justice will liaise with Messrs Brown QC and Beck to arrange a meeting with them and McGrath and Wilson JJ to discuss the issues. The group will investigate whether to revisit the proposed Rules or to suggest they be amended or revoked and a practice note issued. It will report back to the Rules Committee.

Dr Mathieson will produce a paper on the ideal interface between rules, practice notes, and judicial administration.

6. Commerce Amendment Act 2008 an appeals on input methodologies

The Commerce Amendment Act 2008 presents several procedural and policy-related issues. A central question is whether the High Court can adequately deal with the merits-based appeals the legislation contemplates under the new High Court Rules. New High Court Rule 7.5, 'Case management conferences for appeals,' might afford the Court the flexibility it may require.

The Chief Justice noted that it is important not to create a situation, by making specialist Rules, which affords one category of work priority over other general proceedings. There is a related danger that other 'specialist' groups will consider their areas require different rules. The appeals

in question are arguably no more special or unique than many others (for example, where a member of the Maori Land Court sits).

The Committee agreed to establish a Sub-Committee because it was thought to be undesirable to have the regime start without careful consideration of practical and procedural implications. The Sub-Committee will be convened by the Chief High Court Judge. Other members will be the Chief Justice, Fogarty J, and any other persons who the Sub-Committee invites. The Sub-Committee will consider whether to amend the High Court Rules, issue a practice note, or do nothing. It will report back to the Committee for the 1 December meeting.

7. Proposals for amendments to the High Court Rules

The Chair spoke to his memorandum of 17 September proposing a reversal of the presumption in favour of written briefs but retaining the power of Associate Judges and Judges to order written briefs. This proposal is reverting to previous practice rather than suggesting something new. As outlined in the memorandum, written briefs can be costly, complex, constricting, and function as a barrier between the trial judge and witnesses. Also, if a written brief is taken as read in Court, some witnesses might only be able to be heard in cross-examination which can be undesirable.

Chambers J's objection was noted to there being any proposal put out to the profession as distinct from an open-ended enquiry. That view was supported by the Chief High Court Judge.

There was a general discussion which included the continuing advantage of written briefs and that the relationship between briefs and bundles of documents would need to be considered should there be any changes.

A Sub-Committee will consider the issues. It comprises Randerson J, Fogarty J, Asher J, and Messrs Brown and Beck. It will report back to the Committee for the 1 December meeting.

8. Proposed changes to rules for filing of notice of appeal

The Chief Judge spoke to the Clerk's memorandum of 14 August. Any changes will be made to the new High Court Rules because it is not possible to amend revoked rules. Mr Beck had some reservations about the current draft.

After discussion the Committee agreed to amend (new) rule 20.8, 'Filing notice of appeal,' to change the default position for filing a notice of appeal to where the decision appealed against was heard rather than where it was given. This is often fairer on parties where, for example, a decision is issued from a centre other than where the hearing took place. It also helps ensure the appeal is heard at the centre of interest of the case for the parties and community. The nature of appeals has changed since rule 708, 'Filing of notice of appeal,' was initially drafted and more decisions now emanate from Wellington.

An amendment to the case management rule (rule 430/7.5/Schedule 6) will help avoid inertia because the memorandum required by rule 7.5, 'Case management conferences for appeals,' must address anything in Schedule 6, 'Standard directions for appeals,' and the latter includes whether it would be more convenient to the parties for the Court to direct under r 20.8(3), 'Filing of notice of appeal,' that the documents relating to the appeal be transferred to another office.

Any transitional difficulties can be dealt with by the Court's power to direct an appeal be filed in a different office of the Court. The Court will have the flexibility to order an appeal be heard elsewhere than in the default location. The default position is not intended to be a rigid determination.

The wider issue of rule 107, 'Proper office of the Court,' needs considering. This topic need not, however, impact on progress on revision of rules relating to the appeal stage.

The Committee agreed on two relatively minor changes to the proposed amendment to rule 20.8. The Chief High Court Judge and Clerk will liaise with Dr Mathieson to produce an amended rule 20.8 and circulate to the Committee for consideration.

9. Class actions

Dr Mathieson spoke to his proposed consultation paper and Ms Sarkar spoke to the Ministry's paper in response.

A limitation period must be suspended once a class action starts to prevent a claimant being met with a limitation defence if he or she later seeks to bring an action because, for example, a class action they were involved in was mismanaged. Any limitation suspension must function in both the opt-in and opt-out models given New Zealand's proposed regime has both. Suspending the limitation period from the date of filing the class action would work for both models. It is the most appropriate model for the majority of cases, though there might be a comparatively small prejudicial effect on defendants in an opt-in model.

Fogarty J will be acting Chair while Stevens J is on leave. Asher J will join the Sub-Committee with a special interest in litigation funding. Dr Mathieson's paper will be used for further limited consultation, with a cover letter summarising the main points of the regime (to be drafted by Dr Mathieson). The position regarding the Commerce Commission will be left as it is and can be picked up later if need be. All persons who have made submissions will be invited to make further comment and the Sub-Committee has a discretion to broaden the consultation.

Asher J will liaise with Dr Mathieson directly about several drafting points.

The Sub-Committee will update the Rules Committee with its progress.

10. Schedule 3 of the High Court Rules and time allocations

This item was carried over until the 1 December meeting.

11. Constituency Petition Rules

Ms Sarkar spoke to her memorandum of 6 October tabled at the meeting. She noted the Rules were expected to be assented to by the Executive Council at 4pm on 6 October and will come into force on 1 February 2009. There have been no substantive changes from current Part 15, instead the new Rules update and modernise language.