



## THE RULES COMMITTEE

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7 September 2005

Minutes/5/05

### **Circular No. 84 of 2005**

#### **Minutes of meeting held on Monday 05 September 2005**

The meeting called by Agenda/5/05 was held in the Chief Justice's Boardroom, High Court, Wellington, on Monday 05 September 2005 at 10 am.

#### **1. Preliminary**

##### *In Attendance*

Hon Justice Baragwanath (in the Chair)  
Rt. Hon Justice Tipping (Acting Chief Justice)  
Hon Justice Chambers  
Mr A Beck, NZ Law Society representative  
Ms L Sinclair, Deputy Secretary, Ministry of Justice  
Mr H Hoffmann, Parliamentary Counsel  
Mr Jeff Orr, Chief Legal Counsel, Ministry of Justice  
Mr Kieron McCarron, Chief Justice's Judicial Administrator  
Mr Richard Living, Secretary to the Rules Committee  
Ms Bernice Ng, Clerk to the Rules Committee

##### *Apologies*

Rt. Hon Dame Sian Elias GNZM, Chief Justice of New Zealand  
Hon Justice Randerson, Chief High Court Judge  
Hon Justice Fogarty  
Judge Johnson, Chief District Court Judge  
Judge Doherty  
Judge Joyce QC  
Mr Russell Fairbrother, MP  
Ms K Clark, Deputy Solicitor-General  
Mr C Finlayson, NZ Law Society representative

### *Confirmation of minutes*

The minutes of the meeting held on Monday 4<sup>th</sup> July 2005 were confirmed as an accurate record.

## **2. Rules Reform**

### *High Court Criminal Rules Sub-Committee*

The Committee discussed the memorandum from Justice Panckhurst. It was noted that the sub-committee was unsure where the sub-committee should be heading with their work.

Justice Williams, a member of the sub-committee, offered to prepare a best practice manual. The Committee noted that a best practice manual would be useful in determining the work of the sub-committee. Once Justice Panckhurst returns from his sabbatical the sub-committee can start on the task of drafting new criminal rules.

Justice Tipping noted that the Criminal Practice Committee a number of years ago, had prepared a substantial document on best practice in jury trials. It was noted that this document would be of assistance to Justice Williams, who was also a member of that committee.

The Committee agreed that Justice Baragwanath would talk to Justice Williams about the best practice manual.

### *Cross Border Disputes Sub-committee*

The Committee to discuss the work of this sub-committee at the next meeting.

### *General Rules reform*

Progress is to be monitored at the next meeting.

## **3. Electronic Filing**

Ms Sinclair told the Committee that the Ministry is developing an Information Systems Strategic Plan (ISSP). The plan deals with the introduction of electronic courts (e.g. electronic filing and electronic services to the public). There was a 5-year time frame to both plan and implement the ISSP.

Justice Tipping made two observations: The first is that there should be High Court Rules on electronic courts in place before the implementation of the technology, so that court practice was not dictated by the technology. The second is that the 5-year horizon for the planning and implementation of electronic filing is too long.

Ms Sinclair invited members of the Committee and other interested members of the judiciary to liaise with the team from the Ministry of Justice on electronic court initiatives. It was proposed that a meeting should be arranged as soon as practicable and to include Justice

Baragwanath, Justice Chambers, the President of the Court of Appeal, Mr Chris Finlayson and Ms Liz Sinclair.

#### **4. Omnibus 5**

##### *Notice of intention to speak Maori*

The Ministry of Justice still held concerns about the practical difficulties of complying with the 10-day time limit suggested in the proposed rules.

##### *Synopsis of Argument*

The Committee considered and discussed the draft High Court and District Court rules in light of the changes suggested at the last Committee meeting. While proposed rule 251 A is appropriate for the High Court there was some doubt as to whether the equivalent rule was necessary in the District Court.

It was agreed that the matter be considered at the next meeting when the view of the District Court Judges will be available.

##### *Inspection of a document referred to in pleadings*

Justice Randerson in his memorandum to the Committee stated that proposed Rule 299A was too wide.

The Committee discussed whether documents subject to privilege would be covered under the proposed rule.

It was agreed that Mr Hugo Hoffmann would redraft Rule 299A in light of the Committee's discussion and Justice Randerson's memorandum.

##### *Explanatory Note, Form 4A*

The Committee agreed with Justice Randerson's suggested change to the wording of the explanatory note.

The Committee agreed that the rule would be redrafted to reflect Justice Randerson's suggestions.

##### *Proposed Rule 900*

The Committee considered the memoranda from Mr Tony Mortimer and Mr David A R Williams QC on costs in arbitration agreements.

The Committee supports the current form of the Rule.

It is expected that Omnibus 5 will be approved at the next meeting.

#### **5. High Court Rules, r 82: "Incapacitated person"**

The Committee received a letter from Mr Tom Broadmore on High Court Rule, r 82. The rule deals with the definition of an incapacitated person.

Mr Broadmore pointed out that there was a minor error in the High Court Rules due to statutory changes introduced with the passing of the Criminal Procedure (Mentally Impaired Persons) Act 2003.

The Committee agreed that Mr Hugo Hoffmann would consider the issue further. He has since advised that it is of some complexity. Further consultation will be required.

The Clerk to thank Mr Broadmore for his letter. Mr Broadmore's letter and Justice Chambers' letter in reply will be distributed to members of the Committee.

## **6. Harmonisation of Rules of Discovery Committee**

The Committee heard from Justice Baragwanath about his trip to Sydney to the meeting of the Harmonisation of Rules of Discovery Committee. Justice Baragwanath noted that the Australian Judges were enthusiastic about clause 59 of the New Zealand Evidence Bill 2005. A further draft of proposed Mareva and Anton Piller rules, practice note and comment will be provided by Justice Lindgren and Mr Peter Biscoe QC. Our Committee's comment upon it is sought.

It was noted that the Australian Judges and the Australian Attorney-General's office have found it productive to work with their New Zealand counterparts.

## **7. Conduct of Trial Counsel**

The Committee considered and discussed a revised draft High Court Rule, rule 12 A in light of the discussions held between Justice Chambers, Randerson, Baragwanath and Simon France.

Justice Tipping noted that in light of the recent decision from the Supreme Court in *Sungsuwan v R* [2005] NZSC 57, sub rule (5) could cause significant problems. Although the court has a general power to exempt the operation of the rule, the rules could not prevent a person from criticising the conduct of trial counsel without first waiving privilege. It was possible to criticise the conduct of trial counsel without first waiving privilege. Justice Tipping urged the Committee to re-examine the approach to be taken by the Committee on the issue.

The Committee agreed that Justice Chambers would consult with the other members of the Court of Appeal on how to best deal with the matter. The Judges of the Court of Appeal will then consult with the Judges of the Supreme Court. Justice Chambers will report back at the next Committee meeting.

Once the draft is agreed, it should be sent out for consultation to the New Zealand Law Society, Criminal Bar association, New Zealand Bar Association, Crown Law Office and the Judges of the High Court.

## **8. Interlocutory orders**

The Committee considered the Clerk's paper and the comments made by Associate Judge Faire on the matter.

It was conveyed to the Committee via the Chair that Associate Judge Faire suggested that High Court Rule, r 252 should be redrafted adopting language used in High Court Rule, r 469.

Mr Hugo Hoffmann undertook to redraft High Court Rule, r 252 in light of the comments and suggestions made by Associate Judge Faire and section 26 P Judicature Act 1908.

## **9. District Court Amendment (No 2) Rules 2004**

The Committee considered and discussed Ms Sinclair's paper on Form 5, District Court Amendment (No 2) Rules 2004.

The Committee agreed that all references relating to payments into court should be removed from Form 5.

## **10. Spoliation of Documents**

Ms Sinclair undertook to report back to the Committee at its next meeting.

## **11. Evidence Bill 2005 and Trans-Tasman public discussion paper**

The Committee agreed that Justice Baragwanath and Ms Sinclair would discuss whether the Rules Committee should make submissions on the Trans-Tasman public discussion paper.

## **12. Protective Costs Order**

A forthcoming paper prepared by Ms Karen Clark will be discussed at the next Committee meeting.

*The meeting finished at 12 pm.*

### Note:

The next Rules Committee meeting is on Monday 17<sup>th</sup> October.