



The Rules Committee

Te Komiti mō ngā Tikanga Kooti

31 August 2020

HCR 12/20

C 32 of 2020

High Court Rules 2016, r 20.9

Tēnā koutou,

Please find attached for consideration a memorandum from Justice Cooke regarding proposed amendments to r 20.9 of the High Court Rules 2016 (**C 32 of 2020**).

Nāku iti noa, nā;

Sebastian Hartley

Clerk to the Committee

Physical: Auckland High Court, Cnr Waterloo Quadrant and Parliament Street, Auckland 1010

Postal: Po Box 60, Auckland | CX 10222, Auckland

Email: rulescommittee@justice.govt.nz

Phone: 09 916 9782



The Rules Committee

Te Komiti mō ngā Tikanga Kooti

TO: Members of the Rules Committee
CC: Clerk to the Committee
FROM: Hon Justice Cooke
DATE: 24 August 2020
SUBJECT: **CHANGING RULES CONCERNING PARTICIPATION OF DECISION-MAKERS IN APPEALS**

[1] At its last meeting, the Committee decided to appoint a Sub-committee to consider potential changes to the Rules in relation to the participation of decision-makers in appeals against their decisions. That Sub-committee was Hon Justice Kós, Andrew Beck and me.

[2] The existing Rules provide in r 20.9(2) that the Notice of Appeal must not name a decision-maker as a respondent. The Rule then say that this Rule does not apply to appeals under the Commerce Act 1986 (r 20.9(3)). It is also subject to Rule 20.17 which provides that the decision-maker is entitled to be represented and heard at a hearing unless the decision-maker is a District Court, or the Court directs otherwise.

[3] The essential issue identified by the Committee was that in some circumstances it was appropriate for a decision-maker to have an active role in an appeal, and have rights of appeal, particularly when there is otherwise no opposing party. At the same time, it was recognised that usually a decision-maker should not normally do so when undertaking a purely adjudicative function. It was also recognised, however, that in the circumstances of particular cases such participation may still be appropriate.

[4] The Sub-committee agreed that the existing Rules did not capture all relevant circumstances in an appropriate way, and that there was an advantage in trying to capture the position in a single Rule in a way that was consistent with the principle but recognised sufficient flexibility.

[5] Members of the Committee suggested the Sub-committee might derive assistance from reviewing the approach taken in other jurisdictions. The Clerk has examined the

position prevailing in England and Wales,¹ New South Wales,² Victoria,³ Queensland,⁴ Western Australia,⁵ the Commonwealth of Australia,⁶ British Columbia,⁷ and Ontario.⁸ These enquiries have confirmed the Sub-committee's instinctive impression that the Committee's proposed policy in respect of this issue would be unique, such that reference to the position elsewhere is of limited assistance.

[6] Having therefore approached the issue from first principles, the Sub-committee proposes the following Rule for consideration which would replace the existing rr 20.9(2)(3) and 20.17:

20.9A Respondents to appeal

- (1) The appellant must name as respondents to the appeal every person directly affected by the decision appealed against and every person required to be a respondent by virtue of a legislative provision.
- (2) Subject to (3) the appellant must name decision maker as a respondent.
- (3) A decision-maker who has exercised a purely adjudicative function (for example, the District Court or Environment Court) is not to be named as a respondent unless directed by the Court, or it is required by a legislative provision.
- (4) The Court may direct the extent to which a decision-maker is to participate in the appeal.

Nāku iti noa, nā;

Justice Francis Cooke
Chair of the Rules Committee

¹ Civil Procedure Rules (Eng), pt 52 and Practice Directions 52A and 52D.
² Uniform Civil Procedure Rules 2005 (NSW), r 50.5.
³ Supreme Court (General Civil Procedure) Rules 2015 (Vic), order 58.
⁴ Uniform Civil Procedure Rules 1999 (Qld), r 749.
⁵ Rules of the Supreme Court 1971 (WA), order 65.
⁶ Federal Court Rules 2011 (Cth), r 63.31.
⁷ Supreme Court Civil Rules (BC), r 18.3(6).
⁸ Rules of Civil Procedure (Ont), r 61.04.