

Regulatory Impact Statement

Improving Case Management for Civil Cases in the High Court

Agency Disclosure Statement

This Regulatory Impact Statement (RIS) has been prepared by the Ministry of Justice. The RIS provides an analysis of options to reduce delays and encourage efficient use of judicial resources during the management of civil cases in the High Court.

Analysis in the RIS assumes case management is a beneficial process because courts need to manage cases to ensure resources are used efficiently.

The analysis relies heavily on anecdotal evidence and recommendations for the preferred option provided by the Rules Committee. The Rules Committee is established under the Judicature Act 1908, and members include the Chief Justice, Attorney-General, Solicitor-General, Chief Executive of the Ministry of Justice, and representatives of the judiciary and the legal profession. As the Rules Committee is an expert committee established by statute for the purpose of determining appropriate rules of court procedure, relying on their recommendations is reasonable.

The exact magnitude of the problem is unclear. It is difficult to extrapolate, from available statistical information:

- the current amount of inefficiently used case management conference time, and
- the exact current numbers of second and subsequent case management conferences (although we know how many are held in total).

It is also difficult to identify the effects of the different options, so using information from a trial of the Rules Committee's preferred option, we have approximated expected effects on access to justice, waiting times before trial, case management and issues conference time, hearing times, and costs to parties.

More analysis would be required to identify the costs to the Crown for option 3: non-judicial case management (either via rules or practice note).

The policy options are not likely to:

- impose additional costs on businesses
- impair private property rights, market competition, or the incentives on businesses to innovate and invest, or
- override fundamental common law principles (as referenced in Chapter 3 of the *Legislation Advisory Committee Guidelines*).

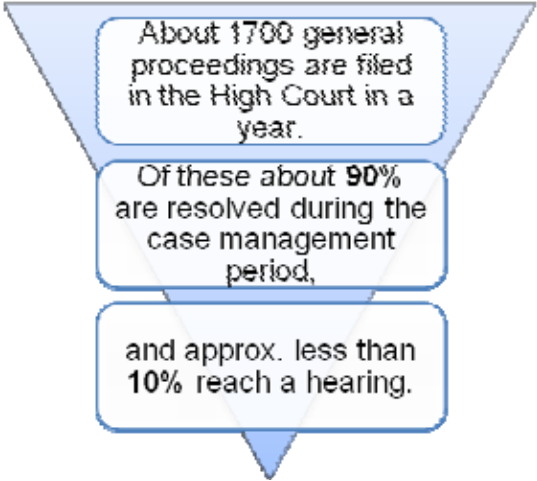
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Status quo and problem definition

1. “Case management” refers to the processes whereby judges, supported by court staff, manage the progression of most civil cases through the High Court system. Civil cases include disputes between individuals, companies and sometimes local or central government. Disputes may relate to matters such as a breached contract or insurance claims. Civil cases can range in nature and level of complexity from simple cases that require very little evidence from witnesses, to long complex cases involving many parties. Some straightforward cases, such as company liquidations or insolvency, are generally not subject to case management.



2. Case management covers the time between when the case is first filed and when it is heard by a judge.

3. Approximately 90 percent of general civil proceedings filed in the High Court are resolved before the hearing.¹ This resolution rate is probably because the financial and emotional costs of a court proceeding encourage people to avoid continuing with the litigation by settling the case.

4. The current case management process for civil proceedings in the High Court is a judicial case management system (with support from court staff), and is set out in the High Court Rules. This process is illustrated in **appendix 1**. Case management involves allocation of a number of “case management conferences”. Case management conferences are meetings between the judge and the parties and/or their lawyers. A range of matters may be considered at case management conferences. Some examples of matters considered at case management conferences include timetabling, and whether the documents filed by the parties need amending. A case management conference is on average up to 20 minutes long.

5. Unless they settle early, proceedings subject to case management must have at least two case management conferences, but often there are at least one or two more. A case management conference is scheduled as soon as the proceeding is filed. The case will be allocated a hearing date at the second case management conference (or a subsequent case management conference).

Problem

6. The case management system is not working as efficiently as it could be. Some cases go through many case management conferences. While it is not clear how many cases have three or more case management conferences, cases which do

¹ Based on numbers of general proceedings filed in High Court (excluding reactivated cases) for the 2011 calendar year.

not settle early will always have at least two case management conferences. The churn of some cases through iterations of case management conferences is caused in part by poor time management and in part by poor preparation by parties and lawyers.

7. As a result of too many case management conferences for ordinary cases, the Rules Committee state that judges spend a disproportionate amount of time on those cases rather than on complex cases that warrant more judicial attention. This means that taxpayer-funded resources such as judicial time and use of courtrooms are inefficiently used. Other effects of inefficient case management are:
 - The estimated average hearing time for general civil proceedings is eight days. If the issues in dispute are not narrowed before the hearing, hearings will take longer as some evidence will be unnecessarily presented. Long hearings are expensive for parties.
 - Long hearings cause delays for other cases. As at 31 December 2011, the median national waiting time (time between the date the hearing was allocated and the hearing date) for a general civil proceeding in the High Court was 271 days.
 - Long waiting times are stressful for parties, and some people are limited in their ability to plan for the future if their future actions depend on the outcome of impending litigation.
 - Long waiting times may encourage parties to settle, potentially to their disadvantage, when they would rather be heard in court, thus diminishing access to justice.

The benefits from this proposal are set out below.

8. Additionally, because a case management conference is scheduled when the proceeding is filed, either some case management conferences occur before the respondent has filed a response, or there is not enough time before the first case management conference to identify substantive issues. This often results in wasted conference time and inefficient use of resources.

Objectives

9. The objective in rule 1.2 of the High Court Rules is to “secure the just, speedy, and inexpensive determination” of disputes. In particular, the civil justice system in the High Court should:
 - manage cases in a way that is proportionate to the complexity of the case
 - preserve parties’ access to resolution of disputes in front of a judge
 - ensure waiting times before trial are as short as possible
 - not impose undue expense on the Crown, and
 - not be too expensive for parties.

Regulatory impact analysis

Option 1(a): status quo

10. The status quo (illustrated in appendix 1) is not preferred by the Rules Committee because it will not solve the problem. Although case management conferences are short (usually taking up to 20 minutes each) and access to justice is good, some other objectives are not achieved by maintaining the status quo. In particular, some resources are inefficiently used because case management is not proportionate to the complexity of the case, waiting times before trial are approximately between six and 15 months, and the average hearing length is eight days. This is expensive for parties. Some cases become stalled in the case management phase as poor time management and lack of preparation may delay case resolution.

Option 2 (a): more tailored judicial case management – by amending court rules

11. The Rules Committee's recommended option is illustrated in **appendix 2**. This option is a tailored approach designed to reduce the churn of cases through the system by enabling judges to spend more time on more complex cases, and less time on ordinary cases. The proposal is as follows:
 - Judges decide whether cases are ordinary or complex.
 - A case management conference is scheduled once a statement of defence has been filed.
 - Rule changes will allow hearing dates to be allocated earlier.
 - Cases may have an "issues conference". The "issues conference" will be a meeting between a judge and the parties and their lawyers, which will focus on identifying the disputed legal issues.

More efficient use of court resources by case management being more proportionate to the complexity of case

12. Although case management conferences are likely to take longer (up to 45 minutes approximately) because of the focus on early identification of the issues, there would be fewer case management conferences for ordinary cases, and more focussed case management conferences for complex cases. As 90 percent of cases are expected to be classified as ordinary, the churn of case management conferences will reduce.
13. Greater involvement from judges at an earlier stage will allow cases to be directed more accurately into the appropriate case management categories (ordinary or complex).
14. The complexity of the case does not necessarily refer to the value in dispute, but rather, the complexity of the issues in dispute, which would be indicated by the expected hearing length. For example, an ordinary case could be a dispute arising from a breached business contract worth \$6 million and expected to be heard in less than five days. This case could be fairly straightforward because the disputed issues are clear. By contrast, a leaky home case with \$300,000 in

dispute may involve many more legal issues, and be expected to have a hearing lasting about four weeks.

Early clarification of legal issues

15. Parties will be encouraged to identify issues at the first case management conference, and in the new “issues conferences”. By ensuring that more issues are resolved during case management, this option is expected to make some hearings shorter than currently. Shorter hearings will allow more hearings to be heard in the same number of days. This means that over time, waiting times before hearings are expected to reduce. The proposal also makes more efficient use of judicial time and courtrooms.
16. Judges are best placed to manage case management and issues conferences because they are highly skilled, impartial legal experts. Judges are highly respected by parties, and by presiding over conferences, their leadership and authoritative guidance can assist parties to refine legal issues.
17. There is a risk that some lawyers may continue to use issues and case management conferences to tactically delay the resolution of the case. However, this risk has been minimised by Rules Committee holding nationwide educative forums for judges and the legal profession about how lawyers can change their behaviour to ensure the High Court’s civil caseload is managed better, thereby improving the system for their clients.

Impact of scheduling case management conference after statement of defence filed

18. The first case management conference will not be allocated until after the statement of defence has been filed. This will provide parties with much more time to identify disputed issues and ensure efficient use of the time allocated for the first case management conference.

Impact of setting the hearing date at the first case management conference

19. Hearing dates should be able to be allocated earlier. Earlier hearing dates means faster access to justice. Earlier hearing dates may also encourage parties to settle earlier, which would increase the availability of court resources for other cases.

Financial implications

20. Judges will manage the division of cases into ordinary or complex categories, so more judicial time will be required in the initial stages of a case. Any additional costs will be absorbed within existing Vote Courts baselines. However, in the long term, a reduction in overall case costs for the courts is expected as a result of better use of court resources (as more ordinary cases will be able to be heard over the same period).

Private benefits

21. Parties usually incur expensive legal fees whenever they have to prepare for any court event. These costs are expected to be lower because of less case management conferences overall, and shorter hearing times.

Benefits of prescriptive regulation for court procedure

22. Rules are subject to checks (including Rules Committee approval, consultation requirements, quality assurance checks, and regulatory impact analysis). Rules are also the first place lawyers usually look to determine which court procedure applies, so are well publicised.

Option 2 (b): more tailored judicial case management – set out in practice note

23. This option is the same as option 2(a), except would be achieved by removing the case management procedures from the High Court Rules. The desired case management procedures would instead be set out in a practice note issued by the Chief High Court Judge or the Chief Justice.
24. A practice note would provide more flexibility for judges and court staff. Any variations to case management procedure could be easily amended. However, there is a risk of less compliance with this option because practice notes are not as widely recognised or as authoritative as the High Court Rules.
25. This option has been trialled in Auckland and Wellington, without amendments to the High Court Rules. This shows that it is possible without amendments to the Rules.
26. This option is not preferred by the Rules Committee. The Rules Committee prefer rules over practice notes for the recognition, authority and compliance reasons above. To issue a practice note, cooperation from the judiciary is required. Rules Committee concurrence is also required to remove case management procedures from the High Court Rules.

Option 3: non-judicial case management (either via rules or practice note)

27. This option is the same as option 2(a) or (b), except cases could be entirely managed by skilled court staff instead of judges. Judges would not be involved in the case management process, and there would be no case management conferences. Instead, cases would be first considered by a judge at the hearing.
28. This option could be achieved by amending the case management procedures in the High Court Rules, or removing the case management procedures from the Rules and setting out the procedure in a practice note (see paragraph 26 above).
29. Court staff are familiar with procedural and timetabling requirements. However, because judges are impartial highly respected legal experts, removing judges from the case management process would remove leadership and authoritative guidance. Judges can identify problems relating to legal issues because of their extensive legal experience; whereas court staff have less experience with complex legal issues. It would be harder for court staff to resolve legal issues during case management conferences, and therefore hearing times may be longer than currently.
30. This approach would be expensive for the Crown as it would involve extensive training of court staff. Some costs may reduce in the long term as the costs of registry staff are lower than judges. However, this would probably be outweighed by the cost of longer hearings.

31. This option is also not preferred by the Rules Committee because they favour greater judicial involvement in case management procedures. Rules Committee concurrence is required to amend the High Court Rules.

Consultation

32. The Rules Committee established under the Judicature Act 1908 has recommended more tailored judicial case management by amending court rules (option 2(a)), and have consulted on this option with groups including the New Zealand Law Society, New Zealand Bar Association, Ministry of Economic Development, New Zealand Business Roundtable, Commerce Commission, Citizens Advice Bureaux, Insurance Council of New Zealand, New Zealand Banker's Association, and the New Zealand Credit and Finance Institute.

33. The Rules Committee has held four case management forums with the legal profession (in Auckland, Wellington, Christchurch and Dunedin). Through these meetings, the Committee has encouraged the profession to support the intent of the changes. Some lawyers expressed concern that the preferred option may lead to additional costs and delays. The Rules Committee has taken these concerns into account, and are satisfied that they have addressed any concerns that have been raised.

34. The Ministry of Justice has consulted Treasury, Crown Law Office, Parliamentary Counsel Office, Ministry of Business, Innovation and Employment (Economic Development) and Inland Revenue Department. The Department of Prime Minister and Cabinet has been informed.

Conclusions and recommendations

35. Option 2(a) (change rules to more tailored case management) is recommended by the Rules Committee. The impacts of the four options are summarised below.

	Option 1: status quo	Option 2(a): change rules to more tailored judicial case management (Rules Committee recommends)	Option 2(b): judicial case management procedures set out in practice note	Option 3: non-judicial case management (either via rules or practice note)
Proportionality to the complexity of the case	OK – some resources inefficiently used	Better	Better	Probably not as good as the status quo as court staff less skilled than judges
Access to justice	Good	Expected to improve	Expected to improve	Probably not as good as the status quo as court staff less skilled than judges

	Option 1: status quo	Option 2(a): change rules to more tailored judicial case management (Rules Committee recommends)	Option 2(b): judicial case management procedures set out in practice note	Option 3: non-judicial case management (either via rules or practice note)
Waiting times before trial	Long (approx. 6-15 months)	Shorter for ordinary cases, so overall waiting times should decrease	Shorter for ordinary cases, so overall waiting times should decrease	Probably longer
Estimated case management / issues conference length	Up to 20 minutes	Up to 45 minutes	Up to 45 minutes	Uncertain
Average hearing length	8 days	Expected to be shorter	Expected to be shorter	Probably longer
Costs to the Crown	Same	Any costs can be absorbed within existing Vote Courts baselines. Lower in long term	Any costs can be absorbed within existing Vote Courts baselines. Lower in long term	Probably higher, as need to train court staff. Costs may be able to be absorbed within existing Vote Courts baselines (more analysis required).
Costs to parties	Expensive	Probably lower (less conferences for 90% cases)	Probably lower (less conferences for 90% cases)	Probably more expensive (as longer conferences)
Risks	<p>“Churn” of cases in case management conferences</p> <p>Lawyers’ poor time management / poor preparation may delay case resolution</p>	<p>Lawyers’ poor time management / poor preparation may delay case resolution (mitigated by education of legal profession)</p>	<p>Lawyers’ poor time management / poor preparation may delay case resolution</p> <p>Potential for less compliance</p> <p>Judiciary unlikely to support; Rules Committee have proposed option 2(a).</p>	<p>Inexperienced court staff unable to resolve legal issues</p> <p>Judiciary unlikely to support; Rules Committee favour judicial management</p>

Implementation

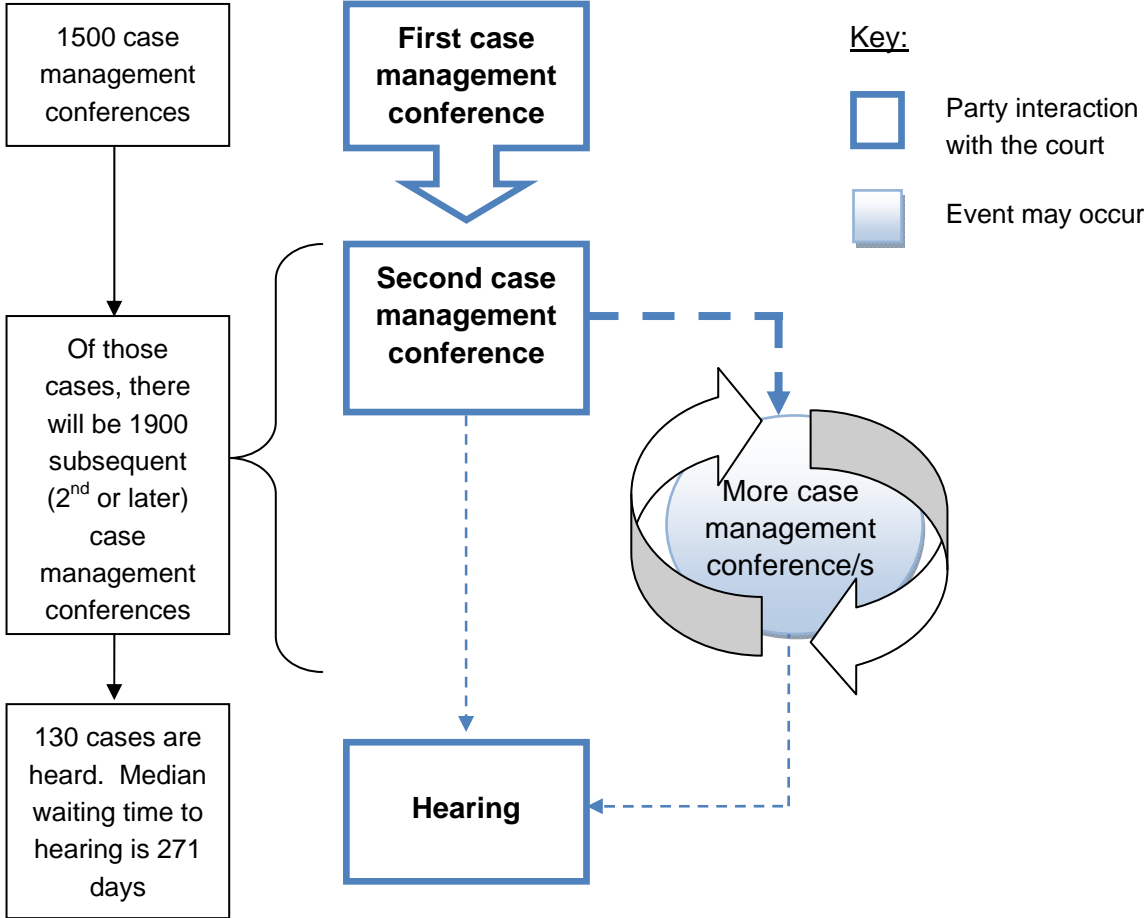
36. The Rules Committee's preferred option amends the High Court Rules, which are administered by the Ministry of Justice. The Rules Committee's preferred option 2(a) has been trialled in Auckland and Wellington, and this has assisted with determining how to implement that option (eg, determining how much time to schedule for conferences). The Ministry will advise court staff about the changes. The Rules Committee and New Zealand Law Society will run a seminar for lawyers about any rule changes.
37. If the High Court Rules are amended, consequential amendments will be required to the District Courts Rules 2009, Constituency (Election Petition) Rules 2008, Court of Appeal (List Election Petition) Rules 1998, High Court Fees Regulations 2001, and District Courts Fees Regulations 2009.

Monitoring, evaluation and review

38. The Ministry of Justice and the Rules Committee will continue to monitor and evaluate the High Court Rules, which contain the case management rules. The Ministry will consider ways to improve data collection, so that it can better monitor and evaluate the impact of any change.

Appendix 1

Option 2 (status quo): current case management for civil cases in the High Court



Appendix 2

Option 2(a) (Rules Committee’s preferred option): proposed case management for civil cases in the High Court

