

## *15.8 Submissions of Federal Court of Australia on Admiralty Rule Reform.*

### **SUBMISSIONS OF FEDERAL COURT OF AUSTRALIA ON ADMIRALTY RULE REFORM:**

#### **RESPONSE TO REPORT OF SYDNEY USERS' GROUP MEETINGS (APRIL – SEPTEMBER 2003)**

The Judges of the Admiralty Committee of the Federal Court of Australia (the Federal Court) have considered the Sydney Users' Group Report (the Report) and have consulted with members of the profession in Australia as well as the Registrars and Marshals of the Federal Court. On behalf of the Federal Court, the members of that Committee (with the exception of Cooper J who is on the statutory rules committee) make the following comments and recommendations.

This response is provided to the Attorney-General's Department for the benefit of the statutory rules committee to consider in any deliberations about possible Admiralty rule reform in Australia.

This response is given by reference to the terms of the Report, a copy of which is attached for ease of comprehension. The numbering and headings used below is the same numbering and headings used in the Report.

Whilst some drafting suggestions are made, the Judges recognise that the precise terms of any amended rules may be a matter upon which improvements could be made.

#### **1. Mutual court access to registers**

As far as they affect the Federal Court, suggested new subrules 14(3) and 14(4) are acceptable. The Federal Court supports new subrule 14(4) insofar as it makes other court registers available in those terms.

#### **2. The application to support arrest**

The Federal Court does not support the views of Street SC set out and discussed on pages 3 and 4 of the Report.

As to the suggested amendment to subrule 39(2), the Federal Court supports that change. As the Judges of the Federal Court understand it, the changes to subrule 39(2) were not intended to bring about any radical change, but rather were intended to clarify what appears in the current rule read together with the notes to the form of the current affidavit.

As to the suggested rule 39A at the top of page 3 (not rule 39A as suggested by Street SC), with one possible variation, the Federal Court supports the rule. The

variation is one to make it plain that what the rule is directed to is not any general duty of disclosure, but rather disclosure of any matter or fact which might bear upon the safety of the Marshal or others in the arrest or in the custody of the ship or other property. It was the “safe” arrest and custody which was the subject, as the Judges understood it, of the rule. Thus, the Federal Court would support a rule in the following or substantially the following terms:

39A

*The party applying for arrest and, after arrest, any party appearing, shall, without delay, inform the Marshal of any fact or matter of which he, she or it is aware and which may bear upon the safety of the Marshal or any other person in or in connection with the arrest or the custody of the ship or other property in question. This obligation is a continuing obligation.*

**3. The question of undertakings by solicitors**

The Federal Court supports new rule 41A concerning undertakings by firms. To the extent that there may be a difficulty in ascertaining whether a partner is duly authorised it might be that in the prescribed form of undertaking there is a statement to the effect that the partner signing the form is duly authorised by the partners of the firm to give the undertaking on their behalf.

As to the new rule 41B “use of clean bonds”, the Federal Court is not opposed to the use of domestic bank undertakings of clear and unconditional nature to stand as security for, or a means of payments of, Marshal’s fees. The Federal Court opposes the use of P & I Club letters and paper of overseas or domestic insurers as security for the Marshal’s fees. There can be no suggestion of the slightest risk in securing the Marshal’s fees. If there is seen to be any risk, the Court may be seen to have an interest in the litigation and its outcome. The undertaking should be from a domestic bank. The various courts should standardise the acceptable terms of a clean on demand bond. On this basis the new rule 41B is generally supported.

**4. Undertaking on application for arrest**

The Federal Court agrees with the suggested changes, for the reasons given.

**5. Overdraft of Marshal and cash calls**

The Federal Court does not support the operation of an overdraft account by the Marshal. Thus suggested rule 41C is not supported.

As to rule 41D, with the excision of the words “instead of any undertaking” the Federal Court supports new rule 41D.

As to new suggested rule 41E, to the extent that the Federal Court does not support the overdraft for the Marshal, the Federal Court would not support the inclusion of references to an overdraft. However, although the Court does have a general supervisory role, it might be of utility, in particular in the light of the use of any clean bonds, for the Court to have a power of the kind set out in suggested rule 41E though not referring to the overdraft account. A suggestion is as follows:

41E

- (1) *On the application of the Marshal or any interested party, the Court may make and give directions and orders as to the making of cash calls or the calling upon any bank bond or guarantee.*
- (2) *Without limiting the generality of subrule(1) the Court may make or give directions or orders as to whether or not one or other method or methods of funding the fees and expenses should be employed, and in what order.*

As to rule 41F dealing with credit insurance, in the light of the view of the Federal Court as to the use of an overdraft, the proposal is not supported.

**6. Other undertakings – application for release from arrest**

The Federal Court supports the changes to the existing undertaking in form 18 and form 19 as set out on pages 10-11 of the Report. As to the three suggestions on pages 11 and 12 of the Report concerning undertakings given on applying for release of the ship or other property, the Federal Court's views are:

- (i) There should be a new rule 52A to provide for a deemed undertaking to arise upon the making of an application for release, in the same way as upon the filing of an application for an arrest warrant (rule 41) or the application for sale/valuation (rule 69). This deemed undertaking to arise would be subject to a power in the Court to dispense with the undertaking or the requirement to give it, where the Court thinks it appropriate.

Also, in relation to the undertaking in connection with the release of the vessel, rule 53 should be amended to add the words after the words "under arrest" at the end of the existing rule the following words:  
*"and in connection with release"*.

- (ii) The new suggested rule 52A should make clear that where there is a solicitor acting for a party and the release of the ship or other property is applied for the undertaking is (as with rule 61) that of the solicitor.
- (iii) The undertaking by the solicitor in relation to release should be permitted to be given by a firm of solicitors in lieu of the sole personal undertaking by the solicitor on the record in the same way proposed for rule 41.

Thus, with one suggested addition as to rule 53 the Court supports the suggestions in the Report under this heading in the above manner.

**7. Interaction between undertakings**

The Court supports the proposed rule 41G.

**8. Aid to and by other Courts**

The Court supports the proposed rule 46A.

**9. Possible omnibus order and related issues.**

The promulgation of a standard omnibus order is not opposed in principle. There are different views as to what should be expressly contemplated as a power, otherwise than through application to the Court. Under rule 47(2) the Marshal has power to take all appropriate steps to retain the safe custody of and to preserve the ship or property. Subparagraph (d) specifically contemplates moving the ship.

It is suggested that there be added to the inclusive list in subrule 47(2) the following:

- (e) *to supply fuel and any necessary supplies to the ship;*
- (f) *to supply victuals and water to the crew and otherwise to take appropriate steps for the well being of the crew.*

The above probably deals with the suggestions on page 15 of the Report, that were not opposed and were not otherwise included in the existing rule 47.

#### **10. Request for information from the Marshal**

The suggested new rule 48B is not opposed in principle. However, it should include safeguards against unreasonable request. Also, there should be a provision that the fees and expenses incurred by the Marshal in responding to a request should be met by the party or caveator making the request or otherwise included within the fees of the Marshal.

With this qualification, the suggested rule is supported by the Court. A suggested amended rule is as follow (with the changes from the suggested rule 48B on page 16 of the annexure underlined)::

The Marshal shall as far as reasonably practicable inform any party or caveator, upon request in writing, as to the status of the arrest, the fees and expenses incurred, anticipated future fees and expenses and the timing and amount of anticipated future demands. The fees and expenses incurred by the Marshal in responding to such request will be met by the requesting party and form part of the fees and expenses in relation to the arrest of the ship or other property.

#### **11. Loading and unloading**

The Registrars, Marshals and Judges have given consideration to the question of loading and unloading. The Court Registrars and Marshals believe that a default position should be set out in the Rules which would avoid uncertainty and at least give a prim facie position, departure from which would need to be justified. The Court suggests that the rule might provide that, unless the Court otherwise orders, when a ship is arrested any loading of cargo must cease but unloading may continue subject to the provision of the appropriate indemnities and undertakings as requested by the Marshal and otherwise subject to any order of the Court.

This is not entirely in accordance with the English practice whereby after a warning to the ship's agent not to continue loading if the warrant has been issued by a mortgagee (such warning being given because of the high probability in those circumstances that the ship will be sold) loading is

permitted. No such warning is given in other cases in the anticipation that security will be given: see *Meeson* 2<sup>nd</sup> Ed page 142 and 3<sup>rd</sup> Ed page 140.

Alternatively, the default position should not be enshrined in the rules, but rather promulgated by a practice note as to the usual approach.

#### 12. ISPS Code

The Federal Court does not think that the suggested rule 47A is appropriate. To the extent that the Marshal is bound by the new *Maritime Transport Security Act 2003* that compliance should be achieved by law and not by a disconnected rule.

#### 13. Bail bonds

The Federal Court does not oppose the suggestions, but supports the consideration as to whether bail bonds should be retained.

#### 14. Sale

The Federal Court is of the view that the suggested rule 70(2) replacing the existing rule 70(2) may be too prescriptive. Rather than taking the course suggested in the Report the Federal Court suggests that the current subrule 70(2) be deleted and replaced with a subrule simply to the effect that the Court may make appropriate orders with respect to the sale of the vessel. Rather than enshrining particularity within the rules, it is considered more appropriate that a practice note be issued setting out the usual orders to be made for a sale of a ship or property.

#### 15. Marshal's fees

The Federal Court agrees with the proposed rule 72.

#### 16. Poundage

Poundage is a matter for individual governments. The Federal Court has urged and urges the abolition or minimisation of this as an unnecessary impost.

#### 17. Costs

The Federal Court supports in principle, proposed rule 76A, but the Judges would suggest some textual drafting changes as follows:

- (2) Unless the Court otherwise orders, in the taxation or assessment of costs to be paid to any person in relation to costs to be paid to any person in relation to proceedings brought under the *Admiralty Act 1988* the amount of any claim for debt, damages or other money is irrelevant.

One further matter not dealt with by the Report which was raised by one Registry in the Federal Court was that in relation to release of a ship the rules might contain a rule that unless the Court otherwise orders the Marshal must release a vessel at the expiration of six months from the date of the ships arrest, subject of course to the payment of the Marshal's fees. This is to ensure the active prosecution by a plaintiff of a claim and to avoid or minimise situations where a ship is under arrest for a significant period of time due to inaction by the parties. Again, however, this may be better dealt with by way of practice note rather than any change to the rules.

**Ryan J**  
**Lee J**  
**Tamberlin J**  
**Allsop J**

\* March 2004