

Submissions of the Supreme Court of New South Wales on Admiralty Rule Reform

Response to Report of Sydney Users Group Meetings and to Submissions of the Federal Court of Australia

The Judges of the Admiralty Committee of the Supreme Court of New South Wales ("the Supreme Court") have considered the Sydney Users Group Report ("the Report") and the Submissions of the Federal Court of Australia on that Report. The Judges note that they participated in the discussions which resulted in the Report.

This response is provided to the Attorney General's Department for consideration by the Statutory Rules Committee in deciding what amendments should be made to the Admiralty Rules.

The Supreme Court makes the following comments on the Report and on the Federal Court's Submissions.

Undertakings by Solicitors

The Supreme Court accepts the view of experienced maritime law practitioners that the present requirement of Rule 41 for a personal undertaking by an arresting party's solicitor is a material disincentive to ship arrests in Australia. The Supreme Court agrees that ways should be found to remove this disincentive while providing proper security for the Marshal's costs and expenses of ship arrest.

The Supreme Court supports the suggestion in paragraph 3 of the Report that the Admiralty Rules could provide for the *"ability to vary or eliminate the undertaking by the provision of an on-demand bank guarantee or bond"*. The Court agrees with the second paragraph of paragraph 3 of the Report that personal undertakings ought not to be abolished completely and that if they are to be given they may be given by firms in the terms of New Rule 41A.

However, the Supreme Court takes the view that the Admiralty Rules should leave it to the Court in each particular case to determine whether it will accept an undertaking, an unconditional bond or guarantee as provided in New Rule 41B, or a cash deposit as provided by New Rule 41D, or a combination of some or all of them. Accordingly,

Rule 41 should be amended so that an application for an arrest warrant does not automatically constitute an undertaking to the Court. It should be left for the decision of the Marshal whether the Marshal will insist on a personal undertaking or will accept any of the securities referred to in New Rules 41B or 41D.

Further, the Supreme Court notes that New Rule 41D(1) provides that it is the Marshall who is to decide whether to accept a cash deposit in lieu of an undertaking whereas New Rule 41B provides that it is the Court which is to decide whether a bond or guarantee is acceptable in lieu of an undertaking. For the sake of consistency and expedition in arrest procedures, the Supreme Court suggests that the Marshal should be empowered under New Rule 41B to accept a bond or guarantee in a form prescribed by the Rules if the Marshal is satisfied as to the adequacy of the amount. It may then be left to the Rules of each Court to provide procedures to bring speedily before the Court any dispute with the Marshal as to the adequacy of the amount required or whether the Marshal is justified in insisting on one form of security rather than another.

Loading and unloading

The Supreme Court considers that a default position should not be prescribed in the Admiralty Rules since an arresting party can time the arrest to cause maximum inconvenience whichever default position is adopted.

Rather, the Supreme Court supports the suggestion that a default position should not be enshrined in the Rules but should be left to be promulgated by a Practice Note explaining the approach which the Court will usually adopt.

Alternatively, the Admiralty Rules could simply provide that upon arrest either party may apply for an order regulating loading and unloading.

Conclusion

Subject to the qualifications discussed above, the Supreme Court supports the recommendations in the Federal Court's Submissions.

____ June 2004
Sheller JA
Ipp JA
Palmer J
Nicholas J