

DRAFT NOTE REGARDING THE CONDUCT OF CARGO CLAIMS

Amendments as at 5 July 2007

The Courts (both the Federal Court and the Federal Magistrates Court) wish to ensure that practitioners approach the resolution of all cargo claims in a manner most conducive to their speedy and cost efficient resolution. It wishes to avoid disputes about the extent of pleading and the provision of information.

To this end, the Courts are of the view that the profession and the parties would be assisted by a clear statement about the responsibilities in the exchange of information in their use of the Courts to resolve their maritime disputes.

Practitioners are urged to examine, with care, the notices to practitioners issued on 21 December 2005 by Chief Justice Black and in April 2006 by the Federal Magistrates Court.

After consultation amongst the Admiralty and maritime judges of the Courts and with the profession, the Courts have decided to require the production of, in addition to relevant pleadings, three particular documents which should stand as a model or a template for the provision of relevant information. These are:

- Plaintiff's Relevant Particulars
- Defendant's Relevant Particulars
- Agreed Statement for Court

The three information documents are not a substitute for pleadings. Nor are they to be seen as standing in the way of efficient and co-operative exchange of information between parties.

Hence, the following is to reduce the number of directions hearings and reduce the need for Court controlled case management conferences in which, experience has shown, the parties sometimes, lose focus on the relevant issue or issues.

The timing of the production of the information documents will be, in part, a matter for the parties. The Courts do not wish to force any costly production of unnecessary documents if the parties can settle the matter at an early stage. If early settlement is, however, not possible, the parties should prepare the information documents, unless the parties are able to produce a document of the character of the “Agreed Statement for the Court” without the process of producing the first two documents.

The Courts do not see the provision of the information documents as requiring investigation or steps which would not otherwise occur in the careful, but efficient, handling of a cargo claim. The information documents other than the Agreed Statement for the Court are not (unless specifically ordered) to be filed, but rather served on the other side to the litigation. It may be, however, that the Court will require to see such documents if the parties are not able co-operatively to reach an agreement as to relevant issues.

Unless the matter can be settled early, or unless the parties can without difficulty agree upon the third document, the “Agreed Statement for Court”, the Courts expect the plaintiff to provide to any defendant who has appeared, at the earliest reasonable opportunity consistently with the above comments, a document entitled “Plaintiff’s Relevant Particulars”. It would include the following information set out in a factual way drafted to obtain agreement and identify any relevant dispute about the following subjects:

1. The identification of the bill of lading or sea carriage document (both hereafter referred to as the SCD) or other transport document.
2. The description of the voyage and the name of the ship.
3. The goods carried.
4. If the goods were containerised, whether the container was packed or stuffed by or on behalf of the shipper or other cargo interest or by or on behalf of the carrier.

5. The party said to be the contractual carrier.
6. The party, if known, said to be the actual carrier, if thought to be different from the contractual carrier.
7. The description of the goods in the SCD or other transport document and whether any limitation of liability argument arises or may arise by reference to such provisions as Article 4 rule 5 of the Hague Rules (HR) or Hague-Visby Rules (H-VR) or Australian Amended Hague-Visby Rules (AAH-VR) or Hamburg Rules (Ham R) or other variant.
8. The legal regime said to govern the carriage: which national law and through it, or otherwise, which convention or regime applies: HR, H-VR, Ham R or AAH-VR or other variant.
9. The causes of action relied upon against each defendant.
10. The facts said to give rise to the title to sue under the relevant *Sea-Carriage Documents Act* or otherwise.
11. The nature of the damage and the breakdown of the claim.

Note: If any of these matters is otherwise clearly identified in the pleading they need not be repeated otherwise than by an incorporation by reference.

The defendant will provide to the plaintiff a document entitled “Defendant’s Relevant Particulars”. If the defendant disagrees with any of the matters set out in the Plaintiff’s Relevant Particulars such disagreement must be clearly stated and the basis for it explained. If the defendant’s position is no more than putting the plaintiff to proof (whether this is anticipated to change by anticipated or possible further instructions or information or not) that should be clearly stated. Otherwise the defendant is to state its agreement with the plaintiff’s document with precision. The following must also be included in the document:

1. A clear statement as to whether the title or entitlement of the plaintiff to sue is put in issue, and if it is, the basis of that denial or assertion.
2. If the defendant says that it is not the contractual party to the SCD, it should expressly state that and in so doing identify who it is asserted was the contractual carrier.
3. If the defendant says that it was not the contractual carrier it must identify the circumstances that lead to such conclusion – including the terms of the SCD, the terms of any charterparty (identifying same) and any surrounding circumstance.
4. The defendant must state any defence from any relevant convention or statute that is to be relied upon whether by limitation, time bar or other, such as Article 4 Rule 2 of the HR or H-VR or AAH-VR.
5. At the end of the document the defendant is to set out a coherent and orderly summary of its position on liability and quantum.

After the exchange of these documents and if it appears that the matter is likely to proceed to trial, the plaintiff and the defendant through their legal representatives are to consult and co-operate in the production of a document entitled “Agreed Statement for Court” which sets out:

1. Relevant issues not in dispute, which can form the basis of an agreed statement of facts to be tendered at the trial.
2. Relevant issues in dispute and the basis for any dispute.
3. If the plaintiff or defendant is of the view that the position of the other is such that it will or may (identifying which) ask the Court to have resort to s 190(3) of the *Evidence Act 1995* (Cth) to waive the rules of evidence in respect of issues not genuinely in dispute or in respect of issues where the application of the provisions referred to in s 190(1) of the *Evidence Act*

would cause or involve unnecessary expense or delay, or that it will seek summary judgment or disposal under s 31A of the *Federal Court of Australia Act 1976* (Cth) or that it will otherwise seek summary disposal, that should be stated.

4. The general nature of the evidence to be led in the proceedings identifying lay and expert evidence and what issues are to be proved by such evidence.
5. The need for video-link evidence and the diplomatic position in relation to any relevant country from which such evidence may be taken.
6. The position of the parties as to referral of the dispute to mediation or arbitration before a Judge or Federal Magistrate or Court Registrar or a person of the parties' choosing.

To the extent that there are multiple defendants and cross-claims between those defendants the Court will expect those parties to exchange relevant documents modified *mutatis mutandis* by reference to the claims and positions of those parties. When the Agreed Statement for the Court is prepared it should be filed.

The above regime will be referred to as the "Usual Order for Particulars" in any direction. It will be the responsibility of the parties to include the "usual order for particulars" in the first directions that are made unless the Court specifically varies the position.