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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

THIRTY-FOURTH REPORT

from the

STANDING COMMITTEE

on

REGULATIONS AND ORDINANCES

Being a report upon the Bankruptcy (Offences) Rules, contained in Statutory Rules, 1970, No. 87.

PERSONNEL OF COMMITTEE

Chairman:

Senator I.A.C. Wood

Members:

Senator Cavanagh
Senator Davidson
Senator Devitt
Senator Greenwood
Senator Lawrie
Senator Wheeldon

FUNCTIONS OF THE COMMITTEE - Since 1932, when the Committee was first established, the principle has been followed that the functions of the Committee are to scrutinize regulations and ordinances to ascertain -

(a) that they are in accordance with the Statute;
(b) that they do not trespass unduly on personal rights and liberties;
(c) that they do not unduly make the rights and liberties of citizens dependent upon administrative rather than upon judicial decisions; and
(d) that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment.

SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

THIRTY-FOURTH REPORT OF THE COMMITTEE

The Senate Standing Committee on Regulations and Ordinances has the honour to present its Thirty-fourth Report to the Senate.

Bankruptcy (Offences) Rules Contained in Statutory Rules 1970, No. 87.

2. The Bankruptcy (Offences) Rules provide that where proceedings in respect of an offence against the Bankruptcy Act, 1966-69 are to be instituted in a Court, the proceedings shall be instituted by filing an information.

Rule 5 provides as follows:

> Amendment of information.
>
> **5. If it appears to the Court that an information fails to disclose any offence or is otherwise defective, the Court may amend the information so as to disclose an offence or to cure the defect.**

The Committee is concerned with two aspects of this rule.

3. First, although the power of a court to amend an information is found in many statutes, there are usually qualifying words which provide that an amendment is not to be made if injustice would result. The New South Wales Crimes Act, for example, provides as follows:

> **365. (1)** Where, before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice.

Similarly, the Victorian Justices Act provides:

> **99.** Upon the hearing of a complaint the court may allow any amendment of the complaint or summons thereon that may be just, and upon such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

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4. The provision contained in Rule 5 allowing amendment of an information appears to be a departure from the conventional statutory requirements conferring powers of amendment in criminal matters.

The Committee proceeds upon the basis that it is well established that a person cannot be convicted upon an information that does not charge an offence and that, if it does occur that an information is defective, the proper course is for the information to be amended so as to make it allege an offence known to the law and triable before the magistrate; and for the magistrate then to allow any adjournment reasonably necessary to give the defence an opportunity of meeting the charge as amended.

5. Rule 5 contains no words to the effect that any amendment made is to be made only upon such terms as may be just.

In the absence of explicit provision that an amendment is not be be made if injustice would result, it may be that the Court would regard itself as entitled to assume that it was not obliged to have regard to justice in considering a proposed amendment of an information. In all probability the Court would have regard to the requirements of justice but the Committee considers that any risk that this may not be so should be removed.

6. Secondly, there are contained in Section 33 of the Bankruptcy Act apparently adequate powers of amendment of any proceeding. It has been stated in evidence before the Committee that there was some doubt as to whether these powers in the Act applied to criminal as well as to civil proceedings. To remove this doubt, Rule 5 had been promulgated under a general power (conferred by Section 273(7) of the Act) to prescribe the procedure to be adopted in criminal proceedings.

7. The Committee believes that it is not a proper procedure for doubts about the effect of the Statute to be removed by delegated legislation, and that if Rule 5 is to be enacted it ought to be done by an amendment of the Statute. This is in accordance with the Committee's long-standing principle that it should scrutinise delegated legislation to ensure that it is

/3. ...

confined to administrative detail and is not substantive legislation more appropriate to Parliamentary enactment. In all the circumstances the Committee considers that the subject matter of Rule 5 is of such a nature that it ought to be regarded as substantive legislation and should be more appropriately dealt with by amendments to the Act.

8. Rule 6(2) of the Bankruptcy Rules is as follows:

> **(2.) Where an information is filed in the office of the Registrar, and the person who swore the information or another person who has personal knowledge of the facts, states in an affidavit that he believes that the defendant will not appear before the Court unless compelled to do so and also states in the affidavit the facts on which he bases that belief, the Registrar may issue a warrant for the arrest of the defendant, for keeping him in custody pending his being brought before the Court and for bringing him before the Court.**

The effect of this rule is that a defendant to an information may be arrested and taken into custody merely because another person states in an affidavit that he has the belief that the defendant will not appear before the Court unless compelled to do so and specifies in the affidavit the facts on which he bases that belief. No doubt the Registrar is to consider whether these facts justify the issuing of a warrant for a defendant's arrest but the Rule does not say this.

9. It appears to the Committee that the provision has novel features. It notes that the power to issue a warrant is vested in the Registrar - who by the Act is to exercise powers and functions of an administrative nature - and not in a justice or in the Court. The powers relating to the issue of warrants given by the N.S.W. and Victorian Justices Acts are exercisable by a justice in accordance with the requirements of natural justice. It is questionable whether the Registrar's powers under Rule 6(2) are similarly required to be exercised consonantly with the requirements of natural justice.

10. The Committee does not believe that the power to issue a warrant for arrest, a power which is normally reserved for a justice, ought to be conferred upon a registrar, who is an

administrative and not a judicial officer. This is not a reflection upon the Registrar in Bankruptcy, nor does it imply that he would not be impartial in his decisions. The Committee affirms its long-standing principle that the rights and liberties of citizens ought not to be unduly dependent upon administrative decisions rather than upon decisions of officers bound to act judicially.

11. If there are circumstances which necessitate Rule 6(2), the Committee considers that the subject matter ought to be enacted by statute rather than by delegated legislation. The subject matter is not concerned with administrative detail but is more appropriate for substantive legislation.

12. For these reasons, the Committee recommends the disallowance of Rules 5 and 6 of the Bankruptcy (Offences) Rules, contained in Statutory Rules 1970, No. 87, and made under the Bankruptcy Act 1966-1969.

IAN WOOD
Chairman

Regulations and Ordinances
Committee Room.

14 October 1970

REGULATIONS AND ORDINANCES COMMITTEE

CANBERRA

THURSDAY, 25TH SEPTEMBER 1970

Present:

Senator Devitt (Acting Chairman)

Senator Cavanagh
Senator Greenwood
Senator Lawrie
Senator Davidson
Senator Wheeldon

Senior Assistant Secretary,
MR J.P. HARKINS, Attorney-General's Department, Canberra, and
Senior Legal Officer,
MR F.J. HAWKINS, Attorney-General's Department, Canberra,

were called and examined.

Chairman

The area of concern is principally, I believe, confined to Clause 5 concerning the power to amend a complaint before the court at the time of the hearing, and Clause 6(2) which concerns the filing of an information and power given to a Registrar to perform certain functions which the Committee has some concern about. Perhaps it would help the purpose of the Committee to facilitate our deliberations if you could outline to the Committee the reasons why the regulations are expressed in these terms, that is, the need for, and the practice which would be gone through in, amending a complaint at the time of hearing, and the reason why there appears to the Committee to be a departure from the normal practice in allowing a Registrar to do certain things which would normally not, we believe, be the province of a Registrar.---(Mr Harkins) Concerning Regulation 5, which permits amendment of an information, I understand the Committee's concern is that there may be some injustice to the defendant in that the amended information may require further consideration by him and an adjournment might be required. This was a matter that we did look at when we were working on the regulations, and the view we came to was that it was unnecessary to make a specific provision in the rules on the view that it was covered by the Act itself - the provision there would be Section 33(1)(a) of the Act. That is a section which gives a variety of powers to the court. (1)(a) is the

power to adjourn proceedings on such terms as it thinks fit, either to a fixed date or generally; (b) is a power to allow amendment of process, and (c) is a power to extend time before or after expiry. On one view, of course, the rule itself that is perhaps not necessary is 33(1)(b) which provides for the amendment of any written process, proceeding or notice. The difficulty that we had was that those were terms that would be used in relation to civil proceedings and, to remove any doubt that an information was not a written process, we felt that it was as as well to provide for it in the rules. But as for the power of adjournment, that is expressed to be in relation to any proceeding, and that seemed to be wide enough to comprehend criminal proceedings which are talked about in Section 273 of the Act, which is the section which provides for the trial of offences and indeed provides for these rules. Sub-Section (7) of Section 273 says 'The procedure of the Court in relation to proceedings for an offence against this Act, including the procedure by which those proceedings are to be instituted shall be as prescribed', so we felt fairly comfortable that the power to adjourn proceedings extended to criminal proceedings, and that is the explanation.

Chairman - Thank you, Mr Harkins. Perhaps we could deal with 5 first, then we could pass on to clause 6(2). I will now ask members of the Committee to direct any questions to you that they feel are necessary to assist in the examination of this matter.

Senator Cavanagh

I would have thought that we disagreed with 33(1)(b) that the court has power to amend the rules, and I would have thought that this 273(7) gave us the power of regulations to describe how it will be done. Our objection seems to be in the prescription, there is not the safeguard which is found in other Acts of the Commonwealth and United Kingdom if no injustice is to result .---(Mr Hawkins) One of the difficulties we had in dealing with these rules generally, was that, as you will see, they are fairly much of a skeleton and this was, I think, largely in deference to the views of Mr Justice Gibbs who attended a conference with members of the Department and Parliamentary Draftsmen on these rules during preparation. Both the draftsmen and ourselves felt in difficulty about how much we should actually spell out in detail for what is, after all, a superior court and can be taken to be well conversant with the principles on which courts grant an adjournment. In fact we did have at one time a copy of the type of warning which is given to an unrepresented defendant in a court of summary jurisdiction, but it was felt quite inappropriate that we should be telling a Supreme Court Judge to use the words which are given to a magistrate or a justice, because he should be quite familiar with them. I think that is part of the general difficulty, to what degree we should be specific, and it was felt that it was a framework rather than a fully detailed set of rules which was necessary.

Senator Greenwood

We understand you to say that the words in Regulation

5 'that the court may amend the information' are words which in comparable contexts have such an established meaning that courts do not amend except on just terms.---That is right.

There is another point, however, which concerns us, and it may even be supported by what you have said this morning. That point is that Regulation 5 is the type of provision which ought not to appear in the rules but should be enacted by substantive legislation. After all, you stated that Section 33(1)(b) is a statutory provision allowing amendment, but you felt that may be limited to civil process. If that be so, you are by regulation enacting or prescribing an amending power for criminal matters.---Section 273 leaves the procedure in respect of proceedings for criminal matters to be as prescribed. I think that Section 273 does expect that there should be some provision of its aims. I suppose one might query whether 273 is to stand alone or whether it is also to have regard to Section 33, as one would assume.

Could I ask you, do you believe that, under the Act, without Regulation 5, there is a power in the court to allow the amendment of informations?---Yes.

Where do you find that?---(Mr Harkins) The doubt is whether the word process is right. I would agree that perhaps, if we were to be neat about this matter, we would either have prescribed in the rules all the provisions that ought to deal with adjournment, amendment and the like, and all the provisions about such matters concerning the Act generally, and proceedings under the Act, other than offences, you might put with Section 33. That certainly would be one way of doing it. However, it does

seem to us the Act speaks generally, it does in 33 seem to deal with all proceedings under the Act, and we really only put this rule in for the precaution against process being perhaps a word that was a little limited in meaning.

Well, it seems to me that you would not have put it in unless you felt there was some force to be directed to that point, that you have already conceded is doubtful, as to whether or not there is power in the Act on informations for the court to amend the information.---I think we must agree it is doubtful.

I think the Committee's concern then is, because of the character of the power you have granted in the regulation, why should not that be by statutory enactment, why should it not be regarded as properly substantive legislation and not a matter for regulation?---Our only answer is that 273 appears to contemplate that you may by regulation prescribe the procedure of the court in relation to offences. Indeed, I would have thought under that we could have said you may amend, you may adjourn, you may abridge time.

Yet if that is right it would seem that the intention of the legislature was otherwise, because there would have been no need to enact 33(1)(b), would there?---That would apply to general bankruptcy proceedings as well as to offences proceedings.

Acting Chairman

Having regard to the points which members of the Committee have just raised with you, could you envisage any better way of achieving the objective?---I would have thought the neatest solution of all would be to amend 33(1)(b) so that it

is clearly wide enough and then in the one place in the Act you have the whole of the provisions about adjournment which apply to all proceedings, civil or criminal. That would perhaps be the neatest in-the-one-place solution to what has been put to us.

Thank you, Mr Harkins. Perhaps the members of the Committee may wish to direct further questions on the basis of that.

Senator Greenwood

I would like to know why it is said that Section 33(1)(b) in your view does not permit the amendment of informations but is limited only to civil proceedings?---I do not put it very high, it is a written process, proceeding or notice under this Act. The notices I imagine under the Act would all be notices under the general provisions of the Act, such as a bankruptcy notice, other notices which are served, proceedings - I am not sure offhand. (Mr Hawkins) I think it was the fact that the word 'proceeding' is sandwiched between the two words 'written process' and 'notice' which we regard as both being terms applicable to civil proceedings. Being sandwiched between two words of that character there is an argument that you are restricting 'proceeding' to proceedings also of the same character, but it may be a restriction on the use of the word. Had it come at the beginning or perhaps at the end I think that inference would have been less strong. It is something of the application of the ejusdem generis rule that the word takes its colour from the words used with it. (Mr Harkins) It is just perhaps there is some flavour in addition to what

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Mr Hawkins says about the rule on any written process; it appeared there might be some doubt as to whether that was wide enough to comprehend criminal process when the bulk of the Act really deals with the ordinary bankruptcy proceedings as we know them. Maybe, of course, it is only a doubt, and not a very great doubt, but we thought it better to be sure than to leave a gap.

Have there been any proceedings or information in which the difficulty which is sought to be overcome by the prescription of Regulation 5 has occurred?---(Mr Hawkins) No, there is no particular instance.

Under the previous Bankruptcy Act I assume that the provision in Section 33(1)(b) was in existence, but what was the position in regard to the substance of what is now Regulation 5, is that in the old legislation?---No, this is entirely novel legislation. This was one of the difficulties as to what precedents to follow. (Mr Harkins) You will probably remember, Senator, that the old procedure was most unsatisfactory and that the court itself, on an application for compulsory discharge, decided to charge a man and then proceeded to try him, and the court really made its own procedure, there were no rules of this kind, so we started this exercise. Some of these provisions, and perhaps this one, comes from the fact that when we did the first draft we sent it round to all the Crown Solicitors' offices and all Bankruptcy Registrars and obtained their comments. Comments came in about this or that doubt. I think this is probably a doubt that was raised by someone who considered we ought to acknowledge it.

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Senator Cavanagh

Still coming back to my point. If there is some doubt in this necessity for this regulation which would suggest the regulation is necessary, ignore 33(1)(b) because it is to cover something that may not be covered by 33(1)(b). Why should we not write the safeguards and not rely upon the knowledge of the judge of a superior court; he may know all the rules as to what he should do and amend the application. Why is it that the Victorian Act, the NSW Act and the United Kingdom Act have these safeguards?---This is the amendment itself you are speaking of?

I am talking about procedure to permit an amendment.---(Mr Hawkins) Which Acts do you mean?

The Victorian Justices Act, the NSW Crimes Act, the UK Indictments Act have found it necessary to write safeguards.---(Mr Harkins) I am afraid what I have not quite yet grasped is the nature of the safeguard that you are putting to me.

In the Victorian Justices Act, which is a court without a superior standing like our bankruptcy courts, but I use it because it seems to express what is expressed in other Acts. They say upon the hearing of a complaint the court may allow any amendment to the complaint or summons thereon that may be just, and upon such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question of controversy between the parties. They include 'on such terms as may be just'. Under your regulations it can be amended without those terms. You are relying on the magistrate.---(Mr Hawkins) We

are not relying on the magistrate, sir, but on the superior judge.

The United Kingdom Act says 'unless having regard to the merit of the case the required amendments cannot be made without injustice and may make such orders as to the payment of costs incurred owing to the necessity of amendment as the court thinks fit'.---(Mr Harkins) The point is whether we should have spelled out the circumstances in which the court should exercise its discretion.

That is what I think we are concerned about.

Senator Greenwood

I think Senator Cavanagh might well add to his question because I think it gets to the heart of his concern, this point. Is there any possibility in your judgment that, because these words do not appear in Regulation 5, a court may say that the absence of them is an indication that the court is not to take those considerations into account? If it was required to take those considerations into account the language of the regulation would have been as it is in other statutes.---(Mr Hawkins) The difficulty is that the draftsman, in providing the rule, must operate within the framework of the Act, and we cannot detract from/or add to what is provided by the Act. Our understanding was that the position had been covered by Section 33(1)(a)of the Act regarding adjournment, which was upon such terms as it thinks fit, and we regard that as applying to Rule 5. We cannot take away from the Act what was in the Act, therefore you really cannot draw the inference which you suggested might be put, Senator.

MR F.J. HAWKINS
MR J.P. HARKINS

Acting Chairman

You mentioned Section 33(1)(a) of the Act and I believe you used the word 'adjournment'.---(Mr Hawkins) Yes, I think we are really speaking about how to amend at the moment.

This gives a different aspect of the matter again, we talk on the one hand about adjournment, and then you talk about a regulation which does not mention it.---(Mr Harkins) I think Mr Hawkins was speaking generally along this line, that when you look at the powers of the court generally they are at large in the Act as in 33. Do you restrict when you come to criminal procedures, and I would have thought that the legislature has vested in this particular court as a superior court the power at large to deal with adjournments, amendment and time. When you come to deal with offences, do you impose additional restrictions or do you spell out the discretions?

Senator Cavanagh

If the regulation is necessary, it has no application to 33.---That is right, but when you come to deal with offences 33 applies, you read them together.

If 33 applies on offences, I cannot see the need for the regulation.---It may be we have been too cautious, but it was one of the doubts that was raised by one of our commentators, and rightly or wrongly we accepted the possibility.

If 33(1)(b) does apply, then any regulation using language outside 33(1)(b) would be beyond the powers of regulation?---Were it not for 273, which gives you the power specifically to prescribe for events such as these.

MR F.J. HAWKINS
MR J.P. HARKINS

Acting Chairman

Let us take a hypothetical case of there being no Regulation 5 as is proposed here, and somebody in fact does raise the sort of doubt which one of your commentators raised when you were formulating these regulations. What could possibly happen should somebody raise this sort of doubt.--- I suppose what would happen is that the defendant would object to the amendment of the information on the ground that it was not 'process'. If the court decided to amend, it would then be challenged.

What you are saying is that Regulation 5 would procure that protection?---This would remove any doubt and prevent the possibility of that change.

Senator Cavanagh

Your regulation would have no application to a process of proceedings which is prescribed in (b), it could only deal with information.---On the view that if the doubt is right, if (b) does not comprehend criminal process, it would be so.

With the process that (b) does cover, your Regulation 5 could have no application if it used different language, then it would not apply to any procedures under 33(1)(b).---You are putting to me that if we make this regulation 273, then it supplants criminal proceedings 33(1) (b).

I think you are saying there is doubt whether criminal proceedings are covered by 33 (1) (b), but if they are not, you have power to make regulations to cover them under this 273 (7). But the power you have exercised under 273 (7) can have no application to something that properly

comes under 33 (1)(b). Does 273 (7) give you power to prescribe what is in Section 33?---In respect of offences I would have thought so.

But even in the question of 33(1)(b) where it permits the court to amend at any time, something coming squarely within that section, surely under 273 you have power to prescribe the conditions.---I think you could have conditions as a matter of law.

Then the power to use different language and put in safeguards would be within the power of 273?---I would have thought so.

Without the language in there the court would be quite within its rights in acting differently to what we expect the superior court from past practice would do.---It would have the power, and our only answer to that is that if the court is given the power at large in 33, should we impose specific restrictions in offences?

The question that Senator Greenwood raised, that in view of the fact that it would appear that the safeguards in other Acts have for some reason been deliberately left out, and would not appear to the court, then there is no need to look into these safeguards.---With respect, I would have thought the difference was in the nature of the court. These safeguards are more typically prescribed in relation to justices and magistrates' courts.

The United Kingdom Indictments Act, I take it, it would be. The NSW Crimes Act of 1900, would it not be a superior court?---The United Kingdom indictments proceedings

certainly ought to be before a superior court.

What would be the standing of someone hearing charges under the NSW Crimes Act?---On indictment, of course, this would be the superior court as distinct from the summary proceedings.

Acting Chairman

It seems to me that we have pretty well exhausted the examination of Clause 5. Perhaps we should now move on to the question of our concern for the provisions of Clause 6 (2) relating to the Registrar. Could you indicate to us the reason for the adoption of the practise of giving power to the Registrar to do certain things?---We had two things in mind here. Firstly, we took a look at the Justices Acts in various States to see what type of provision was made for first instance warrants. They seemed pretty universally to give this power to the justices to issue a warrant of first instance. In practice, of course, he is the Clerk of Petty Sessions discharging his functions in a similar position to the Registrar. Then we took a look at our own officers, looked at the Registrar and considered whether he was a suitable man to give this to. We thought he was, on the view that he is required to be legally qualified, he is a man who sits in court and conducts examinations, he is used to dealing with evidence and ought to issue or refuse to issue warrants on proper considerations. These were the two basic matters that were considered. / (Mr Hawkins) For the convenience of members I have a copy of the provisions of the State legislation. It will be seen in each case except the ACT

where it speaks of a Magistrate, the power of issuing warrants in the first instance is vested in the Justice. So it is a very uniform practice and we felt that the Registrar in Bankruptcy should be regarded as at least, if not more, responsible than the average Justice.

Senator Wheeldon

There seem to be two points here that could arise, one is on the question of costs - and I assume there must be some costs involved and some procedures that would have to be adopted by the party who was making an application for the issue of the summons to the defendant-----(Mr Hawkins) No, no provision has been made for fees under these rules.

So there would not be any imposition of fees on the defendant?---No.

Would there be any provision made to prevent publication of this? It could be damaging to a person in his business, for example, if a person who intended to attend in any event, were brought there by a warrant, and this was reported in the press.---(Mr Harkins) This is right, it should be guarded against in all thesekind of provisions. The only safeguard it seemed we could provide is to put it in the hands of a person who would take into effect that condition in deciding whether or not he should issue a warrant. You get a contrast, perhaps, with say the power of a police officer to arrest a person, and typically his powers are spelt out. For example, the draft criminal clause spells out the circumstances.

Senator Cavanagh

Our concern is not so much with who issues the

warrant, but the grounds of issuing it. I sign an affidavit that I believe someone may not be here for the trial. If there was no basis for that belief, what redress is there for someone who has been wrongfully arrested? If I had to sign an affidavit on reasonable grounds of evidence I form the belief that I do not have to do that.---This is evidence that the Registrar has before him. He has to consider how good the evidence is and whether he should act upon it.

Yes, but if I had no solid reason to believe, I should think the person arrested may have some redress against my action. This takes all his right away. My defence is, well, I believed it.---I would have thought the sworn evidence would not merely be matters of belief.

But the regulation is.

Senator Wheeldon

There is some protection insofar as there is a hearing by the Registrar before an order is made for a warrant. It is not just like the normal witness summons in a court of petty sessions where you merely issue it in the office of the Clerk of Petty Sessions without making any submissions at all.

Senator Cavanagh

But I sign an affidavit that I believe.---It also must go on and state the facts on which he bases that belief. It is on that that the Registrar would really decide.

Senator Davidson

What opportunity does the defendant have to protest that he intends to appear anyway?---None whatever. (Mr Hawkins) This is an ex parte application.

(Mr Harkins) This type of provision is a reserve sort of provision very seldom used. I have inquired to see just what warrants have been issued in the bankruptcy jurisdiction, and none have been issued of this kind that we can ascertain so far. The warrants that have been issued have been typically ones concerned with search warrants or warrants after an examination of proceedings under the Act.

When you say none have been issued so far you are referring to the statement under this regulation?---Not under these Rules.

Acting Chairman

As a matter of procedure, in the event that somebody appears before a Registrar and signs an affidavit based upon certain facts which he alleges to be correct, is there an obligation upon the Registrar to attempt to ascertain the correctness of the facts upon which this affidavit is sworn, or must he accept that the facts which are put to him by the person making the accusation are correct, and he thereupon immediately, as a matter of proper procedure, issues a warrant for the arrest of that person?---I think he is given a discretion by this Rule. The discretion is whether he is going to issue a warrant with very severe consequences of the kind that Senator Wheeldon has mentioned.

It does not say that he has to satisfy himself of the correctness of the facts, does it?---No, it gives him a discretion.

Senator Wheeldon

What I am a little concerned about is, what really

is the necessity for this? For example, if I were to take a private prosecution against somebody in the Court of Petty Sessions, the summons would be served on him and normally, if we all turned up at the court on the day of the hearing and the defendant were not there, a warrant would then be issued to bring this person in. Now this could be very inconvenient. If he does not attend, then presumably some arrangement would be made for costs, assuming that the defendant does have some assets, otherwise it would hardly be worth bothering about bankruptcy proceedings. Has anything occurred which has necessitated this new type of procedure, what is wrong with proceeding in the normal way?---The answer, I think, Senator, is that this is only put in for completeness, because you may have a case where the Official Receiver wants to institute proceedings, an offence is committed by a bankrupt, a man is about to leave the country, or something of that nature. It is an extreme case, but all offences procedures under the Justices Act provide for the unusual case. I agree with you that ordinarily you ought to proceed by summons, if a defendant does not turn up you can get a bench warrant, and so on. But our thinking has been that you should, in these Rules and as provided in all Offences Acts, give a procedure for a first instance warrant if the circumstances should be so unusual as to warrant it.

Could it not be required of the person who applies for the issue of the warrant that he state in his affidavit a belief that the defendant intends to leave the jurisdiction? Merely a belief that he is not going to turn up on the day

would seem to me perhaps not to warrant this, although if he did have a reasonable belief that a person had a plane ticket booked to Tahiti or somewhere, then this would justify the position.---He is required to go on and state the facts on which he bases his decision.

Could it not perhaps be obligatory? If what one is afraid of is that the defendant is going to leave the jurisdiction, then perhaps the rule should provide not conclusive proof, but at least some submission should be made to the Registrar that the applicant does have reason to believe that the defendant intends to leave the jurisdiction - not that he believes that he does not intend to be present but still within the jurisdiction.---(Mr Hawkins) I think if you advert to the position at Common Law, the discretion which the Registrar would exercise would, I think, be based by recourse to that, and there you would find it is the practice to issue a summons in most cases. The step of issuing a warrant is a serious one and is, as you say, to be taken only where there is ground for believing that the defendant is about to abscond or, in the case of a very serious offence. Those are the Common Law limitations and the Registrar would have due regard to those limitations.

Senator Cavanagh

Is there not a conflict in this regulation and in Sections 78 and 81 of the Act where it appears to the court that a man against whom a bankruptcy notice has been issued or a petition has been presented has absconded or about to abscond, the court may issue a warrant?---(Mr Harkins) These

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MR F.J. HAWKINS

are rather different circumstances. Section 78 is a historical section in which you have a number of provisions of different kinds, concealment of property, removal of property, about to destroy papers, about to abscond after notice has been issued, a variety of provisions which historically have been included in one section in the English Act and our earlier Act and on which power is vested in the court to issue a warrant.

Well, what sections does Regulation 6 (2) cover?--- These are prosecution proceedings. It would seem to us that the analogy that we ought to be looking for there is the analogy with other prosecution proceedings and what ought you to provide in the case of a first instance warrant. This is perhaps not a bench warrant, but a warrant that is sought after the court has been involved in the matter in some way. A man is bankrupt and about to remove property. You go to the court. Here you have the process of being about to issue an information and initiate proceedings in the first instance, and what is the appropriate procedure to provide for that. That is why we have looked at the precedents in this area. One I did not mention is the draft criminal code, and it follows the Justices' provisions in the various States. Section 128 is the proposed section for warrants in the first instance, and it again provides along the lines of most of the State Justices Acts in the case of an indictment that the Justice may issue his warrant to apprehend such person and cause him to be brought before Justices to answer the complaint. In the case of a simple

offence in respect of which there is power to arrest, the Justice may, upon oath being made before him substantiating a matter of the complaint to his satisfaction - that seems to be the test they have adopted in the criminal code and that is said to be based on the Queensland Justices Act.

Senator Greenwood

My concern primarily is that you are giving a very extensive power to the Registrar in the first place, and that is one distinction in all the other Acts that you refer to, that it is not the Clerk of Petty Sessions who can issue this warrant, it is the Justices. In this case it is the Registrar, not the court. The second point is that Sections 78 and 81 of the Act have express powers with regard to apprehending bankrupts who are doing various things, and indeed under Section 81, other persons who have dealt with the bankrupt's property. The third point is that there is nothing in the Act as I understand it which gives a general power to apprehend any person simply charged with an offence, and what you are doing is to put all this intoa regulation. Why should not such an extensive power, if it is to be introduced at all, be a certain part of the legislation?--- (Mr Hawkins) One would have thought it was part of proceedings, Senator, covered by Section 273. (Mr Harkins) Perhaps if I could take your points in order, Senator.

You are giving power to a Registrar to issue this warrant instead of to a Justice, and if you were to draw an analogy with the earlier pieces of legislation to which you refer, the proper analogy would be: Does the Clerk of Petty

Sessions have the power to issue the warrant?---The answer as we saw it was that the Justice who does issue these informations or warrants is the Clerk of Petty Sessions who is a Justice. This is the way in which these Acts work.

Senator Wheeldon

Surely that is incidental, it is not so in Western Australia, either. If he is a Justice of the Peace, it is solely incidentally. The party could just as easily be a Justice of the Peace. He is not acting qua justice of the peace when he issues the warrant, he is acting as a clerk of courts who as it happens may also be a justice of the peace.---Except that that is where his power comes from.

Senator Greenwood

Moreover, in the light of Davidson's case, there may be some question as to whether the Registrar has got the power constitutionally to do what this regulation is conferring upon him.---This is one that had been looked at quite carefully and it was considered that this was not an exercise of judicial power.

I must accept your researches on that. I would have thought it was an open point.---He has a duty to act judicially in exercising this discretion, but it is not an exercise of judicial power. That is the view that has been taken.

My second point was that Sections 78 and 81 give fairly express powers in particular instances to deal with bankrupts who are likely to abscond or persons who are likely to do certain things with a bankrupt's property, and that

would appear to be the limit of what the legislation confers in the way of powers to apprehend people. Here under the regulation we are going much further to give power to apprehend persons, bankrupts or others who are likely to be charged with an offence.---The view we have taken on this, Senator, was that what we had to do here was to provide for the first time for prosecution, and this provision for the possibility of arrest is an incidental to proper provision of a prosecution procedure, and that you do not draw from 78 and 81 any conclusion that these are the only circumstances in which power is given to provide for warrants.

I think that is the way you must put it, but as I would see it, it is something which is new, it is not in the legislation.---I agree entirely. We did look at 78 and 81 in considering to whom we ought to give these powers. We were helped a little by 81 in seeing that the power of arrest there is conferred upon the court, the Registrar, or a magistrate, so that in relation to the power to examine a person under that section, the power of arrest is vested in a Registrar and a magistrate as well as the court. It does not take it very far, but does go to show perhaps that in relation to that matter, he was thought to be an appropriate person.

I had the impression that when you look at the Act and the regulations the widest power for the apprehension of persons on an affidavit statement, where they may not appear before the court, is that contained in this regulation. It is wider as I see it than what appears in the Act, and in those

circumstances I would have thought it falls squarely within the purview of this Committee. Should it or should it not be an appropriate matter for substantive legislation? After all, there is a power of arrest involved.---I must agree with that, Senator. If you are to provide, as 273 requires, a procedure of the court in relation to proceedings for an offence, they would be incomplete if they did not guard against the possibility that proceedings could be rendered nugatory if a bankrupt was able to leave the jurisdiction and you could not effectively bring your proceedings. That is the only reason why this is put in.

Acting Chairman

Do I understand you to say that there is no history of a case of this kind ever coming before the court?---No, and of course the old procedure of the court rendered it unlikely, I would imagine, because what you had then was an application for compulsory discharge, a bankrupt before the court, and the judge deciding that he ought to be tried. I suppose the judge had in mind at that stage that if he thought on the evidence before him the bankrupt was likely to abscond, he could issue a warrant himself.

My concern is that in a situation that has never arisen, we are giving the subordinate legislation for any person who has a knowledge of certain facts on which he swears an affidavit, that he believes that a person is about to leave the jurisdiction or that he will not appear at the court. There could be very good reasons in certain circumstances why a person may not appear at the court,

without any real intent to defeat the ends of justice, and there would be no discretion to a Registrar to say, 'well, I know he is not going to come, but the circumstances of his case are quite rare.' I cannot see anything here that gives to a Registrar that sort of discretion. He must, if the facts substantiate the beliefs of any person that the bankrupt is about to leave the jurisdiotion, issue a warrant, take the man into custody and hold him there until he can be brought before the court. There may be a very great injustice in this which the Registrar would not be confortable about, but he would have no option.

Senator Davidson

Would that not be covered by 'the Registrar may'?--- I would be fairly confident that the Registrar has an absolute discretion, and the requirement of the affidavit really is a condition precedent to the exercise of that discretion.

Senator Greenwood

One of the problems in these things is that the Justices of the courts incline in these issues to give the benefit of the doubt to the individual against whom the order is sought. In the nature of things, the Registrar and administrative officer charged with the administration of the Act, I believe, is more likely to give the benefit of the doubt to the administration, the person who wants him apprehended. It is a practical matter, and one does not suggest that Registrars are not honourable people, it is just a matter of the environment in which they operate.

Senator Wheeldon

One of the reasons being also that if the Registrar does happen to exercise his discretion in favour of the defendant and the defendant has flown the coop, the Registrar is going to feel rather uncomfortable in the presence of the court.

Senator Cavanagh

Your power to make Regulation 6 (2); you claim this in 273 (7) as part of the procedure.---(Mr Hawkins) I think particularly when you have regard to the use of the words 'Including the procedure by which those proceedings are to be instituted'. It is rather emphasising that you must provide for the initiating of the proceedings, and that covers I think the issue of a warrant in the first instance.

And the power to arrest must be part of the procedure?---(Mr Harkins) Looking at all of the Justices Acts this is a regular provision in them all, the information, provision for summons, provision for arrest.

Senator Lawrie

This matter of keeping him in custody. That is indefinite, it could be three months?---No, there is no mention of bringing him before the court at 10 a.m. the next day. We have dealt with that in Rule 14, what happens after arrest. We provided that if he cannot be brought before the court on that day, the Registrar has to be told and then he has to fix a time and date as soon as practicable.

That is still very open.---(Mr Hawkins) I think the courts would interpret that in a fairly strict sense in these circumstances.

Senator Greenwood

The Registrar in those circumstances is doing things normally done by a court.---(Mr Harkins) We select the Registrar there because he is likely to be more immediately available, that is the only reason.

Senator Lawrie

And the word court in this case means the bankruptcy court?---That is right.

Acting Chairman

If there are no further questions I would like to thank you very much indeed, Mr Harkins and Mr Hawkins, for making your very valuable time available to the Committee, and for the manner in which you have answered the questions - you have been of very great assistance to us.

The Committee adjourned.