

Comments on Proposed Amendments to the Admiralty Rules

Introduction

This paper has been prepared by the Federal Court of Australia to assist the Admiralty Rules Committee and the Attorney-General's Department in the consideration of the proposed amendments provided in 2004.

The proposed amendments were the subject of extensive consultation with the legal profession, Maritime Law Association of Australia and New Zealand, Federal Court of Australia and Supreme Court of New South Wales. A copy of the amendments was also provided to the other State and Territory Supreme Courts. While the views in this paper are those of the Federal Court, subject to express qualification there is nothing in this paper that is inconsistent with the views of the profession, MLAANZ or the NSW Supreme Court.

In preparing this document the Federal Court has attempted to indicate the reforms that are considered by it and the profession to be of high priority for the efficient operation of this international jurisdiction. These reforms are in the Australian public interest and the Court urges that they be considered promptly.

This paper sets out the proposed reforms which the Federal Court considers to be of particular importance. These proposals are based on, but are not identical to, the proposals made by the Sydney Admiralty Users Group. The paper, for reasons that can be provided if necessary, does **not** include the proposals suggested by the Sydney Admiralty Users Group in relation to:

- Marshal's overdraft (proposed rule 41C);
- Court addressing calls on bonds or cash calls (proposed rule 41E);
- Credit insurance (proposed rule 41F)
- a rule to provide for an 'omnibus order';
- a rule on loading and unloading an arrested ship;
- ISPS Code (proposed rule 47A); and
- Costs in small claims (proposed rule 76A).

Proposed amendment	Comment
Access to registers kept by courts	
<p>Insert a new subrule 14(3) in the following terms:</p> <p>(3) The Registrar of the Federal Court shall maintain the Register of Caveats Against Arrest in a form which includes provision of access to the Registries of Territory and Supreme Courts, through which search by a party may be conducted in satisfaction of requirements of the Rules.</p>	Nil.
<p>Insert a new subrule 14(4) in the following terms:</p> <p>(4) Any register required to be kept under the Act or the Rules by any of the Federal Court or the Supreme Courts of the States and Territories shall be maintained in a form which includes provision of access to the Registries of the Supreme Courts of the States and Territories and Federal Court through which search by a party may be conducted in satisfaction of requirements of the Rules.</p>	Nil.
Information to be provided to Marshal	
<p>Amend subrule 39(2) in the following terms:</p> <p>(2) The application shall be supported by an affidavit of the applicant or of a solicitor or agent of the applicant in accordance with Form 13 <u>and which identifies sufficient short particulars of the claim and of any necessary facts as would entitle an action in rem to be brought in respect of that claim as provided by the Act.</u></p>	<p>This non-contentious amendment reflects a widely held view that the supporting affidavit filed by an arresting party must contain more particulars of the facts that entitle the arrest to be made.</p> <p>The amendment is supported by the Federal Court and the NSWSC.</p>
<p>Insert a new rule 39A in the following terms:</p> <p>Rule 39A Duty of disclosure</p> <p>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.</p>	<p>At present there is no express obligation for a party to disclose information relating to the safety of persons involved in the arrest or custody of a ship. This non-contentious amendment, as suggested by the Federal Court, will impose such an obligation.</p> <p>The amendment is supported by the Federal Court and the NSWSC.</p>

Proposed amendment	Comment
Undertakings and other mechanisms for securing the costs of the Marshal	
<p>Amend rule 41 in the following terms:</p> <p>Rule 41 Liability for Marshal's fees and expenses An application for an arrest warrant constitutes an undertaking to the Court :</p> <p>(a) if the application is made by the applicant personally – by the applicant; or (b) if the application is made by a solicitor on behalf of the applicant – by the solicitor;</p> <p>to pay to the Marshal on demand, an amount equal to the amount of the fees and expenses of the Marshal in relation to the arrest <u>including the fees and expenses of the Marshal in connection with the ship or other property to be arrested whilst under arrest.</u></p> <p>Amend the existing undertaking in Form 12 so that it now reads:</p> <p>I undertake to the court to pay the fees and expenses of the Marshal <u>in relation to the arrest including the fees and expenses of the Marshal in connection with the ship or other property to be arrested whilst under arrest.</u></p>	<p>These amendments reflect and clarify the existing position. It makes clear that the undertaking extends to fees and expenses incurred after the ship or property has been arrested.</p> <p>The rule is the default position. A court may, pursuant to an application under the proposed rule 41G (see below), allow the undertaking to be replaced by a firm undertaking under proposed rule 41A or one of the securities mentioned in proposed rules 41B or 41D.</p>
<p>Insert a new rule 41A in the following terms:</p> <p>Rule 41A Undertakings by Firms</p> <p>(1) The Court will accept an undertaking to the Court by a firm of solicitors practising in Australia signed by one of the partners of the firm duly authorised by the firm to give such undertaking.</p> <p>(2) When such an undertaking is given, any undertaking to the Court by a solicitor personally, provided for by the Rules or otherwise, will be taken to be of the partners of that firm at the time of the application.</p> <p>(3) On application by any one or more of the partners referred to in subrule (2), the Court may, on such terms as it thinks appropriate, add or delete a partner to or from the list of partners, with effect from such dates, in such amounts and on such terms as the Court thinks appropriate.</p>	<p>At present a practitioner must give a personal undertaking for the costs of an arrest. This is inflexible and, as the undertaking can be extremely onerous, places the practitioner in an unreasonable position.</p> <p>This amendment is not contentious and is supported by the profession, the Federal Court and the NSWSC.</p>

Proposed amendment	Comment
<p>Insert a new Rule 41B in the following terms:</p> <p>Rule 41B Use of Clean Bonds If, in any application otherwise calling for an undertaking to be given to pay the fees and expenses of the Marshal, whether the application be for arrest, dealing with or discharge of cargo, release or sale of the property arrested, or otherwise, an applicant or the solicitor for an applicant proffers an irrevocable, unconditional bank bond or guarantee issued by a bank authorised to carry on banking business in Australia, payable on demand in favour of the Marshal in respect of the payment of the fees and expenses of the Marshal either generally or more specifically, then, subject to the Court being satisfied as to that security and its amount, and as to any other relevant matter, the Court may, either generally or on terms, make an order varying or dispensing with any rule or other requirement providing for a personal undertaking or releasing any party from an undertaking, conditionally or unconditionally.</p>	<p>The proposed rule is strongly supported by the profession as a modern commercial mechanism to fund the costs of an arrest. The Federal Court is of the view that the use of such a bond must be closely supervised by the Court so that the terms of any personal or firm undertaking as to costs may be adjusted having regard to the amount of the bond and other relevant factors. In some cases the undertakings might be released.</p> <p>The words “conditionally or unconditionally” have been inserted after “undertaking” in the last line of the proposed rule by way of an amendment to the suggestion by the Sydney Admiralty Users Group.</p>
<p>Insert a new rule 41D in the following terms:</p> <p>Rule 41D: Cash Calls</p> <ol style="list-style-type: none"> (1) The Marshal may demand and accept a deposit of funds which the Marshal considers reasonable to meet the fees and expenses of the arrest or any application in connection therewith. (2) The Marshal may make such demand and accept such funds on an interim basis. (3) The Marshal may, in addition to any undertaking, demand an initial deposit from the party seeking arrest to enable the Marshal to discharge his or her duties effectively upon the arrest of the property. 	<p>This amendment is supported by the Federal Court and the NSWSC.</p> <p>The words “instead of any undertaking” have been omitted from the subrule 41D(1) suggested by the Sydney Admiralty Users Group. As a matter of policy, the release or substitution of an undertaking should be a matter for the Court.</p> <p>The proposed rule supports the practice of the Federal Court and other courts in ensuring the Marshal has funds to meet the costs of the arrest as they fall due.</p>

Proposed amendment	Comment
<p>Insert a new Rule 41G in the following terms:</p> <p>Rule 41G Interaction between undertakings Where an undertaking or security has been given to and accepted by the Court by an applicant or a solicitor or a firm in relation to the fees and expenses of the Marshal and an application is successfully made by another party in which that other party, its solicitor or firm of solicitors gives to the Court an undertaking or security in relation to the fees and expenses of the Marshal which is accepted by the Court, the Court shall have power to make directions and orders as to the just and fair allocation of primary and secondary responsibility of such undertakings and security for the fees and expense of the Marshal, and, if appropriate, release from any undertaking, conditionally or unconditionally.</p>	<p>This non-contentious amendment is supported by the legal profession, the Federal Court and the NSWSC. The proposed rule will provide a mechanism for resolving arguments as to apportionment of responsibility for the Marshal's fees and expenses where a number of undertakings have been given.</p> <p>The words "conditionally or unconditionally" have been inserted after "undertaking" in the last line of the proposed rule by way of an amendment to the suggestion by the Sydney Admiralty Users Group.</p>
Fees and expenses of Marshal acting in aid of another Court	
<p>Insert a new Rule 46A in the following terms:</p> <p>Rule 46A Aid to and by other Courts</p> <p>(1) The fees and expenses of the Marshal of any Court acting in aid of another Court shall form part of the fees and expenses of the Marshal.</p> <p>(2) The Marshal may take any step that he would otherwise have been able to take under these Rules in aid of any other Court having jurisdiction under the Admiralty Act 1988 and may seek and obtain reimbursement of all fees and expenses incurred from the Marshal of that other Court.</p> <p>(3) All fees and expenses incurred by the Marshal in acting in aid of another Court having jurisdiction under this Act are recoverable in full without taxation.</p>	<p>This non-contentious amendment is supported by the legal profession, the Federal Court and the NSWSC. The proposed rule will provide certainty as to the liability for the fees and expenses of a Marshal acting in aid of a Marshal of another court.</p> <p>Consideration might be given to renumbering the proposed rule and locating it in Part XII of the Admiralty Rules.</p>

Proposed amendment	Comment
Provision of information	
<p>Insert a new rule 48B in the following terms:</p> <p>Rule 48B Provision of information by the Marshal</p> <p>(1) The Marshal must, as far as is 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.</p> <p>(2) 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.</p>	<p>The proposed rule is non-contentious and strongly supported by the profession. It ensures that parties are properly informed of the accruing costs of an arrest without imposing an unreasonable cost on the Marshal. The Federal Court and NSWSC also support the proposed rule, the wording of which has been slightly revised from that suggested by the Sydney Admiralty Users Group.</p>
Bail bonds and security for costs	
<p>An amendment to:</p> <ul style="list-style-type: none"> • subrule 3(1) so that the definition of ‘amount claimed’ refers to ‘interest <u>and</u> costs’ (instead of ‘interest <u>or</u> costs’); • subrule 3(1) to insert a definition of ‘costs’ as including a party’s reasonable costs of the proceeding and, if relevant, any amount the party may have paid or is liable to pay to the Court or the Marshal in connection with the arrest, custody or release of the arrested ship or property; • rule 51 to provide that the amount paid into court, or the amount in a bail bond filed in the court, may include a reasonable amount, fixed by the Registrar, for recoverable costs. 	<p>This non-contentious amendment is suggested by the Federal Court and is supported by the profession and the NSWSC. It reflects the current interpretation of the rules dealing with security on release.</p>
Undertakings on application for release	
<p>Amend Form 18 so that it reads :</p> <p><u>I undertake to the court to pay the fees and expenses of the Marshal in connection with the custody of the ship / property [name] while under arrest including the fees and expenses associated with the release of the said ship / property.</u></p> <p>Amend Form 19 so that it reads :</p> <p><u>I undertake to the court to pay the fees and expenses of the Marshal in connection with the custody of the ship / property [name] while under arrest including the fees and expenses associated with the release of the said ship / property.</u></p>	<p>These amendments reflect and clarify the existing position. It makes clear that the undertaking extends to fees and expenses incurred after the ship or property has been arrested.</p> <p>The amendment is supported by the Federal Court and the NSWSC.</p>

Proposed amendment	Comment
<p>Replace rule 53 with a new rule in the following terms:</p> <p>Rule 53 Liability for and payment of Marshal’s fees and expenses</p> <p>(1) An application under rule 51 or 52 for the release from arrest of a ship or property constitutes an undertaking to the court:</p> <p>(a) if the application is made by the applicant personally — by the applicant; or</p> <p>(b) if the application is made by a solicitor on behalf of the applicant — by the solicitor;</p> <p>to pay to the Marshal, on demand, an amount equal to the amount of the fees and expenses of the Marshal in connection with the custody of the ship or property while it was under arrest and the fees and expenses associated with the release of the ship or property.</p> <p>Note. An undertaking under paragraph 53(1)(b) may be given by the solicitor’s firm in accordance with rule 41A.</p> <p>(2) The Marshal may refuse to release a ship or other property from arrest in accordance with an order under this Part unless arrangements satisfactory to the Marshal have been made for the payment of the fees and expenses of the Marshal in connection with the custody of the ship or property while it was under arrest and the fees and expenses associated with the release of the said ship or property.</p>	<p>It has been proposed that the Rules be amended to provide for a deemed undertaking on application for release from arrest. The rule could provide for a deemed undertaking to arise upon the making of application for release, subject to a power in the Court to dispense with this undertaking or the requirement to give it, where the Court thinks it appropriate. The proposed rule addresses the failure of current rules 51 and 52, which deal with applications for the release of a ship, to refer to the undertakings contained in the prescribed forms 18 and 19. It will clarify the position for litigants as to responsibility for the fees and expenses of the release of the ship.</p> <p>The new rule should also:</p> <ul style="list-style-type: none"> • specify who must give the deemed undertaking on application for release from arrest; • make it clear that where a solicitor is acting for the party applying for the release of the ship or other property under arrest, it is the solicitor (and not the party) who is giving the undertaking. • specify that a solicitor’s firm may give the deemed undertaking on application for release from arrest. <p>The amendment might be given effect by replacing rule 53 with a new rule as set out in the left column.</p> <p>The substance of the proposed rule is supported by the Federal Court and the NSWSC.</p>

Proposed amendment	Comment
Bail bonds to be provided by a partnership or corporation	
<p>Insert a new rule 54A (Bail Bonds) with the following elements:</p> <ol style="list-style-type: none"> 1. A partnership or corporation carrying on business within the jurisdiction may act as a surety. 2. Where both sureties are corporations they must be “unrelated”. 3. Unless the Court otherwise orders and if requested by a relevant interested party each surety in support of a bail bond shall file an affidavit as to their current assets and liabilities as well as all known contingent liabilities, proceedings on foot, whether the subject of any earlier insolvency/bankruptcy, and whether the subject of service of any demand under the Corporations Act 2001 or Bankruptcy Act 1966 and the surety shall expressly undertake to the Court to file a further affidavit up dating the same within seven (7) days if any material adverse change in circumstances occurs. 	<p>While allowing a partnership or corporation to act as surety is supported in principle, before this amendment is considered in detail it may be necessary to address the threshold issue of whether bail bonds are still needed at all.</p>
Sale of a ship or property	
<p>Replace subrule 70(2) with a new subrule in the following terms:</p> <p>(2) The Court may make orders as to the method by which a ship or other property is to be sold.</p>	<p>The current subrule 70(2) does not reflect the current practice for the sale of a ship or other property. In all cases the method of sale is the subject of specific orders made in light of the nature of the ship or property and the circumstances of the case.</p> <p>The Federal Court’s proposal, while not in accordance with the amendment proposed by the Sydney Admiralty Users Group, reflects a policy change that will achieve greater flexibility to make the most appropriate orders for sale in all the circumstances of the case. The Federal Court proposal is supported by the NSWSC.</p>
Marshal’s fees	
<p>Replace Rule 72 (to be renumbered in Part XII) with the following:</p> <p>Rule 72 Marshal’s Fees (to be moved to Part XII) Taxation of the Marshal’s fees and expenses is dispensed with unless the Court otherwise orders. Further, any taxation of the Marshal’s fees and expenses is to exclude only fees and expenses which have been incurred unreasonably and otherwise than in good faith by the Marshal.</p> <p>Also delete the words “for taxation” at the end of Rule 71(c).</p>	<p>This non-contentious amendment is supported by the profession, the Federal Court and the NSWSC. By making taxations subject to an order of the Court, the proposed rule will prevent ‘frivolous’ taxations.</p>