

# The Admiralty Act 1988: Arrest of vessels and the Federal Court

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## I. ADMIRALTY ACT 1988

The Admiralty Act 1988 ("the Act") received the Royal Assent on 22 May 1988 and was proclaimed to commence on 1 January 1989. The Act was the end result of meticulous compilation by the Australian Law Reform Commission of the body of learning and draft legislation.

### A. Jurisdiction of the Federal Court

The Federal Court in common with the courts of the territories and the states is given jurisdiction in respect of proceedings commenced as actions in personam on a maritime claim or on a claim for damage done to a ship;<sup>1</sup> and in respect of proceedings that may, under the Act, be commenced as actions *in rem*.<sup>2</sup> Each court which has jurisdiction under the Act is given, by section 12, jurisdiction extending to a matter of Admiralty and maritime jurisdiction (not otherwise within its jurisdiction) that is associated with a matter in which the jurisdiction of that court under the Act is invoked. That makes applicable to courts called on to exercise Admiralty jurisdiction, the accretion of authority to section 32 of the Federal Court of Australia Act 1976, and analogous grants of jurisdiction.<sup>3</sup>

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1 Section 9(1).

2 Section 10.

3 Explanatory Memorandum circulated with Admiralty Bill 1988. Note on clause 12. See also eg *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457; *Fencott v Muller* (1983) 152 CLR 570 and *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261.

Proceedings that may be commenced as actions in rem against ships or other property include those on a maritime lien or other charge.<sup>4</sup> A maritime lien is defined, but not exhaustively, in section 15(2) of the Act.

By section 16 it is provided that a proceeding on a proprietary maritime claim concerning a ship or other property may be commenced as an action in rem against the ship or property. A "proprietary maritime claim" is defined in section 4(2) of the Act as denoting a claim relating to possession, title to, or ownership of a ship or a share in a ship; a mortgage of a ship or its freight; a claim between co-owners in relation to the possession, ownership, operation or earnings of the ship; a claim for the satisfaction or enforcement of a judgment against a ship or other property in a proceeding in rem in the nature of a proceeding in Admiralty; or a claim for interest in respect of one of the foregoing claims.

The definition of a "general maritime claim" in section 4(3) is much wider but the right to commence a proceeding as an action in rem against the ship or property is made by section 17 to depend on a "relevant person" being, when the cause of action arose, the owner or charterer of, or in possession or control of, the ship or property, and when the proceeding is commenced, the owner of the ship or property. "Relevant person", in turn, is defined by section 3, in relation to a maritime claim, as a person who would be liable on the claim in a proceeding commenced as an action in personam. By section 18 a proceeding on a maritime claim concerning a ship only may be commenced as an action in rem against the ship where a relevant person was, when the cause of action arose, the owner or charterer, or in possession or control, of the ship, and is, when the proceeding is commenced, a demise charterer of the ship.

The nexus provided by the "relevant person" is also invoked by section 19 which confers a right of proceeding on a *general maritime claim* as an action in rem against a "sister" or "surrogate" ship. That right is conditioned upon the relevant person having been, when the cause of action arose, the owner or charterer of, or in possession or control of, the ship which the general maritime claim concerned, and being, when the proceeding is commenced, the owner of the surrogate ship.

Section 20 effectively requires that service of initiating process may be effected on only one ship at a time, and only one ship may be under arrest in a proceeding at any one time. That does not preclude a plaintiff from referring in the writ to more than one ship and later

<sup>4</sup> Section 15.

selecting one to serve and have arrested.<sup>5</sup> Once arrested, a ship may be re-arrested in the same proceeding only if the court so orders<sup>6</sup>.

One slight advantage of the institution of proceedings in the Federal Court is indicated by section 22. By subsection (1) it is provided that service of a writ issued out of the Federal Court, and arrest of the ship, may be effected at any place within Australia including the limits of its territorial sea. On the other hand, by section 22(2) service of a writ issued out of a State or Territory court may only be effected out of the jurisdiction of that court if, at some time during the currency of the writ, the res has been within the jurisdiction of the State or Territory court.<sup>7</sup> Thus, if it is known at the time of issue that the ship or property will be entering Australian waters, but details of its passage are unknown, effective service could be ensured regardless of its movements, by issuing in the Federal Court. A "right of innocent passage" as prescribed by section 22(4).

Section 27 confers broad powers to transfer proceedings pending in the Federal Court, or a State or Territory court, to another court that has jurisdiction in respect of the subject matter of the claim. By section 28 there is power to remit a proceeding commenced as an action *in rem* in the Federal Court or the Supreme Court of a State to a State Court or a court of the Territory in which service was effected on the res, provided that the transferee court would have had jurisdiction had the proceedings been commenced as an action *in personam* and served within the locality within which the transferee court may exercise jurisdiction. This provision would permit, for example, remitter from the Federal Court to the County Court of proceedings *in rem* where the amount of money involved suggests that court to be the appropriate forum. In a recently published annotation of the Act it is surmised that<sup>8</sup>—

It is likely that Federal and Supreme Courts would retain control over such matters as arrest, custody and sale of the res but the determination of the merits of a claim could be remitted to a lower court.

What the learned author there contemplates is facilitated by section 30 which gives the transferring or remitting court a discretion to deal with a ship or property under arrest as though the proceeding had not been transferred or remitted, or to make such orders as are necessary or convenient for transferring custody of the ship or property to the other court.

<sup>5</sup> *The Banco* [1971] 1 Lloyd's Rep 49, 53.

<sup>6</sup> Section 21.

<sup>7</sup> Explanatory Memorandum, cl 22, note 3.

<sup>8</sup> S Hetherington *Annotated Admiralty Legislation* (Lawbook Company, Sydney, 1989) p 75.

In the circumstances postulated in my discussion of section 22 as making it desirable to issue in the Federal Court, the power of transfer or remitter under section 27 or section 28 could be invoked even before service has been effected.

If a ship or other property is under arrest in a proceeding in which it appears to the court that the claim should be determined by arbitration or in a foreign court, the court in which the proceeding is pending may stay or dismiss the proceeding on condition that the *res* be retained by the court as security for the satisfaction of an award or a judgment in the foreign court.<sup>9</sup> Whether or not to stay or dismiss the proceeding is a matter for the discretion of the court which may impose such conditions as it thinks just, including conditions with respect to the institution or prosecution of the arbitration or proceeding in a foreign court, and the provision of equivalent security for the satisfaction of any award or judgment which may result.<sup>10</sup>

By section 29(4) the court may make interim orders for the purpose of preserving the *res*, or the rights of a party or person interested in it. As well, under section 29(5) a court which has stayed a proceeding may make an appropriate order in relation to a ship or other property under arrest to give effect to an award or foreign judgment which is otherwise enforceable in Australia.

#### B. Effect of Judgments in rem

A "relevant person" who has entered an appearance in a proceeding commenced as an action *in rem* is personally liable for the full amount of the judgment even if it exceeds the value of the *res*. However, a defendant who has entered an appearance but is not a relevant person is liable only for costs, if any, ordered against him. Save for those costs, the plaintiff must look to the proceeds from the sale of the *res* to satisfy his judgment.<sup>11</sup>

Section 34 of the Act makes the party or person responsible for one or other of these acts or omissions liable in damages to a party or person interested in the *res* who has suffered loss or damage as a direct result.

#### C. Priorities on Sale of Surrogate Ship

Where a surrogate ship has been arrested pursuant to section 19 in a proceeding on a general maritime claim against another ship, the order in which the general maritime claims against both the ships shall be paid out of the proceeds of the sale of the surrogate ship shall be

<sup>9</sup> Section 29(1).

<sup>10</sup> Section 29(3).

<sup>11</sup> Section 31.

determined as if all the claims were general maritime claims against the surrogate ship.<sup>12</sup> A conscious decision has been made not to attempt to codify the principles which have been enunciated by courts of Admiralty for the ranking of competing claims to be satisfied out of the proceeds of the sale of the *res*. It has been left to courts exercising jurisdiction under the Act to continue to apply those principles.<sup>13</sup>

#### D. Interaction of Arrest and Statutory Power of Detention

The Act resolves this potential conflict by rendering a ship under arrest pursuant to the Act immune from the exercise of some other statutory power to detain the ship in relation to a civil claim.<sup>14</sup> As well the exercise of the other statutory power of detention does not prevent the arrest of the ship under the Act,<sup>15</sup> and after the arrest the statutory detention is suspended for so long as the arrest subsists.<sup>16</sup> However, as a corollary, the civil claim in respect of which the statutory detention was, or would have been, exercisable is payable, unless the court otherwise directs in priority to any claim against the ship other than for the Marshal's expenses.<sup>17</sup>

#### E. Limitation of Actions

Section 37(1) makes applicable to a proceeding brought on a maritime claim or on a claim on a maritime lien or other charge, the limitation period that would have been applicable if the proceeding had been brought otherwise than under the Act, ie as an action in personam.<sup>18</sup>

Any power to extend the time limit which would have existed had the proceeding been brought otherwise than under the Act, is exercisable by the court which hears the proceeding under the Act.<sup>19</sup> The absence of the *res* from the jurisdiction is not to be taken into account in the exercise of that power.<sup>20</sup>

Section 37(2) preserves the operation of any statutory time limit imposed by a Commonwealth or Imperial Act or an Act or Ordinance

<sup>12</sup> Section 35.

<sup>13</sup> Explanatory Memorandum, cl 35; ALRC Report No 33, paras 256-258.

<sup>14</sup> Section 36(2).

<sup>15</sup> Section 36(3).

<sup>16</sup> Section 36(4).

<sup>17</sup> Section 36(5).

<sup>18</sup> Explanatory Memorandum, cl 37, note 1.

<sup>19</sup> Section 37(3).

<sup>20</sup> Section 37(4).

of a State or Territory.<sup>21</sup> If no proceeding could have been brought on the claim otherwise than under the Act, a period of three years from the accrual of the course of action is imposed by section 37(1)(b). The Admiralty doctrine of laches is abolished by section 37(5).

#### *F. Mode of Trial*

A proceeding under the Act commenced as an action in rem, a limitation proceeding and a proceeding that is associated with either shall be tried without a jury in any court of Admiralty including the Federal Court.<sup>22</sup>

#### *G. Mutual Assistance by Courts of Admiralty*

This is provided for by section 40 of the Act. It is likely to be invoked particularly where the court in which the warrant is issued does not have an officer located close enough to the ship or other property to effect an arrest expeditiously and economically.

## II. ADMIRALTY RULES

### *A. General*

The Admiralty Rules are embodied in SR 269 of 1988. They do not comprise an exhaustive code of procedure for the conduct of proceedings under the Act. Consequently, in proceedings in the Federal Court, the Federal Court Rules will have full application except to the extent that they are inconsistent with the Admiralty Rules.<sup>23</sup> This means, for example, that the Federal Court practice of fixing a time for a first directions hearing upon issue of proceedings will apply to proceedings in Admiralty. A writ in accordance with Form 6 of the Admiralty Rules should therefore be prepared to include a notification of the time and place of the first directions hearing in accordance with Form 5 in the First Schedule to the Federal Court Rules.<sup>24</sup>

### *B. Marshal and Registrars*

By rule 4(1) of the Admiralty Rules powers, functions and duties conferred or imposed on the Registrar by the rules are entrusted to an officer of the court appointed by the court to be a Registrar or authorised by the court to act as such. The Principal Registrar of the Federal Court and each of the District Registrars has been appointed a

<sup>21</sup> See eg s396 of the *Navigation Act*, subs (3) of which has been amended by s56 of the Act, consistently with s37(4) to remove lack of reasonable opportunity of arresting the defendant ship as a specific ground for the extension of the limitation period imposed by s396(1) of the *Navigation Act*.

<sup>22</sup> Section 38.

<sup>23</sup> See r6(1) and ALRC Report No 33, para 283.

<sup>24</sup> Federal Court Rules 0.4 r1.

Registrar as contemplated by that rule. Similarly, provision is made by rule 4(2) for the appointment of Marshals and the authorisation of a person (whether an officer of the court or not) to exercise the powers and functions and perform the duties of a Marshal. The Marshal in Admiralty is the counterpart of the Sheriff in a civil court. Accordingly, the Sheriff and the Deputy Sheriffs of the Federal Court have all been authorised to exercise the powers and functions and perform the duties of a Marshal pursuant to Rule 4(2). The instrument of appointment is dated 22 December 1988 and is in these terms —

I, the Honourable Sir Nigel Hubert Bowen, A.C. K.B.E., Chief Justice of the Federal Court of Australia, hereby direct those persons holding the offices of Registrar, Deputy Registrar, District Registrar or Deputy District Registrar of the Court to perform all or any of the duties or functions which may be performed by a Registrar under the Admiralty Act 1988 and the Rules made thereunder AND those persons holding the offices of Sheriff or Deputy Sheriff of the Court to perform all or any of the duties or functions of a Marshal under the Admiralty Act 1988 and the Rules made thereunder.

Pursuant to section 35(4) of the Federal Court of Australia Act 1976, officers attached to the Sheriffs' offices within the Supreme Courts of some states have been appointed Deputy Sheriffs of the Federal Court.

### *C. Caveats*

#### *1 Caveats against arrest*

So that a single centralised Register may be available, the keeping of the Register of Caveats against Arrest is entrusted by rule 7(1) exclusively to the Federal Court which alone may set aside such a caveat.<sup>25</sup> The Chief Justice of the Federal Court has provided the following information about the maintenance of the Register of Caveats against Arrest and the Register of Caveats against Release which are discussed below —

The Registrar has written to each District Registrar indicating the manner in which these Registers will be maintained. They will be incorporated in the Court's data base so that searches may be made in each capital city using the computer access equipment presently located there. It is noted that Darwin is to be connected to this system in January or February 1989.

I am writing to the Chief Justice of the various Supreme Courts indicating to them the manner in which the Court will maintain the Register of Caveats against Arrest. The various District Registrars can search these Registers on request and it is envisaged no charge will be made for such searches.

A caveat may be against the arrest of a ship or other property and should be in accordance with Form 2 in the Schedule to the Admiralty Rules. The caveator must satisfy the Registrar by an undertaking endorsed on the caveat in accordance with Form 3, or otherwise, that

<sup>25</sup> Rule 7(5).

the caveator will enter an appearance if a proceeding is commenced against the *res* in an Australian court and will comply with the requirements of rule 9 as to payment into court or bail. One of the ways in which the Registrar may be satisfied otherwise than by an endorsement on the caveat is by a written undertaking to satisfy any judgment for the amount specified in the caveat, being an undertaking given by a Protection and Indemnity Club or a bank as described in rule 7(4).

The mechanism of caveats provides a measure of protection against unjustified arrest since an applicant for a warrant of arrest is obliged to depose to the results of a search of the Register of Caveats against Arrest.<sup>26</sup> Form 2 envisages that the *res* to which a caveat refers is to be identified as or by reference to one ship only. A solicitor who fails to comply with an undertaking endorsed on a caveat is liable to be committed for contempt,<sup>27</sup> presumably of the court in which proceedings are commenced. The filing of a caveat itself constitutes an undertaking by the caveator to enter an appearance of the kind specified in the caveat in a proceeding in rem and to comply with rule 9. That undertaking is enforceable by the court in which the proceeding is commenced.<sup>28</sup> A caveator who fails to comply with that undertaking as to payment into court or the provision of bail within three days after having been served with a relevant writ in rem is liable for committal.<sup>29</sup>

### 2 Caveats against release

By this mechanism, rule 10 enables a claimant against the same *res* to issue a caveat against release where the *res* has been arrested at the instance of another claimant. The caveat should be in accordance with Form 4. Each State Court of Admiralty, as well as the Federal Court, is required to maintain a Register of Caveats against Release effected by that court<sup>30</sup> and may set aside, wholly or in part, a caveat on its Register.<sup>31</sup>

### 3 Caveats generally

Both types of caveat remain in force for twelve months or such shorter period not being less than seven days as is specified in the caveat unless sooner withdrawn or set aside, and may be replaced by a

<sup>26</sup> See Form 13, and s34 of the Act.

<sup>27</sup> Rule 75.

<sup>28</sup> Rule 8.

<sup>29</sup> Rule 9.

<sup>30</sup> Rule 14(2).

<sup>31</sup> Rule 11.

further caveat.<sup>32</sup> Withdrawal of caveats is to be by instrument in accordance with Form 5.<sup>33</sup>

## D. Commencement of Proceedings

### 1 Institution of proceedings

Separate initiating process must be used for an action *in rem* from that commenced as an action *in personam*.<sup>34</sup> The initiating process in an action *in rem* remains effective for service for a period of twelve months after issue, and may not be served after that time without the leave of the court.<sup>35</sup> By Rule 22 a statement of claim in an action *in rem* is, unless the court otherwise orders, to be filed and served within fourteen days of entry of appearance on each party who enters an appearance, and on any current caveator within fourteen days of service of the writ on that caveator. The statement of claim should be in accordance with Form 8. A party to the proceeding must enter an appearance within twenty-one days of service of the writ.<sup>36</sup>

### 2 Service

Service of a writ in rem is generally to be effected in the traditional way by affixing a sealed copy to the mast or other conspicuous part of the ship,<sup>37</sup> or the other property if it is not then on board a ship<sup>38</sup> and may be effected by a Marshal.<sup>39</sup> Rule 30(3) provides for an alternative mode of service on a person apparently in charge of the ship or property, if access cannot reasonably be gained to the *res*. For service where the *res* is the proceeds of the sale of a ship or other property which have been paid into court, see rule 31, and for service on a caveator, see rule 32. Substituted service of a writ *in rem* is not available,<sup>40</sup> but service may be effected in the usual way on a solicitor who undertakes in writing to accept it.<sup>41</sup>

## E. Arrest

### 1 Arrest

By rule 39, application for an arrest warrant is to be made in accordance with Form 12 and supported by an affidavit deposing to the matters indicated in Form 13. A warrant for arrest is to be under

<sup>32</sup> Rule 12.

<sup>33</sup> Rule 13.

<sup>34</sup> Rule 18.

<sup>35</sup> Rule 20.

<sup>36</sup> Rule 23.

<sup>37</sup> Rule 30(1).

<sup>38</sup> Rule 30(2).

<sup>39</sup> Rule 33.

<sup>40</sup> Rule 34.

<sup>41</sup> Rule 37.

the hand of the Registrar and in accordance with Form 14. It shall not be issued without the leave of the court if the Registrar becomes aware that a relevant caveat is in force and the caveator has been given the three days stipulated by rule 9(2) to comply, and has complied, with that sub-rule.<sup>42</sup>

By rule 41 an application for an arrest warrant constitutes an undertaking to the court to pay the Marshal's fees and expenses in relation to the arrest. Only a Marshal may execute an arrest warrant, and then only when the writ *in rem* has previously been served,<sup>43</sup> or is to be served concurrently with the execution of the warrant.<sup>44</sup> Once a warrant has been issued the applicant may request, in accordance with Form 15, or the court may order, that it not be executed.<sup>45</sup> See rule 43(7) for the power of the court, on the application of a caveator or an interested person in relation to the *res*, to discharge an arrest warrant or stay or defer its execution.

After a warrant has been executed, the *res* remains under arrest until lawfully released or sold by order of the court.<sup>46</sup> A Marshal may execute a warrant on any day,<sup>47</sup> and is required to verify the execution by affidavit in accordance with Form 16.<sup>48</sup>

#### 2 Custody of arrested property

Upon execution of the arrest warrant, the *res* passes into the custody of the Marshal whose powers to retain safe custody and preserve the ship or other property are indicated by rule 47(2). The Marshal is given by rule 53 what amounts to a lien over the *res* for his fees and expenses in connection with its custody while it was under arrest.

Subject to an order under section 30(2)(b) of the Act, if an arrest effected earlier by a Marshal of another court is still subsisting, custody of the *res* does not pass to a later arresting Marshal.<sup>49</sup> However, a court whose Marshall has custody may make such orders as are necessary or convenient to transfer custody to the Marshal of another court in which a proceeding in respect of the same *res* is pending.<sup>50</sup>

<sup>42</sup> Rule 40.

<sup>43</sup> A similar monopoly is given to the Marshal by r70(1) in respect of the sale of the ship or other property.

<sup>44</sup> Rule 43.

<sup>45</sup> Rule 43(5) and (6).

<sup>46</sup> Rule 44.

<sup>47</sup> Rule 46. This is consistent with the practice in England where the restriction in the rules of court which prevents service of documents on a Sunday does not apply to warrants of arrest or writs *in rem* (RSC Ord 752.11(3)).

<sup>48</sup> Rule 45.

<sup>49</sup> Rule 47(3).

<sup>50</sup> Rule 47(4).

By virtue of rule 48, a Marshal may apply to the court for directions in respect of the *res*.<sup>51</sup> As well, provision is made by rule 49 for applications to the Marshal or the court for the discharge of cargo from a ship where the ship, but not the cargo, is under arrest or vice versa.

#### 3 Release from arrest

The circumstances in which the Registrar may order release on an application in accordance with Form 18, are indicated by rule 51. Where a caveat against release is in force, the Registrar may not order release of the *res* unless the court so orders.<sup>52</sup> A wider discretion to order release is conferred on the court by rule 52.

#### 4 Bail

The provisions governing the release on bail of a ship or other property under arrest are collected in Part VII of the *Admiralty Rules*. In practice, except in salvage claims in respect of pleasure craft or other small vessels, it is likely that a guarantee or undertaking by a bank, insurance company, or Protection and Indemnity Club, will be accepted by agreement of the parties in lieu of bail.<sup>53</sup>

#### F. Assessment of Damages and Taking of Accounts by Registrar

This power is exercisable by the Registrar on reference from the court pursuant to rule 65. A determination by the Registrar is reviewable by the court pursuant to rule 68. Among the matters in respect of which such a reference might be granted is the assessment of damages for unjustified arrest or detention of a ship or other property.<sup>54</sup>

#### G. Valuation and Sale

The court, on application of a party, may make orders for the valuation, valuation and sale, or sale without valuation, of the *res*.<sup>55</sup> The court may also order a sale of its own motion if the *res* is deteriorating in value.<sup>56</sup>

#### H. Determination of Priorities

Rule 73 provides for the determination by the arresting court of the order of priority of claims against the ship or other property. Notice of

<sup>51</sup> The Court also has wide powers to make orders of its own motion with respect to a ship or other property under arrest, see r50.

<sup>52</sup> Rule 51(5).

<sup>53</sup> See *Halsburys Laws of England* (4 ed Butterworths, London, 1980) vol 1, Guarantee in lieu of bail, para 383, p 255.

<sup>54</sup> See s34(1) of the Act.

<sup>55</sup> Rule 69(1).

<sup>56</sup> Rule 69(5).

application for such a determination must be given in accordance with Form 28. Rule 73(4) and rule 74 appear to contemplate that the publication of that notice shall be procured by the Marshal and that the costs of doing so shall be part of the expenses of the sale of the res.

### III. THE EXPERIENCE OF THE FEDERAL COURT TO DATE

From the limited enquiries which I have been able to make in the course of preparing this paper, it seems that about three proceedings *in rem* have so far been issued out of the New South Wales District Registry of the Federal Court. One of those proceedings, G15 of 1989 was brought by second mortgagees of a 55 metre ocean-going yacht *The Sanyassin* which, after leaving Fremantle, was served and arrested on 24 January 1989 at the Cruising Yacht Club of Australia, Darling Point, New South Wales. Subsequently, on 8 March, an order was obtained from the Registrar for the release of *The Sanyassin* on the ground that "the plaintiff applicants are in possession of the vessel pursuant to its rights under the mortgage of the said vessel . . . and are satisfied that the Court's assistance is no longer required in relation to its security over the vessel".

Proceeding numbered G120 of 1989 was issued for the provisioning, refit and repair of the ship *Catrina B* but a request not to execute an arrest warrant in respect of her was filed on 14 March. Proceeding numbered G131 of 1989 has been issued against the *MV Pakarti Lima* for goods damaged in transit on that vessel en route from Korea to Sydney. A similar cause of action has been invoked on behalf of the same plaintiff in proceedings against *The Narrator* and *The Amaranthos* respectively numbered VG6 and VG11 of 1989 issued out of the Victoria Registry. No arrest warrant has been issued in either of those proceedings.