



FEDERAL COURT OF AUSTRALIA

Notice to Practitioners and Litigants issued by the Chief Justice

Conduct of Admiralty and Maritime Work in the Federal Court of Australia

The Notice to Practitioners in all States and Territories - Conduct of Admiralty and Maritime Work in the Federal Court of Australia issued on 21 December 2005 is revoked and this Notice is substituted.

The purpose of this Notice is to set out the arrangements for the conduct of Admiralty and maritime matters in the Federal Court. This Notice deals with the Court's national arrangements, the identification of Admiralty and maritime work covered by the arrangements, *in personam* proceedings, *in rem* proceedings, assisted dispute resolution, Court annexed arbitration, the proper approach to Admiralty and maritime litigation and the conduct of cargo claims.

National Arrangement

Since 2005 the Court has had a national arrangement whereby nominated Judges in each Registry undertake the Admiralty and maritime work of the Court (defined below) at first instance and, as far as practicable, on appeal. They are assisted by nominated Registrars, skilled Registry officers and Admiralty Marshals. A National Convening Judge and Registry Convening Judges co-ordinate the work and harmonise practice and procedure in accordance with this Notice.

The Judges involved are as follows:

WA	Siopis J	(Registry Convening Judge)
SA & NT	Besanko J Finn J	(Registry Convening Judge)
Vic & Tas	Ryan J Finkelstein J	(National Convening Judge and Registry Convening Judge)
NSW & ACT	Lindgren J Emmett J Rares J Buchanan J	(Registry Convening Judge)
Qld	Dowsett J Greenwood J	(Registry Convening Judge)

External Territories – according to Registry of filing

Admiralty and Maritime Matters

The Admiralty and maritime work of the Court is **not** limited to proceedings under the *Admiralty Act 1988* (Cth). It includes any matter or proceeding **under or by reference to** any of the following Acts and Regulations:

- *Admiralty Act 1988* (Cth) and Admiralty Rules
- *Australian Maritime Safety Authority Act 1990* (Cth) and regulations thereunder
- *Carriage of Goods by Sea Act 1991* (Cth) and regulations thereunder
- *Environment Protection (Sea Dumping) Act 1981* (Cth) and regulations thereunder
- *Export Control Act 1982* (Cth) and regulations thereunder
- *Fisheries Management Act 1991* (Cth) and regulations thereunder
- *Limitation of Liability for Maritime Claims Act 1989* (Cth) and regulations thereunder
- *Marine Insurance Act 1909* (Cth) and regulations thereunder
- *Maritime Transport and Offshore Facilities Security Act 2003* (Cth) and regulations thereunder
- *Navigation Act 1912* (Cth) and regulations thereunder, including the Navigation (Collision) Regulations 1982
- *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth) and regulations thereunder
- *Protection of the Sea (Civil Liability) Act 1981* (Cth) and regulations thereunder
- *Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund Customs) Act 1993* (Cth) and regulations thereunder

- *Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund Excise) Act 1993* (Cth) and regulations thereunder
- *Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund General) Act 1993* (Cth) and regulations thereunder
- *Protection of the Sea (Oil Pollution Compensation Fund) Act 1993* (Cth) and regulations thereunder
- *Protection of the Sea (Powers of Intervention) Act 1981* (Cth) and regulations thereunder
- *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth) and regulations thereunder
- *Protection of the Sea (Shipping Levy) Act 1981* (Cth) and regulations thereunder
- *Protection of the Sea (Shipping Levy Collection) Act 1981* (Cth) and regulations thereunder
- *Sea Installations Act 1987* (Cth) and regulations thereunder
- *Seafarers Rehabilitation and Compensation Act 1992* (Cth) and regulations thereunder
- *Shipping Grants Legislation Act 1996* (Cth) and regulations thereunder
- *Shipping Registration Act 1981* (Cth) and regulations thereunder
- *Ships (Capital Grants) 1987* (Cth) and regulations thereunder.

Causes of action under any such legislation and administrative or other proceedings brought in connection with that legislation are Admiralty and maritime matters. These include applications under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), appeals from the Administrative Appeals Tribunal and applications under s 39B(1) or s 39B(1A) of the *Judiciary Act 1903* (Cth). Any proceeding that raises issues under these Acts or Regulations is an Admiralty or maritime matter.

The attention of practitioners is drawn to the general conferral of civil jurisdiction upon the Court in all matters arising under a law of the Commonwealth Parliament: see *Judiciary Act 1903* (Cth), s 39B(1A)(c); Allsop J, 'Federal Jurisdiction and the Jurisdiction of the Federal Court of Australia in 2002' (2002) 23 *Aust Bar Rev* 29 (an updated version of which is at http://www.fedcourt.gov.au/pdfsrtfs_a/admiralty_papersandpublications16.pdf); Rares J, 'Australia's Sea Change: Towards Developing a Comprehensive System of Admiralty and Maritime Dispute Resolution for Twenty-First Century Trade in the Asia-Pacific Region' (2008) 30 *Aust Bar Rev* 243 (also at http://www.fedcourt.gov.au/how/admiralty_papersandpublications26.html). For instance, a marine insurance dispute involving an issue under the *Marine Insurance Act 1909* (Cth) could be

brought in the Federal Court as a matter arising under a law of the Parliament and would be dealt with under these arrangements.

When commencing an Admiralty and maritime proceeding, practitioners should advise the Registry staff at the time of filing that the matter is of that nature so that it can be allocated to a nominated Admiralty and maritime Judge in that Registry.

***In Personam* Proceedings and Registry Convening Judges**

The Registry Convening Judges attempt to harmonise procedure in *in personam* actions in the same way as *in rem* actions are dealt with consistently by the Court nationally.

The Registry Convening Judge in each Registry acts as an Admiralty and Maritime Procedure Judge. Until the proceeding is allocated for hearing, all interlocutory and procedural matters are dealt with by the Procedure Judge. All directions hearings and interlocutory issues and hearings involved in bringing matters on for trial are dealt with by the Procedure Judge. At the appropriate time in the preparation and conduct of any matter, it will be allocated a date for hearing before one of the Admiralty and maritime Judges in that Registry through the allocation system that underpins the docket system used by the Court.

Urgent Admiralty or maritime applications should be made to the Procedure Judge or, if he or she is unavailable, to another Admiralty and Maritime Judge in the Registry. This arrangement is not intended to change the procedure under the Admiralty Rules as to applications for arrest that are made to the Registrar. For urgent applications outside business hours, practitioners may contact the relevant Registry using the after hours telephone number listed on the Court website under “Contact the Court” (<http://www.fedcourt.gov.au/contacts.html>).

***In Rem* Proceedings**

These arrangements make no substantive change to existing *in rem* procedure. Applications for arrest are made under the Admiralty Rules to the District Registrar. If, however, an application is required to be made to a Judge, parties should first approach the Procedure Judge through his or

her associate. If the Procedure Judge is not available any other Admiralty and Maritime Judge in the Registry should be approached.

The Marshals of the Court are available to arrest a vessel anywhere in Australia at any time on any day of the year.

The Court has its own Marshals in every State and Territory and suitably qualified staff from relevant agencies (usually the Sheriff's Office or local police) around Australia have also been appointed as Federal Court Marshals. Additional Marshals are based in regional and remote parts of Australia.

Arrangements are also in place in each Registry for the urgent appointment of a Marshal. A Marshal may be appointed, for example, when there is insufficient time for a Registry-based Marshal to reach the vessel before it leaves the jurisdiction or when the cost of sending a Registry-based Marshal to the vessel is excessive. Such appointments are strictly supervised by the principal Marshal in the relevant Registry of the Court.

The Marshals have maritime skill and experience or have persons with that skill and experience readily available to them.

Applications to arrest vessels or applications in respect of arrests may be made at any time and the Court is available at all times to deal with such applications. After hours telephone numbers are listed on the Court website under "Contact the Court" (<http://www.fedcourt.gov.au/contacts.html>).

There is no poundage in the Federal Court. It was **abolished** in the Federal Court in 2004.

The approach of the Court to the Marshal's costs is to restrict the costs charged to the parties to the direct third party costs involved in the arrest, other than in exceptional cases where the amount of work necessitates the provision of additional staff.

Assisted or Alternative Dispute Resolution (ADR)

Section 53A of the *Federal Court of Australia Act 1976* (Cth) provides for Court-ordered mediation and arbitration (the latter only with consent). Immunity is conferred on the mediator or arbitrator by s 53C. The parties are expected to discuss the utility of any such ADR mechanism in their case. The Court has Registry officers who are knowledgeable in maritime matters and cargo claims and who are nationally accredited mediators. Early mediation or early neutral evaluation by a Registrar or a third party will be encouraged and sometimes ordered. Mediation can also be used to help identify and reduce issues and dispute, or to eliminate procedural arguments, as well as for the purposes of resolving the whole matter.

It is expected that parties will always seek an early resolution of matters and that they will consider Court annexed mediation or early neutral evaluation. This is especially so for the resolution of small claims in a speedy and inexpensive manner.

In appropriate cases, particularly in small claims, directions will be made on the first return date, or shortly thereafter, for a case management conference to be held before the Registry Convening Judge or Registrar as soon as possible. At this conference the Judge or Registrar will seek to identify whether the matter is appropriate for an early mediation (perhaps undertaken on the basis of the parties' instructions, as opposed to statements), what issues are involved and the most timely and efficient method of disposing of the matter.

As well as its Registrars, the Court has other staff with skills and expertise in maritime matters, some of whom are Marshals. These members of the Court staff are available as required in any Registry to conduct or assist in the conduct of mediations carried out by Registrars. By way of example, Registry staff include persons who have expertise in cargo claim handling, loss adjusting and navigation.

***Ad Hoc* Retained Expertise and ADR**

In appropriate cases the Court is prepared to make available outside persons with relevant skills retained by the Court on an *ad hoc* basis. They would assist in the resolution of matters using

mediation or early neutral evaluation. The engagement of such persons would generally be through the offices of professional or industry associations.

Court Annexed Arbitration

The Court also has power to refer matters (by consent) to arbitration under s 53A of the *Federal Court of Australia Act 1976* (Cth). If parties desire a Registrar to act as an arbitrator, this can be arranged. Speedy procedures akin to those of the London Maritime Arbitration Association Small Claims Procedures can be used. This may be particularly suitable in small cargo claims. If this course were taken, parties could agree to deal with the matter on the papers, or with minimal oral evidence, waiving rules of evidence. If a Registrar acts as arbitrator, fees (hearing and room) are not incurred. Sections 53AA and 53AB provide for referral of questions of law and review on a question of law to the Court. By this mechanism appeals on factual questions can be eliminated.

Approach of Practitioners and Litigants to Admiralty and Maritime Litigation

Parties are urged to agree upon short minutes of order sufficiently prior to any scheduled directions hearing such that they can be sent, where agreed, by email to the Judge's associate. Where possible, a directions hearing will be vacated if the parties can agree upon an appropriate regime prior to the nominated time and date of the directions hearing. An exception to this convenient method of procedure is where one (or more) of the parties is or has been in significant default of existing orders, or where there are difficult issues which need, sooner rather than later, to be ventilated. It is inappropriate for one party to send submissions, letters and partisan documents to the judge. The facsimile machine and the email system are not to be used for private or unilateral filing of submissions or complaints without the leave of the Court, but if all parties agree on a communication being sent to the Judge it may be forwarded, without leave, to the associate.

At some early point in the procedural conduct of the matter, the Court must be informed of the nature of the dispute, the real issues in dispute, how the essential facts are to be proved, whether or not there are technical issues and whether there are any particular evidential difficulties because of expert or overseas witnesses. The Court appreciates that in Admiralty and maritime

matters both the plaintiff and the defendant may, on occasions, need extra time to obtain instructions from overseas clients and to ascertain what did or did not happen in places or on ships which may be both far away and inaccessible. Nevertheless, the Court expects the parties and their legal representatives promptly to ascertain, as far as is reasonably possible, the nature and extent of the facts which pertain to any particular case. This is not limited to the particular points which the party wants to prove. It is not an acceptable way of conducting litigation to ‘put the other side to proof’ on all issues. The parties are expected to identify the real and genuine issues in dispute, whether of fact or law, after due investigation. It is the duty of the profession to assist the Court in the performance of its duty to resolve disputes by reference to what truly is, or should be, in dispute: see generally *Ashmore v Corporation of Lloyd’s* [1992] 1 WLR 446, 453; the speech by Hayne J ‘Judicial Case Management and the Duties of Counsel’, 24 February 1999 to the Readers of the Bar Practice Course, Brisbane (accessible at www.hcourt.gov.au/publications_05); and Hayne J, ‘The Vanishing Trial’ (2008) 9(1) *The Judicial Review* 33. In this context, parties should expect that the Court will be ready to use s 190(3) of the *Evidence Act 1995* (Cth) in appropriate circumstances to lessen the cost of proving matters not *bona fide* in dispute.

How the parties co-operate to identify the issues in dispute, and to agree on facts that are not truly in dispute is a matter for the profession and their commercial clients. An aspect of the co-operation between the parties’ representatives that the Court expects, however, is the provision of information and documentation in a prompt and timely fashion. Where legal practitioners make reasonable requests for documents or information (whether strictly ‘particulars’ or not) those requests should generally be met without the delay. Although in some cases, the formality (and cost) of a verified list of documents may be necessary.

These matters should be made plain to clients. In dealing with questions of costs the Court will presume that clients have been made aware of the general approach and the expectations of the Court reflected in this Notice.

Conduct of Cargo Claims

The Court expects practitioners to approach the resolution of cargo claims in the manner most conducive to a speedy and cost-efficient resolution, and where possible, to avoid disputes about pleadings and the provision of information.

Once a cargo claim proceeding has been commenced, the Court expects the parties to consider actively what steps (including the making of offers) have been, or should be, taken to settle or mediate the matter. The Court may order parties to mediate or attend a case management conference before a Registrar to explore ADR possibilities and/or the narrowing of issues.

The Court expects the parties to address at least the following matters with the aim of defining or eliminating issues:

1. The identification of the relevant bill of lading or sea carriage document (the SCD) or other transport document.
2. The identity of the carrier, or carriers, contractual and actual, and the nature of any dispute about that.
3. If the party said to be the actual carrier is different from the contractual carrier, the terms under which the actual carriage is said to have been performed.
4. If the goods were containerised, whether the container was packed or stuffed by or on behalf of the shipper or other cargo interest or by or on behalf of the carrier.
5. The description of the goods in the SCD or other transport document
6. The legal regime said to govern the carriage: which national law and through it, or otherwise, which convention or regime applies: Hague Rules (HR) or Hague-Visby Rules (H-VR) or Australian Amended Hague-Visby Rules (AAH-VR) or Hamburg Rules (Ham R) or other variant.
7. Whether any limitation of liability or time bar argument arises or may arise by reference to such provisions as Article 4 rule 5 of the HR, H-VR, Ham R or AAH-VR or other variant.
8. The causes of action relied upon against each defendant.
9. Provision of proper particulars of:
 - (a) any claims (e.g. failure to comply with Art III r 1 by exercising due diligence to make the ship seaworthy);

- (b) any defences.
- 10. If title to sue is in issue, the facts said to give rise to the title to sue under the relevant *Sea-Carriage Documents Act* or otherwise.
- 11. The nature of the damage and the detailed breakdown of the claim.

If, after the parties have had due opportunity to consider all relevant issues and after the close of pleadings, it appears that the matter is likely to proceed to trial, the parties are expected to consult and co-operate in the production of a document entitled “Agreed Statement for Court” which sets out:

1. Relevant matters not in dispute which can form the basis of an agreed statement of facts to be tendered at the trial.
2. Matters in dispute and the basis for the dispute.
3. Whether the plaintiff or defendant will or may:
 - (a) ask the Court to have resort to s 190(3) of the *Evidence Act 1995* (Cth) to waive the rules of evidence in respect of issues not genuinely in dispute or in respect of issues where the application of the provisions referred to in s 190(1) of the *Evidence Act 1995* (Cth) would cause or involve unnecessary expense or delay;
 - (b) seek summary judgment or disposal under s 31A of the *Federal Court of Australia Act 1976* (Cth) or otherwise.
4. A skeleton description of the general nature of the evidence to be led in the proceeding, identifying lay and expert evidence and what issues are to be proved by such evidence.
5. Any need for video-link evidence and any restriction upon, or protocols concerning, the giving of evidence by video-link in the country from which the witness would give evidence.
6. The position taken by the parties as to referral of the dispute to mediation or arbitration before a Judge or Registrar or a person of the parties’ choosing.

To the extent that there are multiple defendants and cross-claims the Court will expect the parties to prepare documents referable to the position of each party.

Aim of the Arrangements

The Court's aim is that the full range of its facilities, including mediation, early neutral evaluation, arbitration and judicial hearing should be readily available to bring matters flexibly, inexpensively and speedily to resolution. The Court encourages the use of external mediation and arbitration. Equally it is able, should parties and the profession desire it, to provide specialised, skilled Judges and Registrars who can deal with matters in a variety of ways best suited to the particular maritime dispute.

This Notice is on the Court's Admiralty and Maritime website:

www.fedcourt.gov.au/how/admiralty.html.

Dated: 18 December 2008

M. E. J. BLACK
Chief Justice