

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2006 No. 287**

Issued by the authority of the Attorney-General

*Admiralty Act 1988*

*Admiralty Amendment Rules 2006 (No. 1)*

Section 41 of the *Admiralty Act 1988* (the Act) provides that the Governor-General may make Rules, not inconsistent with the Act, in relation to the practice and procedure to be followed in courts exercising jurisdiction under the Act and other incidental matters.

The Admiralty Act provides a uniform national law to govern the exercise of admiralty jurisdiction by Australian courts. In particular, it provides for actions to be brought ‘in rem’—that is, power to arrest a ship, including foreign ships, within Australian jurisdiction and to use that ship as security for a maritime claim. Actions in rem arise from the existence of a maritime lien or a statutory right of action based on a proprietary or general maritime claim arising under the general law and involving the ownership or operation of ships. The Act also provides for admiralty jurisdiction to be exercised in personam’—that is, directed against a specific person—in relation to maritime claims or claims for damage to a ship.

Amongst other matters, the Amendment Rules gave the Marshal of a court greater ability to recover costs and expenses incurred in exercising functions under the Act. The Marshal’s functions include powers in relation to the arrest, custody, preservation, discharge, release and sale of ships and other property.

The Amendment Rules also changed processes for giving surety for release of a ship or other property under arrest. In particular, the amendments allow a partnership or corporation carrying on business in the jurisdiction to act as a surety, and introduce requirements to better enable the parties to a matter to determine if a proposed surety is sufficient.

Other amendments simply reflect current drafting practice. The Amendment Rules also updated the Admiralty Rules to reflect the National Legal Profession Model Reforms, which are being progressively implemented by each State and Territory.

Details of the Amendment Rules are set out in the **Attachment**. The Amendment Rules were developed in conjunction with the Admiralty Rules Committee, which is established under section 42 of the Act to advise the Attorney-General with respect to the Admiralty Rules. It is constituted by not more than seven persons appointed by the Attorney-General, including a Judge of the Supreme Court of a State or Territory and a Judge of the Federal Court.

The Committee members have significant combined experience in admiralty matters. In reviewing the Admiralty Rules, the Committee consulted extensively with stakeholders including the Federal Court and various State Supreme Courts; the Maritime Law Association of Australia and New Zealand; and the Law Council of Australia.

The Amendment Rules amend the Admiralty Rules, which is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Amendment Rules commenced the day after they were registered in the Federal Register of Legislative Instruments.

**Details of the *Admiralty Amendment Rules 2006 (No. 1)***

Rule 1 gives the title of the rules as the *Admiralty Amendment Rules 2006 (No. 1)*.

Rule 2 provides for the commencement of the Rules on the day after they are registered on the Federal Register of Legislative Instruments.

Rule 3 specifies that the *Admiralty Rules 1988* (the Admiralty Rules) are amended in accordance with Schedule 1.

**Schedule 1**

Items 1 and 7

Items 1 and 7 remove the words “unless the contrary intention appears” from subrules 3(1) and 3(2). The words are considered unnecessary because, if a defined term is intended to have another meaning in a particular provision, this will be expressly stated. This approach reflects current drafting practice.

Items 2 and 6

Item 2 inserts a definition of “Act” while item 6 deletes the previous definition of “the Act”. The amendments reflect current drafting practice.

Item 3

Item 3 makes a technical amendment to the definition of “amount claimed” to replace the disjunctive “or” with the conjunctive “and” so that a reference to an “amount claimed” in the Admiralty Rules includes reference to interest and costs, as well as the principal amount.

Item 4

Item 4 inserts definitions of “Australian legal practitioner” and “authorised deposit-taking institution”. These terms are used in amendments to the Admiralty Rules proposed to be made by items 9, 11, 12, 18, 26, 27, 29 and 33.

Item 5

Item 5 inserts a definition of “costs, in relation to a proceeding” into the Admiralty Rules. Costs in relation to a proceeding have two possible components, those being a party’s reasonable costs of a proceeding, and any amount the party has paid or is liable to pay to a court or Marshal in relation to the arrest, custody, preservation, discharge, release or sale of a ship or other property.

#### Item 8

Item 8 inserts a new rule 6A giving a court broad discretion to waive compliance with the Rules. The rule is in corresponding terms as Order 1, Rule 8 of the Federal Court Rules.

#### Item 9

Item 9 replaces the words “a bank within the meaning of the *Banking Act 1959* or a State bank” in paragraph 7(4)(b) with the words “an authorised deposit-taking institution”. An approved deposit-taking institution is defined in revised subrule 3(1). It is a body corporate with an authority to carry on the business of banking issued under the *Banking Act 1959* by the Australian Prudential Regulation Authority.

#### Item 10

Item 10 substitutes subrule 9(1) to reflect current drafting practice.

#### Item 11

Item 11 substitutes rule 37 with new subrules 37(1) and (2). The amendments reflect current drafting practice, make the rule easier to read, and replace the term “solicitor” with “Australian legal practitioner”.

#### Item 12

Under rule 39 of the Admiralty Rules, a person may make an application for an arrest warrant against a ship or other property in relation to which they have commenced an action in rem. Item 12 replaces subrule 39(2) with new subrules 39(2) and (3).

Subrule 39(2) largely repeats the former subrule except that the word “solicitor” is replaced with “Australian legal practitioner”, while the word “shall” is replaced with “must” to reflect current drafting practice.

Subrule 39(3) specifies that the affidavit required to support such an application must set out the particulars of the claim and any facts necessary for such an application to be made under the Admiralty Act. A note is inserted below new subrule 39(3) referring to new subrule 43(8) (see item 15 below).

#### Item 13

Item 13 inserts new rule 39A which imposes a duty of disclosure on parties to a proceeding commenced as an action in rem. Where a party is aware of a fact or matter that may affect the safety of the Marshal or any other person, or the ship or property, it must disclose this to the Marshal as soon as it becomes aware of it. The amendment is designed to ensure that the Marshal is aware of any potentially unsafe features of a ship or property subject to the action and able to take appropriate action.

#### Item 14

Item 14 replaces rule 41 with a new rule. Former rule 41 provided that an application for an arrest warrant constituted an undertaking to the court that the applicant (or the applicant's solicitor) would pay to the Marshal, on demand, an amount equal to the fees and expenses of the Marshal in relation to an arrest. New subrule 41(1) changes the reference to fees and expenses to "costs and expenses" (which is defined in section 3 of the Admiralty Act) and specifies that the applicant or their legal representative ("Australian legal practitioner") must pay any expenses incurred while the ship or property is under arrest, not just the costs of the arrest itself.

New subrule 41(2) will empower the Marshal to require an applicant to pay a deposit to enable the Marshal to carry out the arrest and any duties the Marshal may perform while the ship is under arrest.

#### Item 15

Item 15 inserts new subrule 43(8), which provides that a caveator or interested person may apply to a court exercising admiralty jurisdiction for an order that an arrest warrant be discharged if the rule 39 requirements are not met. However, an arrest warrant will not necessarily be set aside because of a failure to comply with rule 39.

#### Item 16

Item 16 inserts new rule 48A into the Admiralty Rules. Rule 48A sets out the process for a Marshal, if an arrest warrant for a ship or other property has been issued, to give information relating to the Marshal's actual and anticipated costs and expenses in relation to the arrest of a ship or property to a party to the proceedings or a caveator against the release of the ship or property. The party or caveator must make a request in writing to the Marshal for the information. Upon receipt of the request, the Marshal must as far as reasonably practicable inform the party or caveator of the status of the arrest, the actual and anticipated costs and expenses of the Marshal, and any anticipated demands for a deposit or interim payment under rule 78 of the Admiralty Rules.

The Marshal must accede to the request unless it is unreasonable. Subrule 48A(3) provides that, if the Marshal does not respond to the request, the party or caveator who made the request may apply to the court for a direction that the Marshal provide the information. Subrule 48A(4) specifies that the costs and expenses incurred by the Marshal in responding to a request for information are to be taken to form part of the Marshal's costs and expenses in relation to the arrest. Such costs and expenses must be met by the party or caveator who made the request, unless the court orders otherwise.

#### Item 17

Item 17 substitutes a new rule 53. Former rule 53 provided that the Marshal may refuse to release an arrested ship or arrested property until satisfactory arrangements are made for the payment of the fees and expenses of the Marshal while the ship or property was under arrest.

New subrule 53(1) is structured in a similar manner to new subrule 41(1). It provides that an application for the release from arrest of a ship or property constitutes an undertaking to the court by the applicant, or the applicant's legal representative ("Australian legal practitioner") if the representative makes the application, to pay on demand to the Marshal an amount equal to the costs and expenses incurred by the Marshal in connection with keeping the ship or property under arrest, including costs and expenses associated with the release.

New subrule 53(2) restates the position as it applied under former rule 53 that the Marshal can refuse to release a ship or property from arrest unless satisfactory arrangements are in place for payment of the Marshal's costs and expenses.

#### Item 18

Rule 54 of the Admiralty Rules deals with bail bonds and the execution of the bond by sureties (of whom there must be two). Item 18 substitutes subrule 54(3) in order to reflect current drafting practice, make the rule easier to read, and replace the term "solicitor" with "Australian legal practitioner".

Item 18 also inserts new subrules 54(4) and 54(5). Subrule 54(4) provides that a partnership or corporation carrying on business in the jurisdiction in which the proceeding is commenced may act as a surety.

Subrule 54(5) provides that where the two sureties are corporations, they must not be related corporations within the meaning of section 9 of the *Corporations Act 2001*. A corporation is a 'related corporation' if it is a holding company, a subsidiary company or the holding company of a subsidiary company of the surety corporation (see section 50, *Corporations Act 2001*).

#### Items 19 and 21

Rule 56 deals with objections to bail by filing a notice of objection against the sufficiency of the proposed surety. Item 19 inserts new subrules 56(3A), (3B) and (3C) while item 21 inserts new subrules 56(4A) and (4B).

Subrule 56(3A) provides that the proposed surety must file and serve on each other party an affidavit regarding its financial circumstances. The affidavit must contain, at the least, the matters set out in subrule 56(3B). Subrule 56(3C) provides that, after the affidavit has been filed, the Registrar may, in his or her discretion, direct the proposed surety to file and serve an additional affidavit setting out certain additional information.

Subrule 56(2) provides for the Registrar to set a date, time and place to determine whether the proposed surety is sufficient. Subrule 56(4A) provides that the Registrar may adjourn such a hearing and allow a party to the proceeding to file and serve additional affidavit material concerning the sufficiency of the proposed surety. The Registrar may also give directions about such material. Subrule 56(4B) requires a proposed surety to file and serve an affidavit setting out any material adverse change in relation to any matter or circumstance mentioned in an affidavit filed under rule 56;

the affidavit must be filed and served on all parties to the proceeding within seven days of the change occurring.

#### Item 20

Item 20 updates the penalty provision in subrule 56(4). The amendment results in a small increase of the penalty, which is consistent with subsection 4AB(1) of the *Crimes Act 1914*. The penalty for failure to attend at a hearing will rise from \$5,000 to \$5,500 for a body corporate and from \$1,000 to \$1,100 for an individual.

#### Item 22

Item 22 inserts a new subrule 70(2). Former subrule 70(2) provided that, where a court ordered the sale of a ship or other property under rule 69, the Marshal shall conduct the sale by public auction, unless otherwise directed by the court. However, it has been standard practice for courts exercising admiralty jurisdiction to make directions as to the method of sale after it has made an order for sale. New subrule 70(2) reflects this practice, specifically empowering a court to direct that the sale be by auction, public tender or any other method.

#### Items 23 and 24

Former rule 72 provided for the Registrar to tax the Marshal's fees and expenses where the Marshal conducted a sale of a ship and permitted an interested party to appear before the Registrar on the taxation. The Amendment Rules abolish this compulsory taxation. This is designed to ensure that the costly process of taxation is only undertaken if considered necessary by the court. Item 24 omits rule 72. Item 23 makes the necessary consequential amendment to paragraph 71(c), providing for the omission of the words "for taxation" from the paragraph. See also item 28 (below) which inserts a new rule 78B providing that the Marshal's costs are not subject to taxation unless the court orders otherwise.

#### Item 25

Item 25 changes the heading to rule 74 from "Marshal's fees and expenses" to "Marshal's costs and expenses".

#### Item 26

Item 26 inserts a new rule 74AA providing definitions, for the purposes of Part XII of the Admiralty Rules, of the following terms: incorporated legal practice; law firm; law practice; legal practitioner director; legal practitioner partner; multi-disciplinary partnership; and principal.

The term "law practice" means a law firm, multi-disciplinary partnership or incorporated legal practice. The term "principal" means: a partner, in the case of a law firm; a legal practitioner partner, in the case of a multi-disciplinary partnership; and a legal practitioner director, in the case of an incorporated legal practice. These terms are used in rule 75A (see item 27, below).

## Item 27

Item 27 inserts a new rule 75A relating to the giving of undertakings by law practices under the Admiralty Rules.

Subrule 75A(1) provides that, where the Admiralty Rules require or enable an Australian legal practitioner to give an undertaking as to payment of the Marshal's costs, the court or the Registrar may instead accept an undertaking from a law practice, provided that the undertaking is signed by a principal of the law practice who is authorised to do so.

Subrule 75A(2) deals with the situation where an Australian legal practitioner, by making an application on behalf of an applicant, is deemed under a provision of the Admiralty Rules to have given the undertaking. In such a situation, the undertaking is taken to be given by the law practice for which the solicitor works if a principal of the practice authorised to do so gives a written undertaking to the court to that effect.

Subrule 75A(3) provides that, if a law practice gives or is deemed to give an undertaking pursuant to subrules 75A(1) or (2), the undertaking is taken to be given by all principals of the law practice at the time of the undertaking.

Subrules 75A(4) and (5) provide that, upon application by a principal(s) or former principal(s) of a law practice, the court may add or delete the names of principal(s) from the list of principals of the law practice subject to an undertaking under subrules 75A(1) or (2). The additions or deletions can take effect on such terms and from a date that the court considers appropriate.

Item 27 also inserts new rule 75B, which enables a person required to give an undertaking as to the costs and expenses of the Marshal to give an irrevocable, unconditional bank bond or guarantee from an authorised deposit-taking institution that is payable, on demand and either generally or specifically, in favour of the Marshal. If the court is satisfied with the bond or guarantee and its amount (and any other relevant factor), the court is able to vary or dispense with any rule or requirement on the person to give an undertaking, and to release the person from the undertaking either conditionally or unconditionally.

Finally, item 27 inserts new rule 75C, which makes provision for a situation where a court accepts more than one undertaking or security in relation to the Marshal's costs and expenses. In these circumstances, the court may make directions and orders about the just and fair allocation of responsibilities between those undertakings and securities, and if appropriate release a person from an undertaking either conditionally or unconditionally.

## Item 28

Item 28 substitutes rule 78. Former rule 78 provided that where a person was liable to pay an amount of fees and expenses to the Marshal, the Marshal could accept amounts of money as a deposit towards the full amount payable and make demands for interim payments. New rule 78 makes a similar provision, referring instead to the Marshal's "costs and expenses", rather than "fees and expenses". The new rule also allows the



Marshal to demand *or* accept an amount of money that the Marshal considers reasonable as a deposit towards the full amount payable.

Item 28 also inserts new rule 78A. Rule 78A deals with a situation where the Marshal of one court with jurisdiction in admiralty is acting in aid of another court also having admiralty jurisdiction. In such a case, the costs and expenses of the Marshal providing assistance form part of the costs and expenses of the Marshal of the court being assisted. The Marshal providing assistance may aid the court in accordance with the Admiralty Rules and may request and obtain from the Marshal of the assisted court reimbursement in respect of all costs and expenses incurred in aiding the assisted court.

Finally, item 28 inserts new rule 78B, which provides that the costs and expenses of the Marshal are not subject to taxation unless the court otherwise orders. This is in contrast to the previous position where the Marshal's costs and expenses were compulsorily taxed by the Registrar.

If the Marshal's costs and expenses are taxed under a court order, subrule 78B(2) limits the discretion of the taxing officer such that only costs and expenses that the taxing officer considers to have been incurred unreasonably or otherwise than in good faith can be disallowed.

#### Item 29

Item 29 substitutes Form 3 *Solicitor's undertaking* with a new Form 3 *Australian legal practitioner's undertaking* referring to "Australian legal practitioner" instead of "solicitor". The substituted form included a second superscript 1 after the word "filed" in the first paragraph. Superscript 1 refers to the explanatory note to "strike out whichever is not applicable", and the second superscript 1 was an error, and is therefore removed from this draft.

#### Item 30

Item 30 substitutes Form 12 *Application for arrest warrant* with a new Form 12. Several changes are made in the substituted form. In particular, the substituted form refers to the "costs and expenses", rather than the "fees and expenses", of the Marshal in complying with the application and includes reference to costs and expenses in relation to the ship or property while it is under arrest. The substituted form also refers to "Australian legal practitioner" instead of "solicitor" and, in accordance with the amendments made by item 13, refers to paragraph 41(1)(b) of the Admiralty Rules rather than paragraph 41(b).

An explanatory note is included in the substituted form providing that the note to the form should be deleted where an undertaking is given by a law practice under subrule 75A(2).

#### Item 31

Item 31 amends the heading to Form 13 to reflect that the form is now referred to in subrule 39(3), rather than subrule 39(2).

#### Item 32

Item 32 amends Form 13 *Affidavit in support of application for arrest warrant*. Explanatory note 3 to the affidavit specified that paragraph 3 of the affidavit should specify short particulars of the action. This note is substituted to require that the deponent also set out any necessary facts that would entitle an action in rem to be brought in respect of the claim in accordance with the Admiralty Act.

#### Item 33

Item 33 amends Form 14 *Arrest warrant* to refer to “Australian legal practitioner” rather than “solicitor”.

#### Items 34 and 35

Items 34 and 35 amend Form 18 *Application to registrar for release of ship or other property*.

Item 34 amends the standard form of undertaking in the form to refer to the Marshal’s “costs and expenses”, rather than the Marshal’s “fees and expenses”, in relation to the custody of the ship or other property while under arrest and to include reference to the costs and expenses associated with the release of that ship or other property.

Item 35 amends the form to provide that the final sentence of the form relating to an undertaking to the court to pay the Marshal’s costs and expenses while the ship or property is under arrest, should be deleted when a undertaking is to be given by a law practice under subrule 75A(2).

#### Item 36

Item 36 substitutes Form 19 *Application to Court for release of ship or other property* with a new form. Several changes are made in the substituted form. In particular, the substituted form refers to the “costs and expenses”, rather than the “fees and expenses”, of the Marshal in relation to the custody of the ship or other property and includes reference to the costs and expenses associated with the release of that ship/property.

The substituted form also provides that the final sentence of the form relating to an undertaking to the court to pay the Marshal’s costs and expenses should be deleted when a undertaking is to be given by a law practice under subrule 75A(2).

#### Item 37

Item 37 amends various provisions of the Admiralty Rules in accordance with current drafting practice. In particular, item 35 replaces “shall” with “must”, “shall be” with “is” or “are”, as appropriate, and “shall not fail to attend” with “must attend”.

Item 38

Item 38 amends various provisions of the Admiralty Rules in accordance with current drafting practice. In particular, item 38 replaces “Where” with “If”.

Item 39

Item 39 amends each of paragraph 49(2)(b), subrule 69(4), rule 74, Form 17 and Form 26, item 4 to change the references to “fees and expenses” in these provisions to “costs and expenses”.