

EXPLANATORY STATEMENT

Select Legislative Instrument 2013 No. 206

Issued by Authority of the Attorney-General

Admiralty Act 1988 (Cth)

Admiralty Amendment Rules 2013

Subsection 41(1) of the *Admiralty Act 1988* ('the Act') provides, in part, that the Governor-General may make Rules, not inconsistent with the Act, making provision in relation to the practice and procedure to be followed in courts exercising jurisdiction under the Act and other incidental matters. The *Admiralty Rules 1988* ('the Admiralty Rules') were made by the Governor-General under this authority.

The *Admiralty Amendment Rules 2013* ('the Amendment Rules') amend the Admiralty Rules and ensure their fair and effective operation.

Admiralty law is a distinct body of law which governs maritime questions and offences. The Act provides a uniform national law to govern the exercise of admiralty jurisdiction by Australian courts. Subsection 41(4) of the Act provides that admiralty jurisdiction is conferred on the federal Court, the Federal Magistrates Court and on the courts of the Territories, and invests courts of the States with federal jurisdiction, in respect of matters arising under the Rules.

The Act provides for admiralty jurisdiction to be exercised in relation to actions '*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. A lien is a form of security interest granted over an item of property to secure the payment of a debt or the performance of some other obligation. The Act also provides for admiralty jurisdiction to be exercised in relation to claims '*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 facilitated and streamlined the release of a ship, from arrest, by a registrar. This is the most common form of release. This allows a registrar to order release of a ship or other property under arrest where, as commonly happens, the defendant (or the relevant person) does not enter an appearance before a Court but all persons interested consent to the release and the ship's Protection & Indemnity club (P&I club) (a mutual insurance association which provides marine insurance for its members) or an insurer provides a letter of undertaking or guarantee satisfactory to the plaintiff as security. A Party enters an appearance before a Court by voluntarily submitting to the jurisdiction of the Court.

The Amendment Rules also created a new Form 18A, as a “Release by Consent form”. Parties had previously been adapting Form 18 or 19 when seeking to release by consent and consequently there has been a lack of certainty regarding what the “written consent” document should contain. Further, the new Form 18A creates national consistency. The Amendment Rules provided the Marshal with the power to seize the original certification documents of a ship under arrest that is not in a secure port or berth.

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. The Committee 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 State and Territory Supreme Courts; the Maritime Law Association of Australia and New Zealand; the Australian Maritime Safety Authority; the Law Council of Australia; and the shipping industry.

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.

Authority: Subsection 41(1) of the
Admiralty Act 1988

Details of the *Admiralty Amendment Rules 2013*

Rule 1 – Name of Rules

Rule 1 gives the title of the rules as the *Admiralty Amendment Rules 2013*.

Rule 2 – Commencement

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 – Authority

Rule 3 provides that the Rules are made under the *Admiralty Act 1988*.

Rule 4 – Schedule

Rule 4 specifies that the *Admiralty Rules 1988* (the Admiralty Rules) are amended in accordance with Schedule 1.

Schedule 1 - Amendments

Item [1] – subrule 3(1)

Item 1 inserts new definitions into subrule 3(1). The definition of ‘original certification documents’ lists the types of documents which may be taken by the Marshal under new subrule 47(4). Definitions for each type of original certification document are also provided.

Item [2] – subrule 4(2)

Item 2 amends subrule 4(2) to insert the words “or Associate Judge” after the word “Master”, each time it appears in that subrule. This amendment reflects the change in nomenclature regarding the office of Master in some Australian jurisdictions, and ensures that subrule 4(2) applies clearly across all Australian jurisdictions.

Item [3] – subrule 39A(1)

Item 3 omits the phrase “the following parties to a proceeding commenced as an action”, and substitutes the phrase “the following persons in relation to a proceeding commenced as an application”.

Item [4] – subrule 39A(1)(c)

Item 4 inserts new subrule 39A(1)(c). This amendment includes the master of any ship as a person to which the rule applies in relation to a proceeding commenced as an application *in rem*. This amendment ensures that, in addition to the parties to the proceedings, the master of the vessel is also under a disclosure obligation to the Marshal.

Item [5] – subrule 39A(2)

Item 5 repeals subrule 39A(2) and replaces it with a new subrule 39A(2). The new subrule expands the scope of the provision to “each person referred to in subrule 39A(1)”, and replaces the term “party” with “person” for that subrule. The new subrule specifically includes facts or matters which may affect the safety of the master, crew and cargo of a ship, in addition to the Marshal, as matters which must be disclosed to the Marshal. The new subrule also provides that matters relating to pollution or damage to the marine environment must be disclosed to the Marshal.

Item [6] – subrule 43(1A)

Item 6 substitutes subrule 43(1A). Former subrule 43(1A) required the affidavit in support of an application for an arrest warrant to be served at the same time the arrest warrant is executed. New subrule 43(1A) requires the affidavit in support of an application for an arrest warrant, and where it is not unreasonably impractical, a copy of the writ and annexures and exhibits to the affidavit to be served by leaving it at or near the place where initiating process is served, at the same time the arrest warrant is executed.

This amendment ensures that all of the relevant material is served and not simply the affidavit in support of the application for the arrest warrant. The intention of the amendment is to make available a copy of the relevant material to the master. The method of service specified in the amended subrule 43(1A) is intended to allow service of a copy of the writ and all annexures and exhibits to the affidavit to be delayed if, in the circumstances, it would be unduly difficult or dangerous to do so.

Item [7] – subrule 43(2)

Item 7 amends subrule 43(2) to remove the words “and the affidavit served” from the former provision.

Item [8] – subrule 47(2)

Item 8 inserts new subrules 47(2A), 47(2B) and 47(2C). These amendments provide an express power in the Admiralty Rules under which the Marshal may take into his possession original ship documentation. This power will be limited to original certification documents (as defined in subrule 3(1)), as opposed to all original documentation on board a ship. The Marshal may take into account the operational requirements of a port when considering moving a ship under arrest.

Due to there being very few lay up berth’s available in ports across Australia to accommodate arrested ships, it has become increasingly common for the Marshal to arrest ships at anchor or, if the arrest becomes protracted, to have the ship moved to anchor. Moving arrested ships to anchor, or arresting ships at anchor, gives rise to an increased flight risk as the degree of control that the Marshal can exercise over the arrested ship is reduced. The inclusion of new subrule 47(4) reduces this risk by permitting the Marshal to remove original certification documentation from the ship under arrest at anchor.

Item [9] – subrule 51(1)

Item 9 replaces subrule 51(1) to facilitate and streamline the release from arrest by a Registrar. This type of release from arrest is the most common form of release, and there are administrative benefits gained from the streamlining of this process.

Item [10] – subrule 51(3)

Item 10 replaces subrule 51(3). The amendment will require an application, in accordance with the new Form 18A, to be lodged before the Registrar may order the release from arrest of a ship or property.

Item [11] – Schedule (heading)

Item 11 replaces the Schedule heading to reflect current drafting practices.

Item [12] – Form 1 of the Schedule

Item 12 amends the heading of Form 1 to reflect current drafting practices.

Item [13] – Form 1 of the Schedule

Item 13 makes a minor drafting amendment to the date present on Form 1.

Item [14] – Form 18A

Item 14 inserts new *Form 18A – Application to register for release of ship or other property by arresting party*. The new Form 18A will address the current lack of certainty as to the content of the form and ensure that there is national consistency across each of the Australia's jurisdictions.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Admiralty Amendment Rules 2013

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The purpose of the Legislative Instrument is to amend the *Admiralty Rules 1988* in response to particular issues identified by the Admiralty Rules Committee, which have arisen in the practice of admiralty jurisdiction.

Amongst other matters, the Legislative Instrument facilitates and streamlines the release of a ship from arrest by a registrar, provides the Marshal with the power to seize original certification documents of a ship under arrest that is not in a secure port or berth, and creates a new ‘Release by Consent form’ which will deliver national consistency by providing a uniform mode of Release by Consent across jurisdictions.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.