

## 15.1 Paper by Cooper J to 2000 MLAANZ Conference

### THE REVIEW OF THE ADMIRALTY RULES IN AUSTRALIA AND NEW ZEALAND

#### Australia

##### Introduction

- 1 The Admiralty Rules (“the Rules”) in force under the *Admiralty Act 1988* (Cth) (“the Admiralty Act”) were drawn up by the Australian Law Reform Commission. The Rules were part of the report of the Commission to the Attorney-General recommending reform of Civil Admiralty Jurisdiction in Australia<sup>510</sup>. Section 42 of the Admiralty Act provides for the establishment of a committee (“the Rules Committee”) to advise the Attorney-General with respect to the Rules.
- 2 The Admiralty Act and the Rules commenced to operate in Australia on 1 January 1989. The Rules Committee and the Admiralty Sub-Committee of the Federal Court of Australia, determined to review the Rules after their first ten years of operation. For practical reasons the review process in the first instance commenced in the Federal Court. Additionally, MLAANZ established a Rules Sub-committee to prepare a report on the Rules in operation and to submit that report for consideration as part of the review process.
- 3 It was also considered worthwhile to investigate whether there was a need to, or advantage in, harmonising the relevant admiralty rules in the Australian and New Zealand admiralty jurisdictions.
- 4 Although the review has commenced, it is an ongoing process and the report of MLAANZ is yet to be completed. This paper in consequence will deal with the issues so far raised and some possible changes suggested by the practitioners consulted.

##### The Consultations

- 5 On 11 November 1999 there was a meeting between the Sydney Admiralty Sub-Committee judges of the Federal Court, some Marshals of the Court, the profession and other persons interested in the operation of the admiralty jurisdiction of the Court. Forty-five non-Court persons attended. More recently similar consultations were held in Perth.

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<sup>510</sup> Report No 33 *Civil Admiralty Jurisdiction* AGPS Canberra 1986.

### The Issues

- 6 There is widespread dissatisfaction with solicitors being required to give personal undertakings and some concern as to the operation of the various undertakings provided for under the Rules. There is also dissatisfaction with paying in advance Marshal's expected costs and expenses; the view being that these should be carried by the Marshal and recovered from the unsuccessful party or from the proceeds of the sale of the *res*. Additionally, there is dissatisfaction with the level of costs and expenses incurred by the Marshals in relation to the custody and maintenance of vessels while under arrest. The contention was that because the Marshals are unfamiliar with what is ordinarily required by way of ship maintenance, they are buying in what is expensive expertise, which in turn is recommending an unnecessarily high level of custody and maintenance.
- 7 It was suggested that these problems were not present in North America and that in part they were overcome by the use of a substitute custodian for the Marshal.

### The North American position as to Marshal's costs and expenses

- 8 In the United States, admiralty proceedings *in rem* are exclusively within federal jurisdiction<sup>511</sup> and are heard by the US Federal Court<sup>512</sup>. The rules relating to the action *in rem* are found in Rules C and E of the Supplemental Admiralty Rules, which apply with the US Federal Rules of Civil Procedure.
- 9 The proceeding *in rem* is commenced by complaint verified by oath or affirmation<sup>513</sup>. The complaint and supporting papers are reviewed by the Court, and if the conditions for an action *in rem* appear to exist an order is made authorising a warrant for the arrest of the ship or other property to issue. A warrant is then prepared by the Clerk of the Court and if the property is a ship or property on board a ship, the warrant must be delivered to the US Marshal for service. In case of urgency, the Clerk of the Court may issue a summons and warrant for an arrest and the plaintiff will at a post-arrest hearing have to satisfy the Court that the conditions for an action *in rem* appear to exist<sup>514</sup>.
- 10 A claimant of the property arrested must file a claim within ten days after the arrest, or within such additional time as is allowed by the Court. An answer to the complaint

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<sup>511</sup> S1333(1) of Title 28 United States Code.

<sup>512</sup> *Madruga v Superior Court* 346 US 556 (1954)

<sup>513</sup> The procedure is described in detail by Schoenbaum in *Admiralty and Maritime Law* 2nd Ed. (1994) Vol 2 p480ff.

<sup>514</sup> Rule E(4)(f).

must be filed within twenty days after the filing of the claim. If no claim is filed within ten days, the plaintiff is required to give public notice of the action and arrest.

**11 *The Marshal in executing the arrest warrant will, if it is practical to do so, take the vessel into the Marshal's possession for safe custody. The Marshal may apply at any time to the Court for directions with respect to the property upon service on such parties as the Court shall direct.***

12 Property in the custody of the Marshal may be released by agreement of the parties or by order of the Court. However, the Marshal or other person or organisation having the warrant shall not release the property until the costs and charges of the officers of the Court (including the Marshal) shall first have been paid<sup>515</sup>.

13 Expenses of executing a warrant of arrest are dealt with by s 1921 28 USC. Section 1921 provides :

*"1921 United States Marshal's fees.*

*Only the following fees of United States marshals shall be collected and taxed as costs, except as otherwise provided :*

(a)

(1) *The United States marshals or deputy marshals shall routinely collect, and a court may tax as costs, fees for the following :*

(A) *Serving a writ of possession, partition, execution, attachment in rem, or libel in admiralty, warrant, attachment, summons, complaints, or any other writ, order or process in any case or proceeding.*

(B) *Serving a subpoena or summons for a witness or appraiser.*

(C) *Forwarding any writ, order, or process to another judicial district for service.*

(D) *The preparation of any notice of sale, proclamation in admiralty, or other public notice or bill of sale.*

**(E) *The keeping of attached property (including boats, vessels, or other property attached or libeled), actual expenses incurred, such as storage, moving, boat hire, or other special transportation, watchmen's or keepers' fees, insurance, and an hourly rate, including overtime, for each deputy marshal required for special services, such as guarding, inventorying, and moving.***

(F) *Copies of writs or other papers furnished at the request of any part.*

(G) *Necessary travel in serving or endeavoring to serve any*

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<sup>515</sup> Schoenbaum Vol 2 at 493.

*process, writ, or order, except in the District of Columbia, with mileage to be computed from the place where service is returnable to the place of service or endeavor.*

(H) *Overtime expenses incurred by deputy marshals in the course of serving or executing civil process.*

**(2) *The marshals shall collect, in advance, a deposit to cover the initial expenses for special services required under paragraph (1)(E), and periodically thereafter such amounts as may be necessary to pay such expenses until the litigation is concluded. This paragraph applies to all private litigants, including seamen proceeding pursuant to section 1916 of this title.***

(3) *For purposes of paragraph (1)(G), if two or more services or endeavors, or if an endeavor and a service, are made in behalf of the same party in the same case on the same trip, mileage shall be computed to the place of service or endeavor which is most remote from the place where service is returnable, adding thereto any additional mileage travelled in serving or endeavoring to serve in behalf of the party. If two or more writs of any kind, required to be served in behalf of the same party on the same person in the same case or proceeding, may be served at the same time, mileage on only one such writ shall be collected.*

(b) *The Attorney General shall from time to time prescribe by regulation the fees to be taxed and collected under subsection (1). Such fees shall, to the extent practicable, reflect the actual and reasonable cost of the service provided.*

(c)

(1) *The United States Marshals Service shall collect a commission of 3 percent of the first \$1,000 collected and 1½ percent on the excess of any sum over \$1,000, for seizing or levying on property (including seizures in admiralty), disposing of such property by sale, setoff, or otherwise, and receiving and paying over money, except that the amount of commission shall be within the range set by the Attorney General. If the property is not disposed of by marshal's sale, the commission shall be in such amount, within the range set by the Attorney General, as may be allowed by the court. In any case in which the vessel or other property is sold by a public auctioneer, or by some party other than a marshal or deputy marshal, the commission authorized under this subsection shall be reduced by the amount paid to such auctioneer or other party. This subsection applies to any judicially ordered sale or execution sale, without regard to whether the judicial order of sale constitutes a seizure or levy within the meaning of State law. This subsection shall not apply to any seizure, forfeiture, sale, or other disposition of property pursuant to the applicable provisions of law amended by the Comprehensive Forfeiture Act of 1984 (98 Stat. 2040).*

(2) *The United States marshals may require a deposit to cover the fees and expenses prescribed under this section.*

(d) *The United States marshals may require a deposit to cover the fees and expenses prescribed under this section.*

(e) Notwithstanding section 3302 of title 31, the United States Marshals Service is authorized, to the extent provided in advance in appropriate Acts --

- (1) to credit to such Service's appropriation all fees, commissions, and expenses collected by such Service for --
  - (A) the service of civil process, including complaints, summonses, subpoenas, and similar process; and
  - (B) seizures, levies, and sales associated with judicial orders of execution; and
- (2) to use such credited amounts for the purpose of carrying out such activities."

14 The requirements of s 1921 are given effect to by the US Marshals in accordance with the *Manual for United States Marshals*<sup>516</sup>. The manual in respect of Advance Deposits for costs, provides :

"6.3-6

e. Advance Deposits for Costs. Pursuant to Title 28 U.S.C. 1921, the **U.S. Marshal shall collect in advance sufficient fees to cover the cost of service of the process, U.S. Marshal's insurance, and 10 days keeper and maintenance fees [Supplemental Rule E(4)(e)]**. Due to local labor situations and prevailing work conditions, some districts are required to pay a higher hourly or daily rate for keepers, wharfage, etc., than other districts. Regardless of the going rate, **the U.S. Marshal shall insist on a 10 day advance for his/her expenses**. The custody and safekeeping of vessels pursuant to civil, admiralty, or bankruptcy actions on behalf of private litigants rests with the U.S. Marshal effecting the seizure and are conditioned upon the advance of sufficient funds by the moving party to cover the costs incidental to the safekeeping and custody requirements. If special circumstances exist which will require greater expenditures, then the required deposit should take that into account. If a substitute custodian is to be immediately appointed, then the amount of the deposit required should also take that into consideration. If more than one plaintiff is seizing the vessel or property then consideration should be given to whether more than one deposit is required, how it is to be paid, and who will pay it. Generally, the parties will work this out amongst themselves. Procedures should be avoided where proportionate payments would be received from the various plaintiffs. The 'initial' plaintiff should be made responsible for making the payments.

- 1) While under seizure the vessel and/or the cargo or property is to be protected and kept safely in essentially the same condition as when it was arrested or attached. Unless otherwise ordered by the court or provided in the local admiralty rules, all cargo work or repairs is to stop at the time of seizure. No movement of the vessel or improvements or work of a special nature, except emergency actions, may be undertaken without an order of the court.

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<sup>516</sup> Manual revised as of November 1986. Admiralty is dealt with in Part 6.3.

- 2) ***Following the seizure of a vessel, cargo, or other property, the party initiating such action will be periodically requested to deposit additional funds in advance with the U.S. Marshal as may be necessary to cover costs until the litigation is concluded. If the party initiating the seizure action fails to deposit requested funds, the U.S. Marshal shall seek relief from the district court including, but not limited to, the right to request the release of the property from arrest or attachment with a reservation of the right to proceed against the plaintiff for any balance due. The U.S. Marshal should not wait until; the funds have been expended before approaching the court for the requested relief. Notice of such application shall be given to any or all of the parties as the court may direct [Supplemental Rule E(4)(d)].***
- a) *In accordance with Title 31 U.S.C. 1341, no government employee, including the U.S. Marshal, has the right to obligate government funds to defray costs or expenses incurred in seizures on behalf of private litigants. Therefore, no vessel or property should be seized without receipt of the required deposit. This mandate applies to actions by seamen except in the Second Circuit. Directions should be obtained from the court when necessary.*
- b) *Usually, when the United States requests the arrest or attachment, no deposit is required. This will depend upon the agency involved and the type of action being brought. However, whenever possible, in cases where the initiating government agency is an agency outside the Department of Justice, the initiating government agency should be appointed by the court as substitute custodian at the time the warrant is executed by the U.S. Marshal. It is then the responsibility of the initiating government agency as substitute custodian to bear all costs and expenses pertinent to keeping and maintaining the property following seizure. Substitute custodian orders should not normally be sought in actions initiated by the Department of Justice bureau.”*

15 In *Araya v McLelland*<sup>517</sup> the US Court of Appeals, Fifth Circuit, held that the US Marshal was under no statutory duty to attach a vessel without prepayment of the Marshal's expenses. The Court refused to accept that a practice existed where the Marshal would advance funds for attachment receiving repayment at the conclusion of the litigation. Such a practice, if it existed, was in direct violation of the instructions in the Marshal's Manual and the Court would not give effect to it<sup>518</sup>. In its reasoning, the Court relied on an earlier decision in *Cohn v George*<sup>519</sup>.

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<sup>517</sup> 525 F.2d 1194 (1976)

<sup>518</sup> at 1196 - 1197.

<sup>519</sup> 297 F.Supp. 527 (1968).

16 In *Cohn v George*, Chief Judge Jeurgens said<sup>520</sup>:

*“In admiralty proceedings in which the United States is not a party, the expenses incurred in connection with the safekeeping of a libeled vessel, such as compensation of a shipkeeper, are not payable from public funds, notwithstanding an order from the court directing the payment of such fees by the marshal. This includes seaman cases, in which the seaman is excused only from the prepayment of fees and costs for the service of process.*

*While § 1916 specifically relieves a seaman from prepayment of those fees and costs of suit such as the initial filing fees and various marshal fees that must be paid to the court, this statute does not give plaintiff an automatic right to avoid prepayment of other costs such as those expenses necessary for wharfage, keepers, maintenance and insurance against damage and injury done by the vessel while in his custody. The marshal is not permitted to make expenditures from public funds for this purpose, and certainly the marshal should not be required to draw upon his private funds to support plaintiffs’ suit.*

*The Court finds that the marshal is not required to seize a vessel in a private matter without first receiving prepayment sufficient to cover the expenses necessary for wharfage, keepers, maintenance and insurance.”*

17 There is no question that the US Marshal will not act on an arrest warrant or be ordered to act on the warrant without prepayment in accordance with para 6.3-6e of the Marshal’s Manual set out above<sup>521</sup>.

18 In the US there is a distinction between a ship’s keeper and a substitute custodian. The keeper is a person or party appointed to act on behalf of the US Marshal. A substitute custodian is a person or company appointed to act in place of the US Marshal. The substitute custodian is appointed by order of the Court and has the powers specified in the order of appointment. The reason for the appointment of a substitute custodian is briefly discussed in *Benedict on Admiralty*<sup>522</sup> :

**“20. Substitute Custodians**

*The marshal does not have enough staff to serve for long periods of time as custodian of arrested property, and a substitute custodian costs the plaintiff less money and a smaller deposit than using deputy marshals around the clock. It is the arresting plaintiff’s responsibility to propose a substitute custodian, and usually at the time of judicial review of the complaint and warrant, the plaintiff presents an order for the judicial officer to sign that authorizes the marshal to turn the property over to a prearranged substitute custodian. The substitute custodian can be a commercial security service that provides round-the-clock watchmen, or it can be the master and crew of the ship.*

*The order to appoint a substitute custodian needs to be tailored to the*

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<sup>520</sup> at 529.

<sup>521</sup> See for example *Peurto Rico Drydock & Marine Terminals Inc v MV “Luisa Del Caribe”* 746 F.2d 93 (1984); *Dluhos v Floating and Abandoned Vessel* 162 F.3d 63 (1999) at 68.

<sup>522</sup> 7th Ed (1994) Vol 5 6-5 para 20.

*property and the location. In yacht and small boat cases, the order may provide that the custodian does not have to remain aboard at all times, if the ship is located where security is adequate - for example, a fenced area with a guarded gate. Custody is active custody, with an available custodian making regular rounds to detect and evict trespassers, adjust moorings for tides and weather, operate pumps on the unmanned ship, and fight fire. In some districts the marshal has a list of reliable, knowledgeable, solvent individuals or companies to act as substitute custodians, but such a list is not a Marshals Service endorsement, and proposing the substitute custodian is the arresting plaintiff's responsibility. In no case should the court's order enable the substitute custodian simply to padlock the ship's entrances, chain and lock the ship to a pier, and walk away - saving money but jeopardizing the property."*

19 The appointment of a substitute custodian, so far as it impacts on the Marshal, is dealt with in 6.3-6g of the Marshal's Manual :

*"g. Substitute Custodian. In many instances, a plaintiff will move for the appointment of a substitute custodian to act in place of the U.S. Marshal and his/her keepers. Often this appointment is to take place immediately upon the arrest or attachment of the vessel, the cargo, or the property by the U.S. Marshal. An appropriate court order will accompany the warrant or the writ.*

- 1) *In most districts, and whenever possible, orders proposing the appointment of a substitute custodian are presented to the local U.S. Marshal for review prior to the court's review of the documents. These papers should contain proof of financial ability or sufficient insurance coverage to ensure that the substitute custodian and/or the plaintiff, dependent upon which party has obtained the insurance or is providing the financial security, is able to respond for any damages or injuries that might result from the negligence of the substitute custodian.*
- 2) *The order, and not just the substitute custodian's affidavit, should contain a hold-harmless and indemnity clause running in favour of the U.S. Marshal and the United States. (See samples of a Motion and Order for Appointment of Substitute Custodian and Affidavit of Substitute Custodian at paragraphs 6.3-23b and c, respectively.)*
- 3) *Even though a substitute custodian is appointed, the U.S. Marshal must continue to maintain on his/her own behalf appropriate insurance covering the seizure until the vessel is sold or released from custody.*
- 4) *As appropriate, the United States, if it is the seizing party, may act as a self-insurer. (See sample Order for Appointment of Substitute Custodian at paragraph 6.3-23d).*
- 5) *Whenever a vessel or other property seized is turned over to a substitute custodian, the U.S. Marshal should fill out an appropriate Return and the substitute custodian should fill out an appropriate Receipt of the property. (See sample U.S. Marshal's Return and Receipt at paragraph 6.3-23e.)*
- 6) *Generally, an order appointing a substitute custodian also provides that the reasonable expenses of that substitute custodian will be*

*considered administrative expenses. The substitute custodian, or the plaintiff on his/her behalf, is responsible for payment of all custodial expenses incurred. The U.S. Marshal is not responsible for those payments.”*

- 20 The U.S. Marshal is required to take out liability insurance covering the U.S. Marshal, his/her keepers and the United States against claims for negligence on the part of the Marshal or those acting on his/her behalf<sup>523</sup>. The cost of such insurance is to be paid for by the plaintiff as part of the deposit required for the arrest. Where a substitute custodian is appointed the substitute is responsible for obtaining and paying for liability insurance.
- 21 Except in an emergency, the Marshal will not allow the vessel to be moved from berth to anchorage, or along the wharf, or to be loaded or unloaded or to be repaired without order of the court<sup>524</sup>
- 22 So far as my incomplete research discloses, the quantum of the substitute custodian's fees and costs may be set by the Court and specified in the order of appointment. However, the fact that the order specifies a figure will not entitle the substitute custodian to that payment if it is shown that the specified amount is beyond what is reasonable for the service actually provided. Thus, where immediately before attachment a ship repairer was charging \$110 a week for wharfage, the fact that the repairer convinced the Court appointing it substitute custodian to allow it thereafter to charge \$1,400 per week for providing the same service, did not in fact entitle it to charge more than the rate applicable immediately before appointment<sup>525</sup>. It is also apparent that if the powers contained in the appointment order are not wide enough, the substitute custodian will be required to seek directions of the Court from time to time or seek an enlargement of powers.
- 23 At the time of writing this paper, I have been unable to find any evidence of the use of substitute custodians in Canada. The Canadian solution relies on the Marshal by virtue of execution of the warrant for arrest having custody of the arrested property, although not possession of it, which remains in the owner or person in lawful possession of the ship. The Marshal's right is to custody, not possession. Interference with the custody is dealt with as a contempt of court<sup>526</sup>.

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<sup>523</sup> Manual 6.3-7.

<sup>524</sup> *Benedict on Admiralty* 6.4 para 19; Marshal's Manual 6.3 - 6e(1); Rule E(4)(a).

<sup>525</sup> *Humphreys Railways Inc v FV Nils S* 603 Fed.Supp 95 (1984) at 101-102.

<sup>526</sup> *The Arantzazu Mendi* [1939] AC 256 at 266.

24 The relevant Canadian rules are the *Federal Court Rules 1998*. So far as presently relevant, they provide :

**“482.(1)** *A warrant issued under subsection 481(1), the Affidavit to Lead Warrant and the statement of claim in the action shall be served together by a sheriff in the manner set out in rule 479, whereupon the property subject to the warrant is deemed to be arrested.*

*(2) Proof of service of the documents referred to in subsection (1) shall be filed forthwith after the documents are served.*

**483.(1)** *Subject to subsection (2), possession of, and responsibility for, property arrested under subsection 482(1) does not vest in the sheriff but continues in the person in possession of the property immediately before the arrest.*

**(2)** *The Court may order a sheriff to take possession of arrested property on condition that a party assume responsibility for any costs or fees incurred or payable in carrying out the order and give security satisfactory to the Court for the payment thereof.*

**484.** *No property arrested under a warrant shall be moved without leave of the Court or the consent of all parties and caveators.*

.....

**489.** *Property shall be released from arrest on service of a release on the sheriff and payment of all fees and costs of the sheriff in respect of the arrest or custody of the property.”*

25 In the United States and Canada, the rules do not provide for solicitors or legal practitioners’ undertakings because the fees and charges must be paid in advance or secured to the satisfaction of the Court or Marshal.

26 The principal difference between the two jurisdictions lies in the arrest being required to be served by the Sheriff without the necessity for a Court order and the provision of security. The use of no custodian in possession other than the person in possession at the time of arrest, or a substitute custodian in lieu of the Marshal is driven by a desire to save costs or to avoid having to outlay up front costs to obtain both the act of arrest and the care and custody of the ship while under arrest.

27 The trade-off lies in the quality of care which is exercised by those in possession where possession is not that of the Marshal or Sheriff or the ship’s keeper appointed to act for the Marshal or Sheriff, and, the extent to which the threat of proceedings for contempt will dissuade a vessel, particularly a foreign vessel, from attempting to flee the jurisdiction.

28 The requirements of the US Marshal, as reflected in the Manual, involve prepayment of sums substantially in excess of the sums required in Australia. The US system

where the services of the Marshal are utilised do not allow for credit being extended by the Marshal. Even where a substitute custodian is to be used, the costs of the Marshal of effecting the arrest are to be prepaid in whole and any costs of maintaining the vessel under arrest until the vessel is released to the substitute custodian must be paid in full before the vessel is released to the substitute custodian. Not surprisingly, the US system is predicated on the basis that public money should not be required to fund private litigation. There is much to be said for the view that that is the basis upon which the Rules were drafted. The Marshal is not funded to perform the duties of arresting and caring for vessels under arrest. Unlike the US Marshal, the Marshal does not retain any part of the commission on the sale of a vessel. That money goes into consolidated revenue.

29 Mr Justice Sheen, when Admiralty Judge, had no doubt as to the position in England and Wales<sup>527</sup> :

*“Public funds are not available to pay the costs of keeping a ship under arrest.”*

### **Solicitor’s Undertakings**

30 The dissatisfaction with the requirement for solicitor’s undertakings has two aspects. The first is that there is a requirement at all. The second is the operation of the undertakings and the relationship between the circumstances in which they apply.

31 The use of a solicitor’s undertaking to secure the costs and expenses of the Marshal is of long standing in the admiralty jurisdiction in England and Wales. Examples may be found in the Miscellaneous Forms in Williams and Bruce *Admiralty Jurisdiction and Practice*<sup>528</sup>

32 The requirement of an undertaking by the solicitor who applied for a warrant for arrest to pay the fees and expenses of the Marshal appeared in O 5 r 16(e) of the Rules of the Supreme Court 1883 (UK) in 1934. The requirement for the lodgement of a written undertaking by the solicitor to pay the Marshal’s fees and expenses was carried over into O 75 r 10(3) of those rules<sup>529</sup>. A written undertaking was also required under O 75 r 13(7) to be given at the time of the issue of the release by the releasing party.

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<sup>527</sup> *The “Falcon”* [1981] 1 Lloyd’s Rep 13 at 16.

<sup>528</sup> 3rd Ed (1902); No’s 122 and 123 p684.

<sup>529</sup> A form of undertaking then required is found in *Admiralty Practice Vol 1 British Shipping Laws* (McGuffie, Fugeman, Gray) (1964) at para 263; a later form is found in the Third Supplement (1975) para 263.

33 Under the present Rules of the Supreme Court (UK), undertakings to pay the Marshal's costs and expenses are required on four occasions. They are :

- (a) Service of a writ where property is under arrest, and the undertaking is to pay on demand all expenses incurred by the Marshal or his substitute in respect of service of the writ: O 75 r 8(3).
- (b) Execution of a warrant for arrest where the undertaking is to pay on demand the fees of the Marshal and all expenses incurred by him or on his behalf in respect of the arrest of the property and the care and custody of it while under arrest: O 75 r 10(3).
- (c) Before the release of property under arrest where the party at whose instance a release issued undertakes to pay on demand the fees of the Marshal, whether incurred or to be incurred, and the other fees and expenses in connection with the arrest of the property and the care and custody of it while under arrest and of its release: O 75 r 13(7).
- (d) Before the execution of a commission for appraisal and sale and the party applying for the commission undertakes to pay on demand the fees and expenses of the Marshal: O 75 r 23(3).

34 In respect of each of the undertakings, O 75 r 23A provides :

*"23A(1) Every undertaking under rule 8(3), 10(3), 13(7) or 23(3) shall be given in writing to the satisfaction of the marshal or, where the action is proceeding in a district registry, the district registrar.*

*(2) Where a party is required by rule 8(3), 10(3), 13(7) or 23(3) to give to the marshal or a district registrar an undertaking to pay any fees or expenses, the marshal or district registrar may accept instead of an undertaking the deposit with him of such sum as he considers reasonable to meet those fees and expenses.*

*(3) The Court or, where the action is proceeding in a district registry, a judge, may on the application of any party who is dissatisfied with a direction or determination of the marshal or district registrar under rule 13(7) or this rule, vary or revoke the direction or determination."*

35 The personal undertaking which is given remains that of the party's solicitor<sup>530</sup>.

36 The reason for requiring the solicitor's undertaking, or cash or satisfactory security in its stead, is that the solicitor is in a better position to assess the financial reliability of his or her client, who often is not resident in the jurisdiction, than anyone else and a solicitor should satisfy himself or herself on the point before giving the undertaking<sup>531</sup>. It is also to ensure that the risk of the *res* being insufficient to cover the Marshal's

<sup>530</sup> *The Supreme Court Practice 1999* (The White Book) Vol 1 para 75/23A/2.

<sup>531</sup> McGuffie at para 262; *Patrick Stevedoring No 2 Pty Ltd and the Ships "Turakina" and "Rangitata"*, [1998] FCA 244.

costs and expenses is not borne by the Marshal alone who is not a party and acts only as an officer of the Court<sup>532</sup>

37 The use of the solicitor's undertaking gives the system the flexibility to provide for arrest without the payment, or securing, of all reasonably foreseeable costs and expenses of the Marshal in executing the warrant for arrest and of undertaking the care and custody of the *res* while under arrest. If the solicitor's undertaking is to be dispensed with, some other mechanism must be put in place to protect the Marshal from the consequences of a party's failure to pay sufficient funds to cover the Marshal's costs and expenses or the failure of the property on sale to cover those expenses. The Marshal of the Federal Court has had occasion to call upon a solicitor's undertaking on one occasion already where a party defaulted and the *res* could not be realised in a timely way to cover the costs and expenses incurred to date.

38 The content of the undertakings and their operation is a different issue. There appears to be a significant difference in approach between the position taken in Australia and in the UK. In England and Wales where a request is made of the Marshal to perform an act which under the Rules requires an undertaking to pay the Marshal's costs and expenses, the requesting party will be held to the undertaking and any existing undertaking from another party will to that extent be superceded. Thus where the arresting party has given an undertaking to pay the Marshal's costs and expenses of the arrest, a later undertaking given in respect to the obtaining of a commission for appraisal and sale will operate from the date of its lodgement to the benefit of the arresting party. Thus the solicitor of the arresting party would be liable on his or her undertaking up until the lodgment of the commission. Thereafter the undertaking of the solicitor for the party obtaining the commission would bear all expenses of custody and sale of the ship up until the date of delivery on sale<sup>533</sup>. To like effect, the solicitor's undertaking which procured the release of the vessel from arrest would supercede the undertaking of the solicitor which procured the original arrest<sup>534</sup>.

39 The position which has developed in Australia is that all undertakings given continue to operate until the Marshal is paid his or her costs and expenses. Where undertakings overlap, they are treated as having a concurrent operation with the Marshal being entitled to call upon all or any of the undertakings. The reasoning

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<sup>532</sup> *Bayside Airconditioning Pty Ltd v The Owners of the Ship Cape Don* [1997] FCA 690.

<sup>533</sup> *The Falcon* [1981] 1 Lloyd's Rep 13 at 17.

underlying the decisions is that the Marshal should have the greatest protection possible from loss consequent upon a default of a party or the party's solicitor or a loss on the realisation of the res<sup>535</sup>.

### **Crew members on board at the time of arrest**

40 Finally, with respect to the US position, reference should be made to the position of crew on board at the time of arrest. The position is succinctly stated in *Benedict on Admiralty*<sup>536</sup>:

*“The members of the crew aboard an arrested ship are a problem. The basic premise is that the marshal, for the court, becomes operating agent of the ship, and the plaintiff provides funds to the marshal, subject to being reimbursed for expenses of the ship in custodia legis, the highest priority in payment from proceeds of judicial sale.*

*The crew are not the guests of the marshal, and often the marshal and the plaintiff would rather have them off the ship, but then what?*

*It is the shipowner's duty to provide for the crew, aboard or ashore, but if the shipowner does not perform the duty and has no funds for the purpose, the arresting plaintiff may have to supply food and lodging for humanitarian reasons. Foreign seamen are particularly troublesome, because if they are to go ashore and remain there, customs and immigration authorities have to be satisfied. The United States will not pay to repatriate foreign seamen. While the flag nation has the repatriation duty, it may not provide and pay when the seamen are citizens of another nation. The shipowner's protection and indemnity club may have promised in its rules to pay for repatriation, but the arresting plaintiff may have to pay first and then pursue the P & I club for reimbursement.*

*Where the arrest may be a long one, and where repatriation is not quickly forthcoming, the marshal may ask the court for instructions, suggesting that the court designate the crew as substitute custodians, to maintain the ship and gear, with the arresting plaintiff advancing the funds. The members of the crew ordinarily do not receive wages, but they receive food, maintenance, and other necessities; and since these are expenses of the ship in custodia legis, the plaintiff's claim for reimbursement receives the highest priority in the distribution of proceeds of sale. Even repatriation can be assessed as a custodian expense if the ship has to be sold with the crew removed, as in foreclosing a ship mortgage.”*

41 In this respect, the US position is not substantially different to the position taken in Australia<sup>537</sup>.

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<sup>534</sup> McGuffie 3rd Sup (1975) para 263.

<sup>535</sup> *Patrick Stevedores No 2 Pty Ltd v The Ship MV “Turakina”* [1998] 886 FCA; *Waitemata Stevedoring Services Pty Ltd v The Ship “Rangitata”* [1998] 441 FCA.

<sup>536</sup> Para 19 6-4 - 6-5.

<sup>537</sup> *Patrick Stevedores No 2 Pty Ltd v Ship MV “Turakina”* (1998) 84 FCR 493; as to the crew's position in respect of rights against the vessel and the right to sustenance and repatriation see

- 42 Although the Master and crew as plaintiffs are exempt from payment of the US Marshal's costs of arrest by the operation of s 1916 of Title 28USC, they remain liable to pay and secure the Marshal's costs of holding and maintaining the vessel<sup>538</sup>.
- 43 The protection given by Rule 76 of the Rules to free the master and crew from being required to give security for costs does not, in my view, free the master and crew from the requirement to procure their solicitor's undertaking as required by the Rules to pay on demand the Marshal's costs.

### **Miscellaneous Items**

- 44 There is significant support from shipowner interests and those who act for them that the affidavit in support of a warrant for arrest should contain more detail of the factual elements of the claim so that the ship can respond quickly and in an informed way to the arrest. Additionally, there was support for the view that a copy of the affidavit ought to be served at the time of the arrest as a requirement under the Rules. This would bring Australian practice into line with the Canadian rules requirements. The matter is to be taken up for consideration by the Rules Committee.
- 45 The question of serving caveats by facsimile, as is the position in the UK, was also raised. It was agreed that the need for such a facility should be further investigated.

### **Conclusion**

- 46 The consultations to date have shown that there is a marked disinclination to fund arrest and the custody and maintenance of the *res* pending its release or sale on the part of private litigants. In the US, Canada and the UK private litigation is not funded with public money and the Rules of Court reflect that principle. There is no demonstrable reason why it should be different in Australia. The Courts are not funded to carry the costs of arrest and custody of the *res*. The Court will not require its Marshal to contract a personal liability and carry the risk of loss. There are no funds available to the Court from which losses caused by defaulting parties or insufficient value in the *res* may be recovered. The Federal Court has held that it will not direct the Marshal to attempt to execute an arrest warrant where to do so would put the personal safety of the Marshal seriously at risk<sup>539</sup>. It is an open question whether it would take the same position in relation to risk of economic loss where a satisfactory undertaking, security or prepayment is not offered. The US Federal Court

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*United States Trust Company of New York v Master and Crew of the Ship "Ionian Mariner"* (1997) 77 FCR 563.

<sup>538</sup> 28 USC §1921a(2)

<sup>539</sup> *Wills Shipping Ltd v The Ship Oceania Trader* (unreported) QG 137/90, Spender J 2 November 1990 at 8 - 9.

has refused to so order. No rule change which attempts to shift the cost of admiralty litigation onto the Court or its officers would be likely to be accepted by Government.

- 47 Whether or not there is in Australia a market for commercial substitute custodians who would provide the ship management services, provide the insurance or bond and carry their costs until resolution of the litigation, is an unknown. So too is the extent to which the level of costs and charges now payable as Marshal's costs and expenses would fall if at all. The research to date suggests that functions performed by the US Marshal and the way they are performed are broadly similar in the US and Australia. The significant difference is that a substantial credit balance is required by the US Marshal before he or she will act and that a substantial credit buffer must be maintained throughout the litigation. Although cash advances are sought in Australia, generally there is a willingness to act in reliance on the solicitor's undertaking to carry out the arrest and to put in place such custody arrangements as the circumstances of the arrest require. Thereafter the Marshal looks to the party through its solicitor to fully fund those arrangements.
- 48 The substitute custodian in the US is in many respects similar in terms of function to the provisional liquidator provided for under the various corporations statutes. If substitute custodians are to be introduced in Australia as a viable alternative to the custody of the Marshal, the model of the provisional liquidator may reward some careful study. Unlike the provisional liquidator, the substitute custodian would look to the party seeking its appointment for payment and indemnity in respect of the discharge of the powers and functions of the position.
- 49 The review in Australia has not yet reached the stage where any clear recommendations can be made. One element which will affect the review and may require changes to the rules is the recent Arrest Convention and whether Australia decides to implement it into the municipal law. The Canadian Maritime Law Association has recommended to the Canadian Government that the Arrest Convention not be implemented.
- 50 It is hoped that this paper and the paper to be presented by Tom Broadmore will stimulate further discussion as part of the review process.