15.7 Report of Sydney Admiralty Users' Group 2003 Meetings (April – September 2003)

REPORT OF SYDNEY ADMIRALTY USERS' GROUP 2003 MEETINGS (APRIL – SEPTEMBER 2003)

In April, June and September 2003, the Federal Court held users' group meetings and the Federal Court and New South Wales Supreme Court held a joint users' group meeting to discuss matters of rule reform desired to be raised by members of the profession. Between those meetings, Tamberlin J, Palmer J, Allsop J, Street SC and Nell met on various occasions to undertake drafting to reflect the areas of concerns of the profession.

The following document is presented as the product of those meetings and that drafting to move forward the issue of rule reform for discussion amongst the profession in other States and Territories, MLAANZ, the Courts and others interested.

It should be emphasised that the drafting does not reflect the views of any particular person, the Federal Court or the Supreme Court as to what the Rules should be. Rather it is an attempt to bring together the views at the Sydney users' group meetings and assorted suggestions into drafted form. Drafting has been undertaken only to provide a focus for consideration and discussion.

1. MUTUAL COURT ACCESS TO REGISTERS

Reference was made at a meeting as to the desirability of "on-line" access to the Register of Caveats Against Arrest and Against Release for the purpose of affidavits under the Rules. There may be real issues as to systems and access. Nevertheless, it was thought that rule 14 could be amended by adding subrule (3) as follows:

New Subrule 14(3)

(3) The Registrar of the Federal Court shall maintain the Register of Caveats Against Arrest in a form which includes provision of access to the Registries of Territory and Supreme Courts, through which search by a party may be conducted in satisfaction of requirements of the Rules.

It was also thought appropriate that all relevant registers kept by the courts be available to the Registries of other superior courts. Thus a new subrule (4) has been drafted:

New Subrule 14(4)

(4) Any register required to be kept under the Act or the Rules by any of the Federal Court or the Supreme Courts of the States and Territories shall be maintained in a form which includes provision of access to the Registries of the Supreme Courts of the States and Territories and Federal Court through which search by a party may be conducted in satisfaction of requirements of the Rules.

2. THE APPLICATION TO SUPPORT ARREST

The following reflects the general consensus at the meetings covering minor changes to the current rules as to supporting material.

Amended Subrule 39(2)

39(2) The application shall be supported by an affidavit of the applicant or of a solicitor or agent of the applicant in accordance with Form 13 <u>and which identifies sufficient short particulars of the claim and of any necessary facts as would entitle an action in rem to be brought in respect of that claim as provided by the Act.</u>

Also, form 13 notes should be altered adjacent to [3] to read:

"3. Set out short particulars of the claim <u>to satisfy subr 39(2)</u>."

To the extent that it can be said that disclosure is appropriate insofar as there may be matters which affect the Marshal and the arrest process, perhaps a rule such as the following would be of utility:

Rule 39A

39A The party applying for arrest and, after arrest, any party appearing, shall, without delay, inform the Marshal of any fact or matter of which he, she or it is aware and which may bear upon the safe arrest and custody of the ship or other property in question. This obligation is a continuing obligation.

Street SC is of the view that more should be placed in the supporting affidavit. His proposals were as follows:

Rule 39A – REVISED Affidavit to support Arrest

7. *An affidavit to support an application for arrest warrant should as a matter of form for the administrative issue of the arrest warrant identify facts, whether or not hearsay, to reveal consideration of the existence of a serious question to be tried within the jurisdiction of the Court.*

8. *The affidavit in support should where practicable disclose any known material adverse fact that would be likely make to the arrest wrongful, beyond jurisdiction or an abuse of process.*

9. *An affidavit to support an application for arrest should set out, if reasonably practical and known by the arresting party, a description of the ship or property, and its condition, location, nature and state of loading, number of crew and any special risks likely to affect the arrest or preservation of the property during the arrest.*

Commentary of Street SC

The affidavit under Rule 39 (2) of the Admiralty Rules is generally bare of facts to identify that there is a good arguable cause of action within the jurisdiction and does not set out the state of the vessel, crew and caro where known. The

consideration of a serious question will minimise the risk of vexatious proceedings and ensure that the process is unlikely to be abused. The proposed change treats the issue of the arrest warrant as an administrative act and assumes that it would remain an administrative function of a Registrar. The proposed duty of disclosure as to wrongful arrest, abuse of process or want of jurisdiction should limit the risk of injustice from exercise of the administrative power. The disclosure about the circumstances surrounding the vessel will assist in the Marshal and parties understanding relevant risks for the purpose of protecting their interests.

This difference of view reflects a basal issue of substance as to what needs to be disclosd in an arrest application. This is discussed in a paper by Allsop J at the 2003 MLAANZ Conference.

3. THE QUESTION OF UNDERTAKINGS BY SOLICITORS

The issue has been dealt with as follows. First, a provision for firms to give undertakings has been drafted to supplement the individual personal undertaking of the solicitor on the record. Secondly, there could be the ability to vary or eliminate the undertaking by the provision of an on-demand bank guarantee or bond. The committee thought that a judge should control that use of a bond to avoid or minimise the risk of error and to enable flexibility depending on the face value of the bond or guarantee, and other relevant surrounding circumstances.

A suggestion has also been made for the abolition of undertakings on the basis that cash is provided and topped up. This suggestion has not been directly incorporated.

The suggested rules in this respect are as follows:

New Rule 41A: Undertakings by Firms

(1) The Court will accept an undertaking to the Court by a firm of solicitors practising in Australia signed by one of the partners of the firm duly authorised by the firm to give such undertaking.

(2) When such an undertaking is given, any undertaking to the Court by a solicitor personally, provided for by the Rules or otherwise will be taken to be of the partners of that firm at the time of the application.

(3) On application by any one or more of the partners referred to in subrule (2), the Court may, on such terms as it thinks appropriate, add or delete a partner to or from the list of partners, with effect from such dates, in such amounts and on such terms as the Court thinks appropriate.

New Rule 41B: Use of "Clean Bonds"

It has been sought to roll this up into one rule covering any circumstance where an undertaking might otherwise be called for.

Rule 41B

If, in any application otherwise calling for an undertaking to be given to pay the fees and expenses of the Marshal, whether the application be for arrest, dealing with or discharge of cargo, release or sale of the property arrested, or otherwise, an applicant or the solicitor for an applicant proffers an irrevocable, unconditional bank bond or guarantee issued by a bank authorised to carry on banking business in Australia, payable on demand in favour of the Marshal in respect of the payment of the fees and expenses of the Marshal either generally or more specifically, then, subject to the Court being satisfied as to that security and its amount, and as to any other relevant matter, the Court may, either generally or on terms, make an order varying or dispensing with any rule or other requirement providing for a personal undertaking or releasing any party from an undertaking.

Street SC's drafting contemplated the courts accepting P & I Club letters. It appeared to some of those at the meetings that the bond or guarantee should be one which is unquestionably as good as cash. An overseas insurer, even of high commercial standing, and even if carrying on business in Australia, cannot be viewed as the same as a domestic bank in terms of security. Not only is it a question of security for the Court, but the Court cannot have, nor be seen to have, any financial interest (caused by risk or potential risk) in the outcome of the litigation. Others besides Street SC at the users' group meetings were still keen to pursue the possibility of P&I Club letters being used in this context.

4 UNDERTAKING ON APPLICATION FOR ARREST

There are two further amendments that are suggested might be considered in relation to the undertaking given upon the filing of an application for the arrest of a vessel (Form 12). The first amendment is as to the terms of the undertaking as set out in rule 41. The second is as to the terms in which that undertaking is incorporated into Form 12.

The undertaking to the court which rule 41 of the Rules deems to have been given upon filing an application for an arrest warrant (Form 12) is an undertaking to pay to the Marshal on demand an amount equal to the amount of the fees and expenses of the Marshal in relation to the arrest. However, the terms of the undertaking to the court set out in Form 12 is an undertaking to pay the fees and expenses of the Marshal "*in complying with this application*".

This difference in the wording of what is otherwise intended to be the same undertaking might be eliminated by amending Form 12 so that the undertaking set out in that Form is expressed in terms that are identical to the undertaking in rule 41 and deemed by that rule to have been given upon the filing of the Form 12.

In relation to the terms of the undertaking in rule 41, the existing wording might be amended so that it expressly refers to the fees and expenses of the Marshal in connection with the custody of the ship or other property arrested, while under arrest. Whilst these fees and expenses are probably covered by the existing wording and that

the proposed change does not alter the substance of the existing undertaking, this additional reference might be added, first, to avoid any possible future uncertainty or issue being raised in this regard, and, secondly, so that this undertaking is consistent in this respect with that presently found in Form 19 and required to be given upon an application for release of the ship from arrest.

Accordingly, the possible changes are as follows:

Amended rule 41 Liability for Marshal's fees and expenses

41. An application for an arrest warrant constitutes an undertaking to the Court :

(a) if the application is made by the applicant personally - by the applicant ; or

(b) if the application is made by a solicitor on behalf of the applicant - by the solicitor ;

to pay to the Marshal on demand, an amount equal to the amount of the fees and expenses of the Marshal in relation to the arrest <u>including the fees and expenses of the Marshal in connection with the ship or other property to be arrested whilst under arrest.</u>

Amend the existing undertaking in Form 12 so that it now reads :

I undertake to the court to pay the fees and expenses of the Marshal <u>in relation to the arrest including the fees and expenses of the Marshal in connection with the ship or other property to be arrested whilst under arrest.</u>

5 OVERDRAFT OF MARSHAL AND CASH CALLS

If there is an undertaking or an irrevocable on demand bond or guarantee from a domestic bank it is suggested that it may be appropriate for the Marshal to be given the power to fund the costs and expenses from an overdraft. An issue will arise as to whether he must do so if an undertaking or a guarantee, of the kind discussed above is given. The on demand bond or guarantee could be used as a source of cash flow or as a standby credit as security. Also, if there is to be express provision

for cash calls, the question may arise as to which form of funding for actual costs is to be used: cash call, overdraft or calling down the bank security.

It should be emphasised at this point that real issues as to whether the Marshal should be placed in a position of borrowing funds arises. Relevant Federal and State legislation concerning the conduct of public bodies will need to be considered.

Another possibility is that the party arresting provide an overdraft facility to which the Marshal can be a signatory. These kinds of arrangement might be set up in advance by like interested groups.

The following drafting assumes the course of a Marshal's overdraft is to be adopted and leaves the use of the bond and overdraft covered by *powers* of the Marshal, with an opportunity for the Court to be approached by the Marshal or any interested party to require one course or another. That is the provisions are empowering of the Marshal, not mandating any conduct.

New Rule 41C Masters' Overdraft

Rule 41C

(1) The Marshal may, unless the Court otherwise orders, open and operate an overdraft account for the purpose of interim payment of the fees and expenses of the Marshal.

(2) The charges, costs, fees and interest incurred by the Marshal in opening and operating the said overdraft account are part of the expenses of the Marshal in relation to the arrest or other act of the Marshal such as sale, as the case may be.

New Rule 41D Cash Calls

Rule 41D

(1) The Marshal may, instead of any undertaking, demand and accept a deposit of funds which the Marshal considers reasonable to meet the fees and expenses of the arrest or any application in connection therewith.

(2) The Marshal may make such demand and accept such funds on an interim basis.

(3) The Marshal may, in addition to any undertaking, demand an initial deposit from the party seeking arrest to enable the Marshal to discharge his or her duties effectively upon the arrest of the property.

New Rule 41E – Court Addressing Calls on Bonds and Cash Calls

Rule 41E

(1) On the application of the Marshal, or any interested party, the Court may make and give directions and orders as to the use of the overdraft account, the making of cash calls or the calling upon any bank bond or guarantee.

(2) Without limiting the generality of subrule (1), the Court may make or give directions or orders as to whether or not one or other method or methods of funding the fees and expenses should be employed, and in what orders.

New Rule 41F – Credit Insurance

Rule 41F

(1) The Marshal may, unless the Court otherwise orders, obtain insurance cover in the name of the Marshal against financial default in respect of any undertaking or other security for the payment of Marshal's fees and expenses.

(2) Any premiums or other cost incurred in obtaining any such insurance are fees and expenses of the Marshal in relation to the arrest or other act of the marshal, including sale, as the case may be.

Comment: Investigations of the availability and price of any such insurance should be made.

6. OTHER UNDERTAKINGS - APPLICATION FOR RELEASE FROM ARREST

Under the Admiralty Rules, an application for the release of a ship from arrest can be made to the Registrar (rule 51) or to the Court (rule 52) depending on the circumstances and grounds of the application. The application to the Registrar is made by filing a Form 18. The application to the Court is made by filing a Form 19. Both Forms 18 and 19 require an undertaking to be given by the applicant for release. However, the terms of the undertakings set out in Form 18 and Form 19 are materially different. The undertaking in Form 18 is an undertaking "*to pay the fees and expenses of the Marshal in complying with this application*". The undertaking in Form 19 is an undertaking "*to pay the fees and expenses of the Marshal in connection with the custody of the ship / property ..... while under arrest*". As such, it is arguably a broader undertaking.

It is suggested that this inconsistency between the undertakings in Forms 18 and 19 be removed by providing that Form 18 and Form 19 have the same undertaking.

It is also suggested that the appropriate form of the undertaking for inclusion in both Forms is that currently set out in Form 19, amended in the following two respects.

First, it is suggested that there be added to the present wording of the undertaking in Form 19 an express reference to the costs, charges and expenses associated with the release of the ship (or other property under arrest). This would be in addition to the

existing reference to the fees and expenses in connection with its custody while under arrest.

The second change is as to the nature of that undertaking. Currently, the undertaking in Form 19 is not expressed to be an undertaking to the Court (cf rule 41 and the undertaking given by the applicant for arrest). It is hard to see any reason for this distinction and it is suggested that the undertaking in Form 19 (and to be repeated in Form 18) now be expressed as an undertaking "*to the Court*" (in the same way as the undertaking in Form 12).

Accordingly, the changes suggested are :

> **Amend the existing undertaking in Form 18** so that it now reads :
> I undertake to the court to pay the fees and expenses of the Marshal in connection with the custody of the ship / property [name] while under arrest including the fees and expenses associated with the release of the said ship / property.
>
> **Amend the existing undertaking in Form 19** so that it now reads :
> I undertake to the court to pay the fees and expenses of the Marshal in connection with the custody of the ship / property [name] while under arrest including the fees and expenses associated with the release of the said ship / property.

There are three further issues associated with the undertaking given on applying for the release of a ship or other property from arrest which it was thought might be raised for further consideration.

(i) First, upon an application for release of a ship from arrest, whether under rule 51 or 52, the Admiralty Rules do not themselves provide for the giving of any undertaking by the party making the application (compare the position with rules 41 and 69). Insofar as any undertaking is given, it is only by way of execution of the relevant Form seeking release (that is

Form 18 or Form 19). There is at best only an implicit requirement in rules 51 and 52 that an undertaking be given.

It is suggested that the Rules be amended to redress this, by the addition of a new rule 52A. This may be done in either of two ways.

The new rule could provide for a deemed undertaking to arise upon the making of application for release, in the same way as upon the filing of an application for an arrest warrant (rule 41) or application for sale / valuation (rule 69). This should be subject to a power in the Court to dispense with this undertaking or the requirement to give it, where the Court thinks it appropriate.

Alternatively, the new rule could provide that unless the Court otherwise orders, before the ship or other property under arrest is released, the party at whose instance the release is sought and obtained must in accordance with the directions of the Registrar or the Court (depending from whom the release is sought) either (a) pay the fees and expenses of the Marshal in connection with the custody of the ship (property) while under arrest including the fees and expenses associated with the release of the said ship / property ; or (b) provide a written undertaking to the court to pay these fees and expenses. This would be similar to rule 778(8) of the *Admiralty Rules* (NZ). One advantage of this alternate approach is that it allows the giving of an undertaking to be avoided by the applicant for release where the Marshal's costs are able to be quantified and paid immediately or before the vessel is required to be physically released. It also retains the flexibility of the giving of an undertaking where there is a desire to effect an immediate release of the vessel before all the costs and expenses have been quantified or are otherwise known.

(ii) A second issue that arises (under both of the above alternatives) is as to who is to give the undertaking, in particular whether the undertaking is to be from the applicant party or from its solicitor where a solicitor is acting for the person seeking release. Arguably, there is scope for some

uncertainty in this regard under the present wording of the notes to Forms 18 and 19, which on one view suggest that the undertaking is given by the client applicant even where a solicitor is acting (although it is a view that has not necessarily been adopted by the Courts to date).

It is suggested that this uncertainty be removed by making it clear that where a solicitor is acting for the party applying for the release of the ship or other property under arrest, it is (as with rule 41) the solicitor (and not the party) who is giving the undertaking.

(iii) Thirdly, where the undertaking associated with the application for release is to be given by the solicitor for the party seeking release, it is suggested that the rules permit this undertaking to be given by a firm of solicitors in lieu of the personal undertaking by the solicitor on the record that is otherwise required (in the same way proposed for rule 41). This suggestion has already been incorporated into the wording of the proposed new rule 41A (see recommendation 3 above).

7. INTERACTION BETWEEN UNDERTAKINGS

Discussion took place about the overlapping undertakings given on arrest and on release. Finkelstein J, in his paper, recommended that there be no overlapping. Street SC drafted a clause which saw the undertakings being sequential and not overlapping. That is, Street SC drafted a clause having the arrestor's undertaking to cover the position up to the point of time of the undertaking of the party seeking release taking over.

The issues as to whether or not one undertaking should replace the other, and as to whether there should be sequential undertakings, throw up questions of principle and the competing interests of the arresting party and the ship-owning party. It is

unnecessary in this paper to discuss the real practical struggles which may well take place depending upon the relevant regime. It was thought that these were questions of principle which should at least be discussed. However, one approach, which it was thought might be appropriate for consideration, would be for both undertakings (and, so, if given, both bonds) would continue to apply, but there would be a general provision under which the Court would have the power to identify, according to the justice and fairness of the particular case, which undertaking should relate to what. This would enable the Court to flexibly and fairly adjust the rights of the competing parties pending the resolution of the matter. A possible clause is set out below as a new rule 41G:

Rule 41G:

> Where an undertaking or security has been given to and accepted by the Court by an applicant or a solicitor or a firm in relation to the fees and expenses of the Marshal and an application is successfully made by another party in which that other party, its solicitor or firm of solicitors gives to the Court an undertaking or security in relation to the fees and expenses of the Marshal which is accepted by the Court, the Court shall have power to make directions and orders as to the just and fair allocation of primary and secondary responsibility of such undertakings and security for the fees and expense of the Marshal, and, if appropriate, release from any undertaking.

8 AID TO AND BY OTHER COURTS

The following drafting may need fine tuning at the suggestion of the Marshals.

Rule 46A - Aid to and by other Courts

(1) The fees and expenses of the Marshal of any Court acting in aid of another Court shall form part of the fees and expenses of the Marshal.

(2) The Marshal may take any step that he would otherwise have been able to take under these Rules in aid of any other Court having jurisdiction under the Admiralty Act 1988 and may seek and obtain reimbursement of all fees and expenses incurred from the Marshal of that other Court.

(3) All fees and expenses incurred by the Marshal in acting in aid of another Court having jurisdiction under this Act are recoverable in full without taxation.

9. POSSIBLE OMNIBUS ORDER AND RELATED ISSUES

The question of additional powers of the Marshal for flexibility of the execution of his tasks was discussed.

It was thought that a recommendation of Tom Broadmore in his 2000 MLAANZ Paper, that the Marshal may apply for an "omnibus" order giving him wide authority, should be considered:

> *to take measures considered appropriate to preserve the ship, its machinery and equipment, to move the vessel within port limits and to supply fuel and victuals and water to the crew and otherwise to take appropriate steps for the well-being of the crew.*

Tom Broadmore added in his paper:

> *The content of a standard order would require debate, but in addition to the matters apparently dealt with in Singapore I would suggest consideration of:*
> - *Discharge, or measures for the protection of, cargo;*
> - *Insurance;*
> - *Maintenance of class.*

There is also the question of specific reference to the power of the Court to permit movement outside the port. The circumstances would be unusual or exceptional, but it may be desirable to discuss whether to have the power expressed. Tom Broadmore also suggested this in 2000.

Thus, it is suggested that consideration be given to an omnibus order, to be drafted, allowing:

(a) The Marshal to obtain an order permitting the Marshal to take such measures that the Marshal considers appropriate:

(a) to preserve the ship, it machinery and equipment, including to maintain class,

(b) to move the vessel within port limits,

(c) to supply fuel and any necessary supplies to the vessel,

(d) to supply victuals and water to the crew and otherwise to take appropriate steps for the well being of the crew,

(e) to discharge or otherwise to take measures for the protection of the cargo.

(b) The Marshal or a party to obtain an order that in exceptional circumstances, permits movement out of port.

Alternatively there could be a rule giving the Marshal power, without the need for application for such an omnibus order, to take the measures in (a)(i) to (v) above.

It was thought the above to be appropriate for consideration. One matter in particular which should be considered is whether the Marshal should have power to repatriate the crew when considered appropriate or whether the Court should be approached before any such step be taken.

Any such facultative powers might be positioned near Rule 47(2).

10. REQUEST FOR INFORMATION FROM THE MARSHAL

The following is put forward for consideration.

Rule 48B - Request for Information

5. The Marshal shall as far as reasonably practicable inform any party or caveator against release, upon request in writing, of the status of the arrest, the fees and expenses incurred, anticipated future fees and expenses and the timing and amount of anticipated further demands. The fees and expenses incurred by the Marshal in responding to such request form part of the fees and expenses in relation to the arrest of the ship or other property.

Commentary

There is a need to ensure that the lines of communication with the Marshal are understood and certain. Given the serious consequences of the undertaking as to fees and expenses and the right to immediate interim demands under Rule 78 of the Admiralty Rules there is a need for parties to be aware of the current state of outgoings. The information may also facilitate prompt resolution and may assist in obtaining release.

11. LOADING AND UNLOADING

Given the "interest" at one of the meetings in this subject matter and the terms of rules 47 and 48, it is suggested that there be consideration whether any further rule, or power in the Marshal, should be provided for (cf Meeson (2nd Ed) p 142 [4-057] in relation to loading and unloading). The Marshals may well want a clearly defined default position, from which any change should be by Court application.

12. ISPS CODE

The drafting committee suggests the following be discussed; though the Marshals need to consider this carefully:

Rule 47A

Unless the Court otherwise orders, the Marshal shall implement such steps under the International Ship and Port Facilities Security Code (ISPS Code) as the Marshal sees fit, the cost of which steps shall form part of the costs and expenses of arrest.

Commentary

It is suggested that the ISPS Code should be taken into account by the Marshal in relation to a ship or property under arrest and the Rules should facilitate reasonable steps taken by the Marshal to address these issues. However, given that Commonwealth legislation is pending, this might await a full consideration of Australia's implementation of the Code. Also if the Marshal does not otherwise have an obligation to act in a certain way it is perhaps unclear why there should be a duty of this kind.

13. BAIL BONDS

The following possible changes are raised:

Rule 54A - Bail Bonds

13. A partnership or corporation carrying on business within the jurisdiction may act as a surety.

14. Where both sureties are corporations they must be "unrelated".

15. Unless the Court otherwise orders and if requested by a relevant interested party each surety in support of a bail bond shall file an affidavit as to their current assets and liabilities as well as all known contingent liabilities, proceedings on foot, whether the subject of any earlier insolvency/bankruptcy, and whether the subject of service of any demand under the Corporations Act 2001 or Bankruptcy Act 1966 and the surety shall expressly undertake to the Court to file a further affidavit up dating the same within seven (7) days if any material adverse change in circumstances occurs.

Commentary

Rule 54 provides for Bail Bonds and form 20 provides limited information about the financial position of the proposed surety. The new rule would ensure that appropriate information is provided as to assets and diminish the risk of the surety being a person of straw. There is no reason why a corporation within the jurisdiction cannot be a surety. Two sureties are required and if both are corporations they should be unrelated.

Also, perhaps, there should be discussion about whether bail bonds should be retained cf the new CPR in England.

14. SALE

There was discussion of sale and it was thought that there should perhaps be a more streamlined procedure based on successful past practice. The following is put forward for discussion. It may be that the suggestion is too prescriptive and this could be the subject of a practice note.

Also it has been suggested that time for appearance in existing rule 23 be reduced from 21 to 7 days to reduce the time before an application for an order for sale.

Rule 70(2) – Sale (replacing existing Rule 70(2))

5. Unless the Court otherwise orders the sale of a ship or other property by the Marshal will be by private tender, advertised for a period of six weeks in the UK Lloyd's List, The Australian, the Lloyd's List DCN in the form of the Invitation to Tender and Bill of Sale (in accordance with Form X) requiring payment of the purchase price within one week of acceptance of the tender.

Commentary

Sale needs to be as expeditious as reasonably practical and stream lining the procedure should accelerate the sale. Rules 69 – 70 of the Admiralty Rules do not adequately address the actual steps which gives rise to both delay and unnecessary additional costs. An appropriate precedent will need to be identified and annexed to the Rules.

15. MARSHAL'S FEES

The following is put forward for discussion.

New Rule 72 (though to be renumbered in Part XII) - Marshal's Fees – replacing all of existing rule 72 and deleting the words "for taxation" at the end of Rule 71(c)

The new rule should be moved to Part XII

72. Taxation of the Marshal's fees and expenses is dispensed with unless the Court otherwise orders. Further, any taxation of the Marshal's fees and expenses is to exclude only fees and expenses which have been incurred unreasonably and otherwise than in good faith by the Marshal.

Commentary

Rule 72 and 71 (c) of the Admiralty Rules currently provide for taxation of fees and expenses of the Marshal. The right to taxation under the above Rules is not consistent in principle with right to payment untaxed found in Rule 53 of the Admiralty Rules albeit covering different fees and expenses. Taxation of Marshal's fees is unproductive and should not be encouraged unless there are clear failures that amount to both unreasonable expense and involve an absence of good faith.

The consequence of amounts not being allowed upon taxation raises the question of who then pays. It cannot be that the Marshal should be exposed to unrecoverable liability except in an extreme case of failure beyond inadvertence or want of reasonableness.

16. POUNDAGE

Various governments need to deal with this and that it should be pursued accordingly.

17. COSTS

The following is suggested as to be worthy of discussion.

Rule 76A – REVISED Costs/Taxation

(1) Unless the Court otherwise orders costs to be paid to any person in relation to proceedings brought under the Admiralty Act 1988 the amount of the claim for debt, damages or other money is for the purposes of costs and taxation irrelevant.

Commentary

The complexity of most admiralty proceedings and the nature of the process available perhaps warrant that there be no monetary limit on claims such as generally found in Order 62 r 36A of the FCR.