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**Marshal’s Manual**





Revised 2018



**DISCLAIMER STATEMENT**

This manual has been prepared for the information and guidance of Marshals of the Federal Court of Australia. The manual is a general guide only which may be applied or adapted by Marshals during their day-to-day activities as they see fit. The manual should not be regarded as a set of rules which is binding on the Marshal.

The manual is made available to users of the Court’s services for general information only and is provided on the understanding that neither the Court nor the Commonwealth of Australia is providing professional advice in relation to the practice and procedure of the arrest and sale of ships. Users must exercise their own judgement and carefully evaluate the information provided for accuracy, currency, completeness and relevance for the purpose for which it is to be used. The information in the manual is not a substitute for independent professional advice relevant to user’s particular circumstances.

Please note that the manual is updated periodically and is current as at the date of last revision. Some of the information will, therefore, change from time to time since the Marshal’s practices are under constant review and are revised when appropriate. The Annexures referred to throughout the manual are the precedent documents used by the Marshals. These documents are subject to constant revision and are intended only for internal usage.

The Marshal’s Manual is revised and updated periodically. Any comments should be directed to:

Deputy Registrar (Admiralty and maritime)

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CHAPTER 1: INTRODUCTION

[1.1] Purpose of this manual

This Manual has been prepared to assist officers of the Federal Court who are directed to perform the duties and functions of a Marshal under the *Admiralty Act 1988* (Cth) (Admiralty Act) and the Admiralty Rules 1988 (the Rules). It is also a useful reference for District Registrars and other staff who may be involved in the arrest, custody, release or sale of a ship or property.

The information in the Manual is not exhaustive or binding and is not a substitute for examining the Admiralty Act, Admiralty Rules, Federal Court Rules 2011 and other relevant material or seeking legal advice.

[1.2] The Legislative framework

The Federal Court’s admiralty jurisdiction is conferred by the Admiralty Act. Under the Admiralty Act, the Federal Court may hear and determine ‘proprietary’ and ‘general’ maritime claims, as well as claims for damage done to a ship. The Admiralty Act defines the types of matters that are ‘proprietary’ maritime claims and ‘general’ maritime claims.

Proceedings under the Admiralty Act are commenced as either an action *in rem* or an action *in personam*.

An action *in rem* is an action against a ship or cargo or other property on, or related to, the ship. In such an action, a ship coming into Australian waters may be arrested for the purpose of providing security for money claimed from the ship owner and operator. If security is not provided, a judge may order the sale of the ship to provide funds to pay the claims.

An action *in personam* is a proceeding against a person, including an organisation.

An action *in rem* may be commenced against a ship or other property on the basis of:

(a) a proprietary maritime claim; or

(b) a maritime lien or other charge in respect of the ship or other property (a maritime lien is defined in the Admiralty Act as including a lien for salvage, a lien for damage done by a ship, a lien for the wages of a Master or crew member, and a lien for a Master’s disbursements;

(c) a general maritime claim where the owner of the ship or property when the action is commenced was the owner or charterer or was in possession or control of the ship or property when the cause of action arose, and such person would be also liable on the claim if commenced as an action *in personam*; and

(d) a general maritime claim where the demise charterer (being a person who has full possession and control of a ship pursuant to a lease) of the ship when the action is commenced was the owner or charterer or was in possession or control of the ship when the cause of action arose, and such person would be also liable on the claim if commenced as an action *in personam*.

A proceeding in respect of a general maritime claim against a ship (the first ship) may also be commenced as an action *in rem* against some other ship (the surrogate ship) where the owner of the surrogate ship when the action is commenced was the owner or charterer or was in possession or control of the first ship when the cause of action arose, and such person would be also liable on the claim if commenced as an action *in personam*. The right to proceed against a surrogate ship does not arise in relation to a proprietary maritime claim.

The general procedure for the conduct of matters under the Admiralty Act is set out in the Admiralty Rules. As the Admiralty Rules do not provide a comprehensive code, the Federal Court Rules will apply to areas where there is no coverage. Where there is any inconsistency between these rules, the Admiralty Rules will apply.

In the Federal Court a national arrangement has been established whereby nominated Judges in each Registry undertake the Admiralty and maritime work of the Court at first instance and, as far as practicable, on appeal. They are assisted in undertaking the work by nominated Registrars, skilled Registry officers and Admiralty Marshals. These Registrars and Registry officers assist the Federal Circuit Court in its handling of *in personam* matters.A National Convening Judge and Registry Convening Judges co-ordinate the work and harmonise practice and procedure.

For more details see the Court's website at the [Admiralty & Maritime practice area](http://www.fedcourt.gov.au/law-and-practice/national-practice-areas/admiralty) page. This page has links to information on the [National and Registry Admiralty Coordinating Judges](http://www.fedcourt.gov.au/law-and-practice/national-practice-areas/admiralty/judges) and the [Admiralty & Maritime Practice Note A&M-1](http://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/a-and-m-1).

The [Court’s intranet](http://fca.intranet.fedcourt.gov.au/registry_court_services/admiralty2) has information for marshals which includes important/useful contacts, forms precedents and this Manual.

[1.3] Maritime transport security legislation

The maritime transport security regime that commenced on 1 July 2004 may impact on the work of the Court’s Marshals under the Admiralty Act.

A copy of an information sheet entitled ‘Information for Marshals on the Maritime Transport Security Regime’ is **Annexure 1A**. The information sheet should be read in conjunction with this Manual.

This regime includes a requirement that all persons working within the secure areas of a port, ship or offshore oil and gas facility and who require unmonitored access to these areas must obtain and display a maritime security identification card (MSIC). Further details on MSIC can be found in [3.19].

CHAPTER 2: APPOINTMENT, DUTIES AND FUNCTIONS OF MARSHAL

[2.1] Appointment of Marshal – the legal basis

Under paragraph 18ZH(1)(a) of the *Federal Court of Australia Act 1976*, the Registrar may appoint such Marshals for the purposes of the Admiralty Act as are necessary.

The current practice is for the Registrar to appoint a Marshal or Marshals in each District Registry. Also, as required from time to time, the Registrar appoints people to be Marshals in each State and Territory who are not employees of the Federal Court . These are usually only short term (closed) appointments. A blank instrument is available for closed appointments (see [2.3]).

[2.2] Appointment procedure

The District Registrar or Marshal should contact Melanie Faithfull in the NSW Registry with written details of the need for the appointment and the person’s full name, position, contact details and background. A recent digital photograph of the person’s head and shoulders is required so that an ID card from the Court may be prepared. Please also provide details of any other appointments held, such as deputy sheriff, authorised officer.

A copy of the instrument of appointment will be sent to the relevant District Registrar, with the original instrument retained in the Principal Registry.

The [Human Resource Management Policy for Admiralty Marshals](http://fca.intranet.fedcourt.gov.au/registry_court_services/human_resources/all_documents/policy_documents/admiralty_marshals_policy) on the Court’s intranet provides guidance on a range of issues for Federal Court staff undertaking the role of a Marshal.

[2.3] Appointment of Marshals in remote areas

Where the ship or property to be arrested is in a remote area, it is often more appropriate to arrange for a local police officer or other suitable person to be appointed as a Marshal.

In 2013 the Court entered into a Memorandum of Understanding with the Australian Customs and Border Protection Service regarding the provision of assistance with arresting ships. A protocol was developed for the Australian Border Force to provide its officers to be appointed as a Marshal for the purpose of executing an arrest of a ship or property. It was implemented on 4 November 2013.

The appointment for non-Federal Court staff will usually be for a fixed period of time. An instrument for a fixed term appointment for a Marshal is available. It is on the intranet at http://fca.intranet.fedcourt.gov.au/registry\_court\_services/admiralty2.

The name and details of the person to be appointed, along with an estimate of the length of time of the appointment, is to be sent to Melanie Faithfull in the NSW Registry so that the instrument of appointment can be arranged and returned by email. A photograph of the person is not required.

[2.4] Revocation of appointment

If a person who holds an appointment as a Marshal ceases to need this appointment or leaves the Court, the Registrar will revoke their appointment as a Marshal.

In this case arrangements should be made with Melanie Faithfull in the NSW Registry to have the appointment revoked. At the same time, if the person holds a MSIC, please return this card to Melanie Faithfull. It must be returned to the Department of Home Affairs, which includes the Australian Border Force, for cancellation.

[2.5] Duties and functions of the Marshal

The functions and obligations of the Marshal are set out in the Admiralty Rules. They include:

* serving initiating process (although this does not have to be done by a Marshal)
* executing arrest warrants
* taking all appropriate steps to retain safe custody of, and to preserve, a ship or property under arrest, including:
* removing from the ship, or storing, cargo that is under arrest
* removing cargo from a ship that is under arrest and storing it
* removing, storing or disposing of perishable goods that are under arrest or are in a ship that is under arrest and
* moving the ship that is under arrest
* arranging for the release of a ship or property pursuant to an order by the court or a registrar
* arranging for the valuation and sale of a ship or property pursuant to an order by the court
* filing a return of sale, and an account of sale and documents in support of the account for taxation
* paying the proceeds of the sale of a ship or property into the court
* filing copies of notices concerning an application for a determination of the order of priority of claims against the ship or property, or the proceeds of the sale such ship or property.

The Marshal may also carry out other functions, as directed by the court, with respect to the custody of a ship or property under arrest.

A Marshal who arrests a ship or property has custody, **not possession**, of the ship or property. In *Government of the Republic of Spain v SS Arantzazu Mendi* [1939] AC 256, Lord Atkin explained that, subject to the Marshal’s control of the custody, all the possessory rights in relation to the arrested ship or property which previously existed continue to exist, including all the remedies which are based on possession.

[2.6] When the Marshal is in doubt

There will be situations when a Marshal is unsure about the most appropriate action to take in performing his or her duties and functions.

At first instance, any queries should be directed to the relevant District Registrar. In some cases arrangements may be made for an experienced Marshal to provide advice on the issue or issues that have arisen. Advice may also be obtained from Tony Tesoriero (NSW) who is the nationally appointed Deputy Registrar (Admiralty and maritime) or Russell Trott, Deputy District Registrar, (WA).

Where a ship or property is in the custody of the Marshal, the Marshal may apply to the Court for directions under rule 48 of the Admiralty Rules. Such an application should clearly identify the issue or issues to be considered by the Court and, to the extent possible, the orders that might be made. Under rule 50, the Court may make appropriate orders with respect to the preservation, management or control of a ship or other property that is under arrest.

The Court also has a general power under rule 80 to:

* give any appropriate direction with respect to a proceeding
* extend or abridge any time in which certain things must be done (before or after that time has expired) and
* dispense with compliance with any of the Admiralty Rules before or after the time for compliance.

[2.7] Legal representation for the Marshal

In the course of an Admiralty proceeding it may be necessary for the Marshal to appear before the Court. This might be because the Marshal is:

* applying to the Court for orders
* the subject of orders being sought by one or more of the parties to the proceeding
* assisting the Court in its consideration of an application by one or more of the parties.

While the Marshal may appear in person, there will be situations where it is appropriate that the Marshal be legally represented. When deciding whether to retain a solicitor or Counsel, consideration should be given to:

* the nature and complexity of each issue which is the subject of the proceeding
* whether the issue is the subject of a dispute between the Marshal and one or more of the parties, or between the parties
* the likely time and resources it would take for the Marshal to deal with the issue without representation
* the likely cost of the representation and whether it is reasonable for the Marshal to incur that cost given the value of the ship or property under arrest.

The relevant District Registrar and the Deputy Registrar in the NSW Registry should be consulted when consideration is being given as to whether a legal representative is to be engaged to appear on behalf of the Marshal.

[2.8] Where the ship or other property is interstate

The Court’s Protocol for Interstate Arrests is set out below.

**Protocol for Interstate Arrests**

Occasionally documents maybe filed in a registry concerning the arrest of a vessel that is located in an area outside the filing Registry. When making arrangements for the arrest, if it is determined that the filing Registry cannot effect the arrest, there are a couple of options to consider. These are arrest either by:

* Interstate Registry
* Australian Border Force (the ABF).

**Interstate Registry undertakes the arrest**

1. If an arrest is to be effected in a Registry other than the filing Registry, as much notice as possible is to be given to the District Registrar and Marshals in the interstate (arresting) Registry.
2. There should be discussions between the filing and interstate registries about the most efficient way to effect the arrest, whether it is either by the interstate registry or by the ABF.
3. If the interstate Registry is to undertake the arrest, then that Registry will take carriage of the arrest and custody.
4. Both filing and arresting Registries should identify the respective officers responsible for the arrest and provide to the file their contact telephone numbers, ie mobile, office and after hours.
5. The filing Registry is to provide the arresting Registry with all relevant documents filed in the filing Registry. This should be done electronically where possible.
6. Practitioners involved in the *in rem* proceeding should generally deal with the arresting Registry. However, care should be exercised to ensure all relevant documentation reaches the filing Registry.
7. Demands for money for Marshal’s fees and expenses associated with an arrest should preferably be made by the arresting Marshal as has been the practice.
8. Project codes (bank accounts) are to be opened by the arresting Registry.
9. The question of transfer of the proceeding to the arresting Registry will depend on the circumstances. The decision to transfer the proceeding is to be decided by the Docket Judge in consultation with the Marshal.

[Comment: If there is no appearance and the proceeding continues only as a proceeding *in rem* it would be generally preferable to transfer the proceeding to the arresting Registry. If the *in rem* proceeding depends upon a jurisdictional argument which can conveniently be done in the filing Registry it may not be preferable to transfer the proceeding. If an appearance is filed and security is put up and the matter proceeds as *in rem* and *in personam* proceedings, the question of transfer should be dealt with at the filing Registry on the ordinary principles governing transfer.]

1. Interlocutory applications in connection with arrest and custody should generally be filed in the filing Registry although may be heard in the arresting Registry. There should be flexibility in consultation with the admiralty judges in both registries.

[Comment: It is important to retain flexibility based on discussion between the respective Procedure Judges. Subject to particular considerations if there is any local knowledge required or the views of the arresting Registry Marshal are relevant the application should be heard in the arresting Registry with the assistance of videolink if necessary. The location of practitioners will be a consideration as to which Registry Procedure Judge will hear the matter.]

1. The filing Registry should advise the arresting Registry of any interlocutory application filed in the filing Registry. To the extent necessary the respective Registry Convening Judges should consult. Generally, the arresting Registry will be responsible for the sale of any vessel and consequential applications and functions.

[Comment: Flexibility may be required in all the circumstances, for instance the location of the parties may affect this.]

1. The costs incurred by the arresting Registry should be assessed and provided to the filing Registry. The report will contain recommendations as to the issue of any cost re-allocation.

**ABF officers undertakes the arrest**

1. If the arrest is to be effected by the ABF, the arresting Registry (whether or not this is the same as the filing Registry) should contact the ABF via the 24 hr call centre, the Australian Border Operations Centre (ABOC). A request will be made for an ABF officer to undertake the arrest under the MOU arrangements.
2. For an interstate arrest, where the ABF agrees it is able to assist, the arresting Registry will take carriage of the arrest and custody. The ABF will only be carrying out the actual arrest. All other activities will be the responsibility of the filing Registry such as dealing with the practitioners/parties involved in the proceedings.
3. The filing Registry will provide all relevant documents filed in the filing Registry to the arresting Registry. This should be done electronically.

[2.9] Marshal’s records

The actions of the Marshal are subject to the scrutiny of the Court and the parties to an Admiralty matter. It is therefore important that a full and complete record is kept by each Marshal in relation to the performance of their functions. The File Index at **Annexure 2** contains a full list of records that should be included in the Marshal’s file.

The arresting Marshal records should include the following:

* **A Marshal’s Time and Record Log** – this document may be maintained in hard copy or in electronic form, and is a chronological and time record including duration of each event, conversation or other action taken in the course of the arrest, custody and release of the ship or property (whether by discharge or pursuant to a judicial sale). The log must be kept up to date at all times.
* **Marshal’s Receipts and Expenditure Record** – a record should be kept of each receipt and expense incurred by the Marshal. It should include a copy of the tax invoices and receipts concerning those expenses and disbursements. Expenses are discussed in greater detail in the next chapter and in Chapter 8 of this Manual.

The parties’ solicitors will regularly request a Statement of Marshal’s costs and expenses to date and these should be supplied promptly.

* **Demands for funds** – a record should be kept of the date and amount of each demand for funds, and of each payment received. It should include a copy of all relevant correspondence.
* **Court papers** – a copy of the originating process, warrant of arrest, supporting affidavits, request not to execute arrest warrant, affidavits of service, Court orders and other Court documents should be kept by the Marshal.
* **Correspondence** – a file should be kept containing copies of all correspondence (including emails) sent and received by the Marshal.

The following sample documents will be of assistance in recording the details of each action taken by the Marshal:

* + **Annexure 2(a)** file index
  + **Annexure 2(b)** sample time and record log
  + **Annexure 2(c)** sample vehicle log
  + **Annexure 2(d)** sample receipt and expenditure record
  + **Annexure 2(e)** sample form of reconciliation
  + Administration File Spine Label.

**See also** [4.3] – Recording the condition of the ship

[2.10] Occupational Health & Safety

The *Work Health and Safety Act 2011* provides a nationally consistent framework protecting the health, safety and welfare of workers at work. Commencing on 1 January 2012 it is intended to harmonise occupational health and safety laws across Australia. It sets out the responsibilities of both employees and employers in relation to work health and safety of the employees of the Commonwealth and of Commonwealth authorities.

All employees have a responsibility to safeguard their own health and safety and that of their colleagues in the workplace, section 28. A ‘workplace’ is where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be while at work. A place includes a vehicle, vessel or aircraft or other mobile structure, section 8.

The work of a Marshal may at times present greater risks and danger than would normally be the case in an office environment. Therefore, it is imperative that Marshals take even greater care not to put themselves or others at risk in potentially dangerous situations such as during the boarding and arrest of ships at a berth, at a mooring or at sea.

Each Marshal should use his or her judgement in all situations and make a decision about whether he or she is able to carry out the duties of a Marshal without putting himself or herself or others at risk.

The following documents will be of assistance:

* Local Guidelines on arresting vessels at anchor
* Guidelines for offshore arrests
* Helicopter safety
* Personal protective equipment.

[2.11] Marshal Contact Register

The Marshal Contact Register contains contact details including office telephone number, home telephone number, mobile number and office email address for all internal Marshals.

The Register was found on the Court’s computer system by opening the Excel program and selecting: Q:\National Data\Admiralty\Marshal\Marshal Contact Register document. It is now on the SharePoint site: http://thehub.fedcourt.gov.au/teams/AdmiraltyMarshal/Lists/Register%20of%20Marshal/AllItems.aspx. Please contact Andrew Gilbert (Victoria Registry) to get access to this database.

The Register is accessible by all Federal Court Marshals and Registrars on a ‘read only’ basis. Maintenance access has been assigned to Melanie Faithfull in the NSW Registry.

Making the Register available on a national level is in keeping with the national approach adopted for the admiralty and maritime jurisdiction of the Court. It assists Registrars and Marshals in interstate arrests by facilitating contact between Registries and Marshals at any time.

New appointments and revocations can occur at any time. Staff are not notified of changes to the Register as they occur. Registrars and Marshals should print a version of the Register when needed to hold with other after hours contact details. At the foot of the Register is a ‘last modified’ date that is updated when changes are made.

Where a Marshal’s contact details have changed the Marshal should send an email to Melanie Faithfull with details of the change.

CHAPTER 3: ARREST OF SHIP

LEGAL FRAMEWORK AND THE ARREST WARRANT

[3.1] The legal framework

Part VI of the Admiralty Rules set out the rules for the arrest of a ship or other property.

[3.2] The arrest warrant

Usually after an action *in rem* is commenced, an application supported by an affidavit is made for an arrest warrant to be issued in respect of the ship or property concerned. The application constitutes an undertaking to the Court to pay on demand the costs and expenses incurred by the Marshal in relation to the arrest and while the ship or property is under arrest.

An arrest warrant is issued by a registrar in the District Registry where the documents are filed. Under rule 43 of the Admiralty Rules, the arrest must be made by a Marshal.

Once an arrest warrant is issued, the issuing Registrar should:

* if the ship or other property is close to the registry in which the documents have been filed – contact the Marshal in the registry and provide him or her with the initiating process (writ), warrant, application and affidavit in support
* if the ship or other property is in a remote part of the State or Territory in which the documents have been filed – the Registrar should consider the use of a remote marshal and ask the Marshal in the registry to arrange for a local customs or police officer or other suitable person to be appointed as a Marshal and, where such a customs or police officer or other suitable person is available, forward to that person a copy of the instrument of appointment along with the initiating process (writ), warrant, application and affidavit in support
* if the ship or other property is in a remote part of the State or Territory in which the documents have been filed and it is not possible for a local customs officer or police officer or other suitable person to be appointed as a Marshal – the Registrar should contact the Marshal in the registry and provide him or her with the initiating process (writ), warrant, application and affidavit in support and request that the Marshal make the necessary travel and other arrangements
* if the ship or other property is in a State or Territory other than the one in which the documents have been filed – contact the District Registrar and Marshal in that State or Territory and immediately forward to them the initiating process (writ), warrant, application and affidavit in support (see the Protocol for Interstate Arrests at [2.8] above).

An arrest warrant must not be executed more than six months after it was issued by a registrar (rule 42).

PREPARING FOR ARREST

[3.3] Is the vessel a ‘ship’?

The vessel must be a ‘ship’ within the meaning of section 3 of the Admiralty Act. For the purposes of the Act, a ship is a vessel of any kind used or constructed for use in navigation by water, however it is propelled or moved. This includes a barge, a lighter or other floating vessel, a hovercraft, an off-shore industry mobile unit and a vessel that has sunk or is stranded and the remains of such a vessel. A ship does not include a seaplane, inland waterways vessel or a vessel under construction that has not been launched.

[3.4] Notification to Office of Transport Security

Prior to an arrest warrant being executed against a ship that is covered by the maritime transport security regime (see [1.3] and **Annexure 1A**), the Marshal should inform the Transport Security Coordination Centre (TSCC) of the Office of Transport Security of the impending arrest. The TSCC is a 24 hour point of contact. Its website address is: <http://www.infrastructure.gov.au/transport/security/contact.aspx>.

[3.5] Notification to Australian Maritime Safety Authority (AMSA)

On 14 August 2002, a Memorandum of Understanding (MOU) between the Court and the Australian Maritime Safety Authority (AMSA) was executed by the Chairman of AMSA, Dr Kenneth Moss and the then Chief Justice, the Hon Michael Black AC.

AMSA’s task as an agency of maritime safety is to do its best to ensure ships trading in Australian ports are safe and handled in a safe manner. To accomplish this, AMSA is empowered to cover all aspects of ship safety, including navigational aids, numbers and qualifications of ships’ crews and officers, the prevention of collisions, the construction and equipment of ships, cargo handling, emergency procedures, position reporting and pollution control.

AMSA has responsibility for trading ships on interstate and overseas voyages. Intrastate trading ships, most fishing vessels, inland waterway vessels and pleasure craft are the responsibility of the appropriate State/Territory government.

Under the terms of the MOU, AMSA and the Court have agreed that the Marshal and AMSA staff will exchange relevant information during an arrest and subsequent custody of a ship. Arrest notifications are to be provided to AMSA’s Rescue Coordination Centre (RCC) Australia. The RCC operates 24hrs a day. A local AMSA manager will contact the Marshal to facilitate ongoing communication. The Marshal should provide their direct contact details when making the initial contact with RCC. Its website address is: <http://www.amsa.gov.au/emergency-contacts/index.asp>.

In practical terms this means that upon AMSA being informed of the Court’s interest in a particular ship within AMSA’s jurisdiction, AMSA will:

* check the inspection history of the ship and advise the Marshal accordingly
* advise the Marshal of any specific safety concerns likely to be encountered with the ship
* advise the Marshal of desirable precautions to be taken in connection with any action the Marshal intends.

The Marshal will assist AMSA by:

* providing advice of the Court’s interest in a particular ship to AMSA as early as is reasonably possible
* discussing with AMSA the safety implications of any intended action by the Marshal in respect of a ship under arrest
* informing AMSA of any orders that the Court has made or intends making that will prevent AMSA from taking the full range of regulatory actions in respect of a ship that they would be entitled to take were the ship not in the custody of the Court.

AMSA has offices in the states and their contact details are at : <http://www.amsa.gov.au/about-amsa/organisational-structure/amsa-offices/index.asp>.

[3.6] Ensure sealed documents available

The Marshal should have six sealed copies of:

* the arrest warrant
* the initiating process (writ) and statement of claim (if any)
* the application
* each supporting affidavit.

In addition to the copy to be affixed to the ship or property, a sealed copy of (at least) the warrant and initiating process is to be provided to the person in charge of the ship, the Manager Marine Operations/Harbour Master, Port Authority, Police, Australian Customs Service, AMSA and ship’s agent.

Other than the person in charge of the ship, these persons/agencies may be more easily provided with the documents via email. Also, if the supporting affidavit is large, these persons/agencies may be provided a copy of the affidavit without the annexures and attachments. Note however that the person in charge of the ship of the vessel should typically be provided with the complete supporting affidavit.

The arresting Marshal should place a set of all the documents filed at the time (if held) in an envelope addressed to the master of the ship and provided to the master or other person in charge immediately after the ship has been arrested. Where the ship is unattended the envelope should be placed in a waterproof jacket and left on the ship.

Where a sealed copy of the warrant or initiating process is not immediately available (such as where the arrest is to occur at a remote location), subrules 30(4) and 43(2) allow a copy of the sealed documents, transmitted by facsimile transmission, to be used for the purposes of service and arrest.

If the Marshal is not asked to serve the initiating process then he or she should check that these documents have, in fact, been served. This can usually be done by asking the party seeking the arrest of the ship to confirm that the initiating process has been served, and/or by examining the Court file to see whether an affidavit of service has been filed. In any event, it will become obvious to the Marshal when he or she attends the ship or other property to be arrested whether the documents have been served as Admiralty Rule 30(1) provides that the initiating process must be served by securely affixing a sealed copy of the process to a mast, or some other conspicuous part, of the ship (or property, package or container as provided by subrule 30(2)).

If the initiating process has not been served in this way then the arresting Marshal should serve the process so as to comply with subrule 30(1) or 30(2) as is appropriate in the circumstances.

[3.7] Obtain details of location of ship or property

The Marshal should ask the party seeking the arrest of a ship for the following information:

* the ship’s name and, if known, port of registration
* the location of the ship or property
* the destination of the ship or property
* the type and size of the ship
* any distinguishing features of the ship;
* the likely nationality of the Master and crew, and whether an interpreter may be needed
* the number of people on board
* whether the people on board are aware that the ship is to be arrested
* a copy of the Lloyds outline of the ship.

While responsibility for this information lies with the party seeking the arrest, the Marshal may also make his or her own enquiries. For example, information on the ship’s location may be obtained from:

* maritime websites such as [www.marinetraffic.com](http://www.marinetraffic.com) or [www.digital-seas.com](http://www.digital-seas.com)
* port authority
* Search and Rescue
* the Australian Maritime Safety Authority (see [3.5] for contact details)
* publications such as the “Lloyd’s List”.

In the situation where there is very limited information available, another source, if the party is a Charterer, might be the Protection and Indemnity Club (P&I Club).

The Marshal should take care in making enquiries about a ship to be arrested to avoid the possible arrest becoming generally known, especially at the port of call, and thereby providing an opportunity for the other party to try to avoid arrest.

[3.8] Seek money on account of costs and expenses of arrest

An application for an arrest warrant constitutes an undertaking to the Court to pay to the Marshal, on demand, an amount equal to the amount of the costs and expenses of the Marshal in relation to the arrest, including costs and expenses while the ship or other property is under arrest (see rule 41). The undertaking is given by the applicant personally or by the applicant’s lawyer.

Before the arrest, in addition to the undertaking, the Marshal may, if it is considered necessary, demand an amount of money as a deposit to discharge his or her duties effectively in relation to the arrest and while the ship or other property is under arrest (see Rule 41(2)). This amount should be based on an estimate of any travel costs (such as air fares) and other expenses which can be foreseen (such as launch hire), including insurance premiums. In most cases it will be reasonable to ask for an amount of $5,000 where the ship to be arrested is a large ship located in a port at a capital city. For large ships located in remote ports the Marshal should consider whether $10,000 to $15,000 is more appropriate. A cheque should be made out to the Federal Court of Australia.

No GST is payable on Marshal’s costs and expenses nor on any demand made by the Marshal. When demanding funds pursuant to an undertaking the Marshal should send a letter of demand for the GST exclusive amount. The Court will pay from its funds any GST amount shown on an invoice and claim that amount as an input tax credit. See section [8.4] for an explanation of the GST position.

Despite the failure, for whatever reason, to expeditiously satisfy the demand for a deposit, the Marshal should proceed to execute the arrest warrant without delay, relying on the undertaking.

After the arrest warrant has been executed, the Marshal may make an interim demand under Rule 78(b) for money on account of costs and expenses, whether or not those expenses have been incurred (see *Waitemata Stevedoring Services Pty Ltd v The Ship “Rangitata” & Anor* [1998] FCA 441 per Lindgren J and see rule 41 generally). There are sample letters of demand on the intranet Admiralty Page.

If the Marshal is in any doubt then Tony Tesoriero, NSW Deputy Registrar (Admiralty and maritime), may be contacted on (02) 9230 8250 or Russell Trott, WA Deputy District Registrar on (08) 9268 7117.

[3.9] The Marshal’s Account

The Court’s Principal Registry maintains a central account known as ‘The Marshal’s Account’ that is administered by each District Registry. The Australian National Audit Office has adopted the view that this account is not a trust account. When monies are received by the arresting Marshal they will be receipted in the District Registry. The Collector of Public Moneys in that Registry (or otherwise the Marshal) will arrange with the Director, Financial Accounting, Principal Registry to allocate a project code (a four digit numeric code) for that proceeding. Other funds received pursuant to a demand will be credited to that project code and any payments made will be debited to that code.

The Marshal should ensure that a unique project code has been allocated for **every** proceeding where he or she receives funds for Marshal’s costs and expenses.

The Principal Registry will provide a quarterly summary of receipt and payment transactions and project code balances to each District Registry.

Contact the Director, Financial Accounting on (02) 9230 8823 for assistance.

When making payments to be debited against a project code the Marshal should apply the usual government accounting practices and ensure that all of the necessary delegations are obtained.

[3.10] Safety: Arrange police attendance

The Marshal, in conjunction with the DDR or Registry Manager, should review the work, health and safety issues associated with the arrest, particularly:

* size, type and location of the ship
* possible issues with boarding the ship
  + weather conditions
  + time of day/night
* need to anticipate any activities (loading cargo)
* need to anticipate hostility or language difficulties (crew)
* other possible hazards.

The Marshal (other than a delegated law enforcement officer) must ask the police or the water police to accompany him or her on the arrest if there is any risk to the Marshal’s personal safety.

If police or water police are unable to assist, the Marshal may proceed with the arrest only if he or she considers it safe to do so. If at any stage of the arrest the Marshal is threatened or physically restricted, he or she should leave the ship and contact the local police immediately. It is an offence for a person to obstruct or hinder a Commonwealth public official in the performance of their duties (see [3.20]).

If police are unavailable and there are safety concerns, consideration may be given to hiring an appropriate number of private security guards. Marshals should be aware that private security guards have limited powers and may not be able to physically hold, detain or arrest any person.

[3.11] Items to take on arrest

The following items should be taken when carrying out an arrest:

* the Marshal’s court provided identification card and MSIC
* personal protective gear
* the documents for execution and service:
* the arrest warrant
* the initiating process (writ) and statement of claim (if any) if these documents have not already been served
* the application
* each supporting affidavit
* a clear plastic sleeve in which the arrest warrant and other documents may be placed
* string and/or stout adhesive tape for attaching the plastic sleeve containing the documents to the mast or other conspicuous part of the ship
* a mobile telephone
* a torch
* a camera to record the condition of the ship or property at the time of the arrest
* a watch
* business cards with the Marshal’s details
* a pen and paper for recording what happens.

[3.12] Disclosure of matters affecting safety

Rule 39A deals with disclosure of matters affecting safety. Under this rule, a party seeking to arrest a ship or a party appearing in the proceeding after the execution of the arrest warrant must disclose to the Marshal “any fact or matter that the party is aware of that could affect the safety of the Marshal or any person, or the ship or any other property, in, or in relation to, the arrest or custody of the ship or property”.

At the time of filing the arrest documents or prior to the arrest a Registrar or Marshal should make a party aware of the disclosure provisions set out in the Rule either by providing a copy of the rule or advising them of the provision. A copy of Rule 39A for distribution is available on the Court’s intranet.

The master of the vessel and the defendant should also be asked to make a similar disclosure (even though no duty exists under the rule). A Registrar or Marshal should provide the defendant with a copy of the Rule and ensure they understand the duty of disclosure under the rule.

[3.13] Arrests at sea

On occasions a Marshal will be asked to arrest a ship at sea within Australian territorial waters. Transport to the ship may be by helicopter or by launch. The Marshal should arrange for the plaintiff’s lawyer to provide a letter to the Marshal at the time of filing the arrest documents requesting that:

* the ship be arrested at sea;
* specifying the mode of transport to be used.

If a helicopter is to be used, the Marshal should establish the hourly hire rate and inform the plaintiff’s lawyer in writing of the potential cost. The Marshal must confirm that the helicopter can land on the ship with minimal risk to the Marshal.

If a launch is to be used and the Marshal has to climb the pilot’s ladder up the side of the ship then safety issues may arise. The Marshal should ensure that he or she has an inflatable life jacket equipped with the necessary alert and distress functions. The Marshal should also have the physical capacity to make the climb and ideally, have completed prior to any field work the required medical assessment and passed the Marshal’s rope climb training. If the Marshal has any doubts about their safety then the arrest should be deferred. The Marshal should only undertake the arrest in a safe manner that does not put the safety of the Marshal or any other person at risk.

The Marshal should inform the insurer in writing of the arrangements that have been made where the arrest is to be at sea.

INSURANCE

[3.14] Insurance for the Marshal

The Marshal has a common law duty to take reasonable care in carrying out his or her statutory duties. Ordinary tort principles suggest that this duty of care extends to third parties who might reasonably and foreseeably be affected by a Marshal’s negligent acts or omissions in the course of carrying out his or her statutory duties: *Dorset YC v Home Office* [1970] AC 1004.

The Marshal cannot rely on any insurance cover obtained by the shipowner or charterer as the Marshal is not a party to that arrangement and, in any event, such arrangements often include a clause to the effect that the cover will lapse or be suspended upon a ship being arrested.

The Court has an arrangement with Arthur J Gallagher & Co (previously known as OAMPS Gault Armstrong Pty Ltd), insurance brokers, for the provision of insurance for the Marshal, underwritten by Lloyds’ London. The policy covers the liability of the Marshal arising out of the arrest of a vessel including hull, machinery, equipment, cargo, bunkers and fuel. All premiums are billed based on arrest activity with the premium for an arrested vessel being paid in arrears.

The Marshal will obtain indemnity for the period the vessel is in the custody of the Marshal. The costs of that insurance will be an expense incurred by the Marshal payable by the party issuing the application for the arrest of the vessel.

The main features of the insurance cover provided by the Policy are set out in the following table.

|  |  |
| --- | --- |
| **Who is covered** | The Sheriffs, Deputy Sheriffs and Marshals of the Federal Court of Australia and the Supreme Courts of New South Wales, Northern Territory, South Australia, Tasmania, Victoria and Western Australia and their agents exercising powers, functions and duties under the Admiralty Act 1988 (Cth). |
| **What is covered** | Subject to the limitations, terms and conditions of the Policy, the Marshal will be indemnified for:   * personal injury * pollution * property damage * salvors compensation * wreck removal   as a result of an occurrence during the period (of the insurance) within the location and in connection with the arrest of any ship to which the policy applies, including ships arrested during the period that remain under arrest beyond expiry of the period. |
| **Exclusions** | The policy does not cover claims in respect of:   * Asbestos * Contractual liability * Cyber attack * Employees * Fines and penalties * Owners insurances (liabilities recoverable under the owners Hull and/or Protection Indemnity Policies) * Pollution (arising as a consequence of the discharge or escape of any hazardous waste, previously carried on the ship, from any land based dump, storage or disposal facility) * Property in custody or control * Radioactive contamination * Sanctions * Ships (whilst owned or operated by the assured) * Terrorism. |
| **Trading Areas** | Anywhere in the Commonwealth of Australia and External Territories and in respect of arrested Ships within the limits of any port in Australia (including whilst at places within 100 miles of any port in Australia) with leave to load, unload, move, be moved and towed, dock, undock including hauling out, launching, overhauling, fitting out, trials and trial trips within port limits.  Movement of Ships between ports within Australia and transportation in excess of one hundred 100 miles between places and ports in Australia held covered at premium rates and terms to be agreed. |
| **Limits of cover** | Limit of liability for any one accident or occurrence is up to AUD$100,000,000 (Ship value up to AUD$10m) increasing to AUD$250,000,000 any one accident or occurrence (Ship value over AUD$10m to AUD$250m). |

A copy of the current Policy is available from each District Registrar, Melanie Faithfull in NSW Registry and on the Court’s intranet. The Policy is renegotiated to commence on 1 January. Each year, on receiving the new Policy, the Deputy Registrar circulates to all Marshals a memorandum providing information about any changes to the Policy.

The Court also holds the following insurance policies with ComCover.

* General liability insurance – covers liability to pay compensation for harm including bodily injury, death, sickness, disease, disability, shock, fright, mental anguish and mental injury, false arrest or imprisonment, wrongful detention, malicious prosecution and humiliation. Product liability cover for risks associated with the sale of cargo or ships is also provided.
* Professional indemnity – covers liability for loss caused by the execution or breach of the Marshal’s duties. This insurance does not extend to crew members.

Commonwealth employees who are injured in the course of their employment are covered by the insurance scheme under the *Safety, Rehabilitation and Compensation Act 1988* (Cth).

Marshals who are not Commonwealth employees should contact their employer if they have any queries about worker’s compensation or other insurance issues.

[3.15] Insurance by interested parties

The Admiralty and Maritime Practice Note (A&M-1), re-issued by the Chief Justice effective from 25 October 2016 substantial in the same terms as Practice Note 12 (10 May 1996), provides:

**7. Insurance of property arrested under the Admiralty Act**

7.1 The *Admiralty Act* provides for the arrest of property (including vessels) by the Marshal in actions *in rem.* The Marshal will obtain indemnity insurance for the period the vessel is in the custody of the Marshal. The cost of that insurance will be an expense incurred by the Marshal payable by the party issuing the writ for the arrest of the vessel. The Court may require that party to undertake to pay the cost of that insurance at the time the writ is issued.

7.2 The Marshal does not at any time during the period of arrest hold commercial insurance for the benefit of any person who has an interest in the arrested property including cargo. Persons with an interest in the arrested property and their lawyers may wish to consider the question of insuring the amount of their interest against consequential risk, including risks occasioned by any movement of the vessel. .

This means that the plaintiff and any other parties with an interest in a ship or its cargo will need to make their own insurance arrangements in respect to that interest.

Background information on insurance:

Marine insurance provides "hull and machinery" cover for shipowners, and cargo cover for cargo owners.

Protection and indemnity insurance, (P&I insurance), is a form of mutual maritime insurance provided by a P&I Club covering open-ended risks that traditional insurers are reluctant to insure. Typical P&I cover includes a carrier's third-party risks for damage caused to cargo during carriage, war risks and risks of environmental damage such as oil spills and pollution. A P&I Club is a mutual insurance association that provides risk pooling, information and representation for its members who are typically shipowners, ship operators or demise charterers, but more recently freight forwarders and warehouse operators have been able to join.

CARRYING OUT THE ARREST

[3.16] Time for arrest

An arrest warrant may be executed at any time and on any day of the week (Rule 46).

[3.17] Identifying the ship

The Marshal will usually be able to identify the ship to be arrested from its markings. The ship’s name is usually painted on the bows and across the stern of the ship. The ship’s port of registration is found on the stern of the ship. In some cases, the ship’s name will also be shown on a plate located on the port or starboard side of the superstructure. The ship’s name can be confirmed by checking the ship’s certificates and its log.

[3.18] The arrest

The manner in which an arrest warrant is to be executed is set out in Rule 43.

Subrule 43(1A) provides that the affidavit in support of the application for the arrest warrant and the writ and all annexures and exhibits to the affidavit (unless it is not reasonable to do so) must be served at the same time the arrest warrant is executed. Subrule 43(2) provides that the arrest warrant must be executed, and the affidavit served, in the same way as the initiating process is served.

Rule 30 provides that the initiating process must be served by securely affixing a sealed copy of the process to:

* a mast, or some other conspicuous part, of the ship, or
* (in the case of property that is not, at the time of service, on board a ship) the property or to a package or container containing the property.

In practical terms, an arrest will involve the following steps:

1. The Maritime Transport and Offshore Facilities Security Regulations prohibit unauthorised entry to a port, ship or on-shore security zone. The Marshal will be able to rely on paragraphs 6.05(c) and 7.05(c) of the Regulations to enter a port, ship or on-shore security zone in the course of the Marshal’s duties (such as executing an arrest warrant or retaining safe custody of a ship or property under arrest).

In practice, this will mean a Marshal must be able to produce photo identification when required to do so, particularly when not accompanied by a law enforcement officer (such as a member of the police or water police), and be able to explain the reason for entry. In order to enter, remain and work unmonitored within a maritime security zone, the Marshal must display a MSIC (see [3.19]).

If the ship is berthed, contact the port’s Manager of Marine Operations/Harbour Master and notify them of the impending arrest to ensure that clearance for the ship to leave the port is not given.

1. The Marshal should board the ship and introduce himself or herself to the Master or other person in charge (see [Seafarer's professions and ranks](https://en.wikipedia.org/wiki/Seafarer%27s_professions_and_ranks) for information on the roles on board a ship) (“I am a Marshal of the Federal Court here to arrest this ship. Please take me to the Master of the vessel.”) and show that person his or her Marshal’s identification. If the proceeding is against the ship or other property that is on the ship, the Marshal should securely affix a sealed copy of:

* the initiating process, if necessary; and
* the arrest warrant and supporting affidavit;

to the mast, or some other conspicuous part (such as the windscreen of the wheelhouse), of the ship. It is not sufficient for the documents to be attached to, for example, the hull of the ship.

1. The Marshal should give to the Master or other person in charge a sealed copy of the documents. This is not a legal requirement but one of courtesy – the Marshal should not be concerned if there is nobody on board to be informed or to receive the documents. Usually the documents are put in an envelope addressed to the ship. If the ship is unattended the envelope should be placed in a plastic cover and left on the ship.
2. If the proceeding is against property that is not, at the time of service, on board the ship, the Marshal should securely affix a sealed copy of:

* the initiating process, if necessary
* the arrest warrant and supporting affidavit

to the property or to a package or container containing the property.

1. If the Marshal cannot reasonably obtain access to the ship or property to affix the documents, the initiating process, warrant and affidavits may be served and executed by:
   * handing a sealed copy of the documents to a person apparently in charge of the ship or property
   * if the person refuses to accept the documents, by putting a sealed copy of the documents down in the presence of the person and telling the person what the documents are.

Where a sealed copy of the warrant or initiating process is not immediately available (such as where the arrest is to occur at a remote location), rule 30(4) allows a copy of the sealed documents, transmitted by facsimile transmission, to be used for the purposes of service and arrest.

1. Ascertain the identity and contact details of the ship’s agent, if any.
2. Record the condition of the ship (see [4.3]).
3. If deemed necessary but not typically, appoint the Master as Shipkeeper and obtain an undertaking from the Master (see [4.10]) and, if appropriate, organise to brief the crew members directly.

**Annexure 3** sets out an arrest checklist that should be completed by the arresting Marshal.

[3.19] Maritime Security Identification Card (MSIC)

Under the *Maritime Transport and Offshore Facilities Security Act 2003* and *Maritime Transport and Offshore Facilities Security Regulations 2003*, all persons working within secure areas of a port, ship or offshore oil and gas facility (maritime security zones) and who require unmonitored access to such zones must obtain and display a maritime security identification card (MSIC) any time they are in a maritime security zone.

Maritime security zones are used to subject areas within ports, on and around ships, and on and around offshore facilities to additional security requirements. The zones include:

* port security zones
* ship security zones
* on-board security zones
* offshore security zones.

The MSIC is a nationally consistent identification card which shows the holder has met the minimum security requirements to enter, remain and work unmonitored within a maritime security zone. The holder has been subject to police criminal history checks and security assessments and has been deemed not a threat to maritime security. The MSIC is not an access card and does not entitle the holder to automatic entry to all security zones. There still needs to be a genuine work-related reason as to why the holder is in a security zone. The relevant authority at each port/facility still controls access to its maritime security zone.

While working in a security zone, everyone needs to follow the facility operator’s standard occupational health and safety procedures. A person must properly display the MSIC by attaching it:

* to outer clothing;
* at or above waist height;
* at the front of the body or side of the body or on a board around the upper arm; and
* so that the whole front of the MSIC is clearly visible.

A person may be fined or prosecuted if a MSIC is not displayed correctly, or it is invalid or misused when the person is in a maritime security zone.

The scheme commenced on 1 January 2007 and is administered by the Department of Infrastructure and Regional Development (DIRD). Offences which may preclude a person from obtaining a MSIC include:

* Treason, espionage and harming Australians;
* Supply of weapons or missiles;
* Offences involving hijacking or destruction of an aircraft or vessel;
* Treachery, sabotage, sedition, inciting mutiny;
* Unlawful drilling;
* Destroying or damaging Commonwealth property;
* Interference with aviation, maritime transport infrastructure or offshore facility, including carriage of dangerous goods on board an aircraft or ship or endangering the security of an aerodrome, a port or an offshore facility;
* Counterfeit or false identity documents or assuming another’s identity;
* Transnational crime involving money-laundering, racketeering or people smuggling;
* Importation, exportation, supply or production or weapons, explosives or trafficable quantity of drugs.

The issuing body confirms the applicant’s identity, operational need and requirements and the background checks. DIRD determines the eligibility of all applicants. Unsuccessful applicants may have a right of appeal. A MSIC is valid for 2 or 4 years with a background check conducted every 2 years.

Marshals require a MSIC any time they have to enter and remain in a maritime security zone, either for the purpose of arresting a vessel or maintaining custody of the vessel. Marshals should always carry their Federal Court identification card as well as their MSIC when entering a security zone.

The Court is responsible for obtaining all MSICs required by Marshals. Please contact Melanie Faithfull in NSW Registry to arrange for a MSIC to be issued, renewed or returned.

[3.20] Obstructing or interfering with Marshal

It is an offence for a person to:

* obstruct, hinder, intimidate or resist a Commonwealth public official in the performance of the official’s functions as a Commonwealth public official (section 149.1 *Criminal Code Act 1995* (Cth)); or
* intentionally receive, remove, retain, conceal or dispose of property which has been attached or taken under the process or authority of any federal court (section 49 *Crimes Act 1914* (Cth)).

[3.21] Ship being loaded or unloaded at time of arrest

Generally, when considering the timing of an arrest, the Marshal will be cognisant of the impact of the arrest on the operations of the port, in particular whether the ship is carrying a load or is empty, waiting at anchor, coming into berth or already at berth.

This section provides some guidance as to the approach to be taken where a ship is in the process of being loaded or unloaded at the time of arrest.

At the time the arrest documents are filed in the Registry, the Marshal is usually only provided with very limited information about the cargo (if any) that is on the ship. Where loading or unloading has commenced prior to the arrest, the Marshal gives an instruction that the ship be restrained from working. The underlying premise is that the ship is not allowed to work without the Marshal’s express permission. If the Marshal arrests the ship and allows it to continue to work he or she should consider issues of the Marshal’s liability if there is an accident whilst unloading cargo. If unloading was not permitted or ceased at the direction of the Marshal, a person who is entitled to immediate possession of cargo may apply to the Marshal pursuant to Rule 49 to discharge the cargo from the ship.

It is not always possible for the Marshal to reach the ship at the time it arrives at port. Further, the Marshal may decide not to arrest the ship immediately if the arrest would interfere with any cargo unloading operations that are underway. However, as some modern ships can load and unload at the same time, the general premise to be applied here is that the Marshal should not allow the ship to load any cargo whatsoever, except where the Court orders otherwise. If the ship has commenced loading before the arrest takes place then, immediately after execution of the arrest warrant process, the Marshal should direct the Master to cease all cargo operations. In relation to unloading, it may be appropriate to consider executing an arrest after the unloading has been completed to avoid complications.

Where cargo already loaded includes livestock or perishable materials or goods, the Marshal should:

* seek advice from the relevant port and quarantine authorities – if livestock are already on board the ship then the Marshal should ensure that arrangements have been made for food and water to be loaded as well
* AMSA should be consulted where dangerous or hazardous goods or material are on board
* the Registry Convening Judge or docket Judge should be consulted where the plaintiff or other person has made a request to load cargo.

Other factors that the Marshal may need to consider include:

* any quarantine restrictions on the cargo being unloaded in Australia
* if the ship was to be sold (it cannot be assumed because the cargo was allowed to be loaded that it can be unloaded – this particularly applies to livestock and grain)
* the re-sale value of the ship and the amount of the claim(s)(as specified in the writ(s))
* the time the ship may take to fully unload its cargo (it could be 24 hours or longer)
* the other responsibilities of the Marshal (who may be a delegated law enforcement officer)
* whether the ship will need to be moved to allow other ships to load at the berth or terminal (see [4.15] in relation to moving the ship)
* costs generally.

If the cargo being unloaded is under arrest then suitable arrangements will need to be made for the secure custody of the cargo once it is discharged from the ship.

See [4.13] in relation to applications to discharge cargo.

AFTER THE ARREST

[3.22] Notification of authorities

Once the arrest is made the Marshal should immediately notify the following authorities of the arrest and provide each of them with a copy of the arrest warrant:

* Manager of Marine Operations/Harbour Master
* the relevant Port Authority
* the water police (if not available at the time of arrest)
* the Collector of Customs
* the Operations Centre of the Office of Transport Security
* the Australian Maritime Safety Authority.

Each authority should be asked to help prevent the departure of the ship by refusing clearance facilities until further notice.

[3.23] Notifications to the Admiralty Judges and Principal Registry

Immediately after the arrest, the arresting Marshal should advise the Admiralty Judges and Marshals along with the Deputy Registrar (Admiralty and maritime) and Melanie Faithfull in the NSW Registry of:

* the name of ship arrested
* the date, time and location of the arrest
* the names of the parties
* any problems or other significant issues about the arrest.

An Outlook group has been set up, Admiralty Judges & Marshals ([AdmiraltyJudgesMarshals@fedcourt.gov.au](mailto:AdmiraltyJudgesMarshals@fedcourt.gov.au)), which includes the names of all the people wishing to be notified of an arrest.

The relevant District Registry (that is, the Registry where the documents commencing the proceedings were filed) must also be advised of the execution (and service) for the purposes of updating Casetrack. The arresting Marshal (unless a remote Marshal) or otherwise a Marshal in the arresting Registry is responsible for updating the Admiralty Arrest Register.

[3.24] Admiralty Arrest Register

The Admiralty Arrest Register was originally an Excel file that contained details of the ships arrested by the Marshals. A SharePoint version was developed in 2017.

The Excel version of the Register can be found on the Court’s computer system by opening the Excel program and selecting: Q:\National Data\Admiralty\Marshal\Admiralty Arrest Register document. The SharePoint version can be found at: <http://thehub.fedcourt.gov.au/teams/AdmiraltyMarshal/Lists/Arrests/AllItems.aspx>. If a Marshal cannot view the Register then he or she should contact the IT Service Desk on (03) 8600 4444 and request that this document be added to their profile.

[3.25] Notification to insurer

Within 14 days of an arrest warrant being executed the Marshal must complete as comprehensively as possible a Declaration of Arrested Ship (see **Annexure 4**) and send it to the insurance broker, Arthur J Gallagher. It is a condition of cover that the declaration form be completed as comprehensively as possible.

The broker’s contact details are as follows:

|  |  |
| --- | --- |
| Mr Ric Clarke | Phone: (08) 6250 8300 (switch) |
| Arthur J Gallagher & Co |  |
| Level 2, 235 St Georges Tce |  |
| PERTH WA 6000 | Email: [ric.clarke@ajg.com.au](mailto:ric.clarke@ajg.com.au) |
| PO Box 6299 | Web: [www.ajg.com.au](http://www.ajg.com.au) |
| EAST PERTH WA 6892 |  |

Alternative email addresses:

[yessica.pudja@ajg.com.au](mailto:yessica.pudja@ajg.com.au)

jonathan.joe@ajg.com.au.

[3.26] Notification of ship’s agent

A copy of the arrest warrant should be provided to any ship’s agent for the ship. The role of the ship’s agent should be considered carefully. Where it seems obvious that the arrest will be of a short duration the agent may continue to arrange and provide victualling, fuel, laundry and other services with the costs to be met by his principal. The Marshal should confirm these arrangements with the Master and the agent. Alternatively where the costs are not met by the agent’s principal or where it is clear that the arrest will be of a longer duration, the Marshal should personally arrange to provide the supplies and services to the ship. The ship’s agent should be able to assist with this. If the Marshal is to meet the costs of supplies and services to the ship then the Marshal should ensure they are reasonable.

The Marshal will need to communicate with the agent during the arrest to obtain information about the ship, its services, cargo issues and other issues that may have arisen pre-arrest that could assist the Marshal with custody of the ship.

[3.27] Notice that the ship is under arrest

As soon as practicable after the arrest, the Marshal should post a notice at the bottom of the gangway (or as close as possible to where the gangway allows access to the ship) stating that the ship is under arrest and that there is no access to the ship without the Marshal’s formal permission.

A precedent notice is **Annexure 5**.

[3.28] Affidavit of execution of arrest warrant

The arresting Marshal must complete and swear (or affirm) an Affidavit of Execution of Arrest Warrant. This affidavit should be in accordance with Form 16 in the Admiralty Rules, a copy of which is at **Annexure 6**. The Affidavit should also include details of the service of any originating process (that is, the writ) and affidavit in support served by the Marshal at the same time as the arrest warrant was executed.

The affidavit should be filed in the District Registry in which the proceeding is being conducted and a copy should be sent to the solicitors for the Plaintiff.

[3.29] Arrest of small vessel

The arrest of a small vessel (fishing boat, yacht) may raise issues for a Marshal not encountered during the arrest of container or cargo vessels. The standard considerations in relation to health and safety issues for these types of arrests are size, type and location of the ship, possible issues with boarding the ship (such as weather conditions, time of day/night), need to anticipate any activities (loading cargo), and need to anticipate crew hostility or language difficulties.

Further considerations flowing from this are:

* whether the police or customs are interested in the vessel for their investigations
* need to get as much information from the practitioner as possible to identify probable issues to be encountered during the arrest and the custody
* if the vessel is located on private property, such as a marina, determine ease of access and whether the Marshal needs to obtain permission from the owner of the property, where the property owner is not a party to the matter or related to one of these parties
* whether there will there be resistance from anyone, either on board or otherwise:
  + any crew on board, whether they will resist is difficult to ascertain until conducting the arrest (consider requesting police etc assistance)
  + if this is a small community, there could be concern from locals
* the crew can be encouraged to leave the vessel but cannot be forced to go and if they stay, the Marshal should consider whether to appoint the crew member as a ship’s keeper (it may assist maintaining the security of the vessel)
* as a courtesy, give a copy of the warrant etc to crew on board
* how to secure/lock up the vessel, and any belongings, after the arrest
* whether other security arrangements need to be made (such as a paid security guard) if the vessel is unattended or cannot be supervised in some manner
* if it is not safe to leave the vessel in its current location or whether the vessel needs to be moved or possibly put on hardstand or dry docked
* identifying property of the crew (it is vital to take comprehensive photos to address any subsequent claims about property on board)
* if a fishing vessel, there may be the issue of any catch (cargo) on board and who owns the cargo.

If there is any risk to the Marshal’s personal safety, the Marshal (other than a delegated law enforcement officer) must consider whether to approach the police or the water police to accompany them on the arrest.

If police or water police are unable to assist, the Marshal may proceed with the arrest only if they consider it safe to do so. If at any stage of the arrest the Marshal is threatened or physically restricted, they should leave the ship and contact the local police immediately. It is an offence for a person to obstruct or hinder a Commonwealth public official in the performance of their duties (see [3.20]).

If police are unavailable and there are safety concerns, consideration may be given to hiring an appropriate number of private security guards. Marshals should be aware that private security guards have limited powers and may not be able to physically hold, detain or arrest any person.

It is helpful to approach the local ABF officers (even if they are not undertaking the arrest), as they can assist with the risk assessment process and may have intelligence regarding the particular vessel.

Following are examples of small vessel arrests by Marshals and further details are available in the relevant Marshal’s file.

**MV Sandman**(fishing vessel) – WA 2015 arrested for unpaid loans

1. **Marshal’s power of entry onto private/rented/leased property**

A Warrant was issued for the arrest of a fishing vessel (MV SANDMAN) which was in a specially designed cradle to support the vessel whilst in dry dock at a commercial industrial site. The premises were surrounded by a security fence and a locked gate. Fortunately the caretaker was on duty and allowed access.

With the vessel being on ‘private premises’, the following issues may arise. Responses are in red behind the questions posed.

1. Does the Marshal have to seek permission from the land owner (unless pre-arranged) to enter the premises at any given time? – yes, the Marshal does need to seek permission as they cannot trespass on private land to access the ship
2. The subject of further costs may emerge should a call out for the owner to allow entry.
3. If granted permission to enter, however, the owner of the vessel refuses to allow the Marshal on board to affix the documentation – the owner of vessel cannot refuse entry and may be contempt of court if they do
4. Should the owner refuse initial entry will they become liable for obstruct/hinder the Marshal – as above, yes
5. If Police attendance is requested re the above, Police may be somewhat hesitant in exercising their powers due to the nature of the matter – in the past Police have threatened to arrest a resident if he causes a breach of the peace during an arrest
6. What are the procedures to relocate the vessel away from the premises to another suitable location? – best to seek an order from the Court to move the vessel which should only be done if the arrest is protracted, longer than a couple of days
7. **Property of vessel’s crew**

The vessel contained a number of fixed items allegedly belonging to a crew member, in this instance, the crewman stated he had designed and constructed a large metal fishing net reel which was bolted to the deck. He was most adamant he was going to remove the reel immediately as it was his property and not subject to any Court Order or proceedings.

Fortunately, he was persuaded to leave everything as is, despite his strongest objections avoiding the necessity for the Marshal to decide at the time of the arrest who owns what item.

Perhaps a good approach is, at the time the Application is sought, specific details are included as to what must remain on the vessel.

This is a difficult situation and the Marshal can only use their discretion. If items look to be the personal items of the crew and the master confirms this then it is alright for the crew member to remove it. However, if they are items of equipment then err on side of caution and restrain the person from taking them.

1. **Practitioners input/Legal questions**

Given that these types of vessels are privately owned and probably the only source of income, the owner may be fiercely reluctant to assist the Marshal.

1. Practitioners need to provide to the Marshal as much information as is available concerning the possibility of resistance prior to arrest and any relevant information regarding the crew etc.
2. Where the owner is not present, can the writ etc be served on the crew member to affect the arrest? – all documents are to be attached to the vessel as per the usual arrest, on the window and signs attached to the vessel’s entry point
3. If the vessel is unattended, should the arrest be affected without the owner present? – yes, with smaller vessels an unattended vessel is easier to arrest; take photos of the documents attached to the vessel
4. Should contact be made with the owner while at the site if the owner is not in attendance? This may cause delays and hinder the arrest if and when he/she arrives – it is better to talk to the owner regardless of the time it might take as it is helpful for them to know what is happening
5. Should the vessel contain a catch (fish etc), who has ownership of the catch and where can it be appropriately stored (in cold storage)? – the catch is cargo and may involve a legal question for which the Marshal may need to seek an urgent direction from the Court.

**Dragon Pearl** (yacht) – NT 2017 arrested due to dispute over money used to pay for yacht

Vessel being sailed from Singapore to a marina in Darwin by 2 crew members and there were a number of issues:

* Electrical repairs required
* Crews’ wages outstanding, they wanted to stay on board as they had no money and nowhere to go
* Money for provisions on the vessel are slow to come through so maintenance work such as cleaning of the vessel cannot take place as the crew do not have the requisite cleaning products.
* The crew members are dissatisfied with the current arrangements and have mentioned repatriation or leaving Australia. How will the vessel be managed if they leave?
* Cyclone Season was imminent and the Marina Management were asking how long the Marshal intend for the vessel to remain in this berth as it is one of a limited size berths used for other vessels as a refuge when a cyclone is approaching. Marina Management need to know how long it will be berthed so they can update their cyclone management plans
* The generators and engine are overdue for servicing. This work will need to be undertaken prior to movement once released from arrest. Only once the vessel is mobile and out of the marina can the septic tank waste on board be emptied
* With Cyclone Season approaching there is a cut-off time to safely sail a vessel of this size to Qld
* Vessel not designed to run using on-shore power continuously for extended periods
* Cost of moving the vessel to another place such as Queensland (information was provided that the marina in Queensland would be the best place to undertake the necessary repairs).

[3.30] Marshal’s files

The files maintained by a Marshal in relation to an arrest are not stored on the matter file. Instead, they are stored in a SharePoint site developed for marshals.

This SharePoint site includes the Arrest Register, the Marshals Register and the Marshals’ files which stores any documents created by the marshal during the arrest: http://thehub.fedcourt.gov.au/teams/AdmiraltyMarshal/default.aspx.

Contact Andrew Gilbert (Victoria Registry) on (03) 8600 3513 to obtain access to the Marshals’ SharePoint site.

CHAPTER 4: CUSTODY

INTRODUCTION

[4.1] The legal framework

Rules 41, 47, 48, 49, 50, 75A, 75B, 75C, 78 and 78A of the Admiralty Rules are relevant to the custody of the arrested ship or property.

In particular, subrule 47(2) provides that the Marshal shall, unless the court otherwise orders, take all appropriate steps to retain safe custody of, and to preserve, the ship or property, including:

(a) removing from the ship, or storing, cargo that is under arrest;

(b) removing cargo from a ship that is under arrest and storing it;

(c) removing, storing or disposing of perishable goods that are under arrest or are in a ship that is under arrest; and

(d) moving the ship that is under arrest.

The courts have found that the Marshal has a duty to take reasonable care in carrying out their duties in relation to an arrested ship or property (see, for example, *Mooloolaba Slipways Pty Ltd v The Owners of the Ship “Santa Maria” & Anor* [2001] QSC 470).

[4.2] Application to the Court

Rule 48 provides that the Marshal may at any time apply to the Court for directions with respect to a ship that is under arrest. This may be done by the Marshal directly, as an officer of the Court, or if considered necessary by a legal representative retained by the Marshal. If the Marshal intends to make an application to the Court then the local registrar and or Tony Tesoriero, Deputy Registrar (Admiralty and maritime) can assist.

CUSTODY OF SHIPS AND PROPERTY UNDER ARREST

[4.3] Recording the condition of the ship

A photographic record of the condition of the ship and the items on it should be made at the time of the arrest. This record may be important in the event that there is any dispute about the condition of the ship or the preservation of property on it.

A record should be made of the following matters (depending on the type of ship and the circumstances of the arrest):

* the ship’s dimensions, utilisation and age – this should be available from the ship’s Register and survey/classification certificate (the expiry date of which should also be recorded – the Master will often have a list of the certificates and their expiry dates)
* the estimated current market value of the ship (this is part of the information that is provided to the insurer within 14 days of the arrest and may be obtained from a local ships broker, or the insurer may assist)
* the overall condition of the ship, including whether there are:

any structural or mechanical problem(s)

any leaks, damage, rust, zinc corrodes or other deterioration

* whether any repairs or maintenance work have been booked
* whether anything must be done to the ship if it is going to be laying up for several days
* the names and nationality of the crew, including a copy of the crew list
* the medical condition of the crew
* the amount, condition and relevant expiry dates of the ship’s medical supplies
* the amount of drinking water for the crew
* the amount and condition of hard and fresh rations on the ship
* the amount and age of the bunker fuel, and the number of sailing days it will allow
* the amount of diesel fuel for generators
* the amount of water and feed for any livestock (if relevant)
* the condition of the sewerage system and when it is next due to be serviced

the type and condition of the ship’s communications system

* the condition of any refrigeration system on the ship (if relevant)
* details of any cargo on board, including:
  + the nature and quantity of cargo
  + the approximate value of the cargo (if known)
  + whether any cargo is perishable
  + the identity of the owner(s) of the cargo
  + the destination of the cargo.

A checklist for recording the condition of the ship is **Annexure 7** and must be completed by the arresting Marshal**.**

The Marshal should record the responses given by the Master and/or Chief Engineer against each item on the checklist where relevant, then sign, date and record the time of completion on the checklist. The completed checklist should be countersigned by a Deputy District Registrar for internal control purposes and to meet audit requirements.

Where the Marshal is concerned about some aspect of the ship’s condition, or the arrest is to be for a significant period of time, consideration should be given to having the ship inspected by a qualified marine surveyor for the purposes of providing:

* + - an expert report on the ship’s condition
    - advice on what reasonable steps should be taken to protect and preserve the ship.

AMSA may also be able to assist with ascertaining the ship’s condition.

[4.4] Mooring the ship

At the time of the arrest the Marshal should assess whether the ship is properly moored. This will include an assessment as to the suitability of the location and type of mooring in terms of safety, weather conditions, proper supervision, maintenance and cost.

At the time of arrest the ship may be at a working berth (this is usually the case for commercial cargo and passenger ships). Early consideration should be given to whether the ship should be moved from a working berth to a more suitable type of mooring. There are several reasons for this:

* working berths often incur very high berthage rates (in excess of $500 per hour)
* if the arrest continues for more than a short period the port facility operator and the harbour authorities will need to have the working berth cleared to accommodate incoming ships
* access for the Marshal and others to working berths can be problematic, particularly in busy ports where cargo operations are undertaken 24 hours per day, 7 days per week.

Issues that might need to be taken into account when considering the suitability of the current berth or whether to move the ship to another berth include:

* the likely duration of the arrest
* the suitability, safety etc of the current berth – particularly if the duration of the arrest may be protracted
* any advice from harbour authorities and the port facility operator regarding the need for the working berth to be freed for other ships
* the likely costs of any move, including berthage fees
* the availability of suitable alternative berths
* whether or not cargo operations are underway or likely to occur during the period of arrest
* any advice from the Master as to whether the ship needs to be alongside for any repairs or maintenance works scheduled whilst in port
* the accessibility of any new berth for the Marshal, maintenance workers, provision of victualling supplies, brokers and prospective buyers (in the event of a sale) etc.

When a Marshal is considering whether to move a ship, the harbour authorities can provide advice on the location and cost of other suitable types of berth that may be available.

There are several types of mooring:

* working berth
* lay-by or lay-up berth
* buoy
* dolphin
* trot
* anchorage.

The harbour authorities can advise on which type of available berth is most suitable for the type of ship under arrest.

Some harbour authorities or port facility operators still maintain ‘lay-by’ berths where a ship can be berthed for considerable periods at minimal cost, however these are fast disappearing.

It may be advisable to also consult with the plaintiff via their solicitor in regard to any move of the ship. They may be able to provide informal or ‘without prejudice’ advice on the likely period of arrest, the likelihood of any application to load or unload cargo and their client’s attitude in regard to the costs of such a move.

If the Marshal is considering moving the ship on the Marshal’s own motion, it is advisable to ask for a direction from a Judge so that an order can be made that the costs of the move be a part of the Marshal’s costs and expenses of arrest.

In circumstances where:

* vessels are arrested other than in major ports or
* there is a conflict of ownership of a vessel or
* there is unsatisfactory protection from prevailing weather conditions,

it may be possible to obtain the assistance of the Royal Australian Navy (RAN) where there is a base or facility in close proximity to the arrest location. When assistance is sought from RAN, it is suggested that the RAN facility be considered to be a temporary haven that will allow the Marshal sufficient time to consider all other options in regard to seeking a safe berth or mooring for the vessel.

The RAN, within their general guidelines and policies, have a role to play in assisting general commercial and, more particularly, Federal Government agencies. Arrangements should be made at Commanding Officer or Executive Officer level at the relevant facility.

[4.5] Bringing an arrested ship into port – maritime transport security legislation

In addition to having to have the usual approvals and clearances for entering a port, Part 5 of the *Maritime Transport and Offshore Facilities Security Act 2003* provides that a regulated foreign ship may not enter an Australian port unless:

* the ship has:
* an International Ship Security Certificate (or approved International Ship Security Certificate equivalent) (ISSC) – s 91 and
* the ship has provided pre-arrival information in accordance with the regulations – s 92 or
* the Secretary has issued a control direction to the ship operator or the Master of the ship allowing the ship to enter the port.

The Marshal should be able to ascertain whether a regulated foreign ship is able to enter a port by contacting the relevant port authority. If the ship is not able to enter the port because it does not have an ISSC, has not provided the required pre-arrival information or is not subject to an appropriate control direction, the Marshal should contact the Transport Security Co-ordination Centre of the Office of Transport Security or the relevant State Security Director.

While it is an offence for a regulated Australian ship that is being used for maritime transport to:

* not have a ship security plan
* not have an ISSC or
* fail to comply with its ship security plan

it seems that none of these matters will prevent a ship from entering an Australian port subject to the ship having the other necessary approvals and clearances. Nor is it clear from the legislation whether failure by a regulated Australian ship to provide pre-entry information will preclude it from entering an Australian port.

The Marshal should be able to ascertain whether a regulated Australian ship is able to enter a port by contacting the relevant port authority.

[4.6] Other certificates

If the ship is a large ship (that is, a ship other than a yacht, fishing trawler, cruiser etc) then on arrest, or as soon as practicable after an arrest, the Marshal should seek copies of the following certificates:

1. Certificate of Class – Hull
2. Certificate of Class – Machinery
3. International Tonnage Certificate
4. Certificate of Bareboat Charter Registry
5. Statutory Survey notices including:
   1. Load Line Annual Survey Certificate\*
   2. Safety Equipment Annual Survey Certificate\*
   3. Radio Certificate\* and
   4. Radio Renewal Survey Certificate\*
6. Tank Statement
7. Safe Manning Certificate
8. Copy of ship’s plans.

\* These certificates may all be part of one certificate.

[4.7] Quarantine

The Marshal should formally approach the Department of Agriculture and Water Resources. The relevant section is the Maritime National Coordination Centre (MNCC) on 1300 004 605, which has taken over responsibility for quarantine issues from the Australian Quarantine and Inspection Service (AQIS). Please contact this Centre and request that they remove items of quarantine concern from the ship. After they have attended the ship, this Department will formally confirm that the ship is a quarantine risk free ship.

Quarantine issues may arise during the custody of the vessel and may impede the vessel’s arrest in certain circumstances. Marshals, at the time of the arrest, should ascertain whether there are any animals (such as dogs, birds and the like) on board the vessel as this may immediately raise issues effecting Australia’s quarantine laws.

Where there are animals on board the Marshal should:

* execute the warrant on the vessel
* obtain copies of any available quarantine certificates in relation to these animals
* contact the MNCC to determine whether there is a quarantine risk.

The issue may cause difficulties for the Marshal if the animal is infected in any way. It is suggested a cautious approach be adopted when arresting the vessel, for example it may be obvious that a dog is on board the vessel before boarding. This knowledge, together with any other information about the vessel’s voyage details, should be taken into consideration at the time of execution of the warrant. It is better to involve quarantine officers as early as practicable where animals are seen to be on the vessel.

[4.8] Excise on fuel purchases

In the matter of *OW Bunker & Trading Co Ltd A/S v Ship ‘Mawashi Al Gasseem’* (SAD 146/2005) an issue arose as to whether the Marshal must pay excise duty on bunkers (marine gas oil) ordered by the Marshal. The matter was raised at the local level with the Australian Customs Service (ACS) and was subsequently referred to Canberra for a response. The response from the Director Cargo Environment, Cargo Branch, ACS, to the Manager, Container Examination Facility/Enforcement Operations, ACS, South Australia was set out in an email entitled: “In Confidence: Mawashi Al Gasseem Bunker Query” sent on 12 July 2005 at 14.44. The substance of the advice is set out below:

“The short answer is that the nature of the ship, the ongoing purpose of its voyage and the fact that it is not loading/carrying solely domestic cargo indicates that it has not disconnected from its international voyage and therefore revenue should not be charged in the ship’s bunkers.”

The content of the email is to be used as the authority in such circumstances for the non-payment of excise duty and this should be made clear when ordering bunker supplies. It is clear that the authority relates to ships on international voyages only.

[4.9] Insurance claims

Under the terms of the Court’s insurance policy the Marshal has a duty to disclose promptly in writing any occurrence (a term which is defined in the policy) that may result in a claim. The occurrence may come to the Marshal’s attention in a telephone call, an email or an unsigned letter addressed to the Marshal that refers to damage or the conduct of the Marshal or other party that has the potential to cause damage.

Regardless of the Marshal’s view of the event, Arthur J Gallagher & Co should be informed of the event so they in turn can inform the underwriters who may decide to investigate the claim. Notifying the insurers at the earliest time enables a marine surveyor or insurance assessor appointed by the broker to gather evidence as soon as practicable after the event and to form a view as to liability.

The Marshal must not admit liability nor give any waiver of subrogation without the express permission of the underwriters.

The Marshal has a duty to take such measures as may be reasonable for the purpose of averting or minimising a loss.

The Marshal should keep a detailed account of the particulars of any event that may result in a claim including records of conversation with potential claimants, photographs of damage that record the date and time it was taken, hold any part of the ship that may have been detached from the ship as part of an event (where it is possible) and report such contact to the broker. When a claim is under investigation the broker will provide the Marshal with advice as to dealings with the claimant.

MASTER AND CREW

[4.10] Persons on board when arrest occurs

If the ship is unattended, the Marshal must be satisfied that it is safely moored.

In the case of a small ship, if there are people on board then the Marshal should direct them to secure the ship to the Marshal’s satisfaction. In some cases it may be appropriate to direct all or some of the people on board the ship to gather their personal belongings and leave the ship within a reasonable time (as specified by the Marshal).

Whether this is appropriate for other ships will depend on such things as the size of the ship, safe custody, safe manning levels (see the ship’s Safe Manning Certificate), preservation of the ship and requirements of the local port and other relevant authorities. The Marshal will usually appoint a ship-keeper and obtain an undertaking from him or her (see **Annexures 8 and 9**). The Master remains responsible for complying with any obligations under port or navigation legislation and for the crew. The Marshal should take care that any instruction given to the Master does not impinge upon those responsibilities.

If there are foreign crew then the Department of Home Affairs will need to be notified of the arrest.

The Marshal must also give instructions to the Master and any crew remaining on board that any visitors, press, maintenance workers etc can only board the ship with the Marshal’s permission.

[4.11] Repatriation of crew

If the Master or any member of the crew is a foreign national or foreign resident and elects to leave the ship or is discharged, that person must be repatriated unless he or she is taking a post on another ship.

Where repatriation is to occur, the Marshal with the assistance of the Master should prepare a schedule of costs of repatriation. The schedule should provide for air travel to the nearest home port, any domestic travel and enough cash to enable the crew member to reach home. It has been held by the courts that, while in most cases the costs of repatriation are expenses of the arrest, these costs may also be expenses of sale (*Patrick Stevedoring No 2 Pty Ltd v Turakina and Waitemata Stevedoring Services Ltd v Rangitata & Ors* (1998) 154 ALR 514; 84 FCR 493).

The Marshal should also ascertain whether any member of the crew has personal belongings that cannot be carried out of Australia as plane luggage (for example, in the matter of *Patrick Stevedores No 2 Pty Ltd v M V Skulptor Konenkov* NG 495 of 1995 it was necessary to have a crew member’s second-hand car shipped to Russia by container).

[4.12] Retention of crew

The Convention for the Safety of Life at Sea (SOLAS) is an international maritime safety treaty. It ensures that ships flagged by signatory States comply with minimum safety standards in construct, equipment and operation. SOLAS requires the flag State of a ship to issue it with a Minimum Safe Manning Certificate which must be observed.

In some ports the Harbour Master requires that a Master and crew be engaged for ships of a certain size. The Marshal must consider whether a crew or a ship’s keeper are necessary to maintain the ship in good working order, for instance by keeping machinery running (such as pumps and generators). Consideration should be given to using a labour hire firm, otherwise it is the Marshal’s responsibility to make wages, tax and superannuation payments and to arrange any applicable insurance cover. Alternatively, the Marshal can ask the plaintiff to retain a crew. The advantage of the latter is that the Marshal does not have to outlay any moneys for wages or be responsible for tax, superannuation and insurance. In such cases the plaintiff will usually seek an order from the Court that money paid for the crew be recoverable as part of the Marshal’s expenses of arrest.

The Marshal must ensure that the Harbour Master, the plaintiff, the water police and other interested parties are kept informed of arrangements concerning the crew of the ship.

[4.13] Application for removal (discharge) of cargo

Rule 49 provides that, if a ship is under arrest but its cargo is not, a person who is entitled to immediate possession of the cargo may apply, in accordance with Form 17 Application for discharge, to the Marshal to discharge the cargo from the ship.

A copy of Form 17 is **Annexure 10**.

The Marshal may comply with an application to discharge the cargo if:

* the Marshal is satisfied that the applicant is entitled to immediate possession of the cargo
* the applicant gives an undertaking in writing that is satisfactory to the Marshal to pay on demand to the Marshal the costs and expenses of the Marshal in connection with the discharge
* if the Marshal so requires, the applicant indemnifies the Marshal, in a form satisfactory to the Marshal, in respect of any claim against the Marshal arising from the discharge.

A precedent undertaking and indemnity is **Annexure 11**.

A checklist for dealing with the discharge of cargo is **Annexure 12** and should be completed by the arresting Marshal.

Issues to be considered on an application to discharge the cargo include:

* whether there are suitable cargo handling facilities at the berth
* whether the ship will have to be moved to a working berth
* whether there are any hazardous or dangerous goods included in the cargo to be discharged – in this case consult with AMSA
* whether the cargo is under arrest – in this case suitable arrangements will need to be made for the secure custody of the cargo once discharged from the ship
* whether the ship’s Master and crew will co-operate with cargo operations – this can be a particular issue where the background to the arrest includes any dispute over the payment (or non-payment) of crew wages or entitlements
* whether the parties are nearing settlement of the dispute and the ship could be released from arrest shortly
* whether a party will make an application for sale of the ship – in these circumstances all the cargo on the ship will need to be removed and the respective cargo interests should make an application to the Court so that costs, ship movements and cargo discharge arrangements can be directed or ordered by the Court.

Notwithstanding that the Marshal may rely on the applicant’s undertaking in relation to the costs of the discharge, it is often preferable that an agreement be reached with the applicant that they make the logistical arrangements for the discharge and pay the associated costs directly.

If the Marshal decides to discharge the cargo he or she should notify the following organisations that permission has been given to berth for discharge of cargo so that clearance and facilities may be given:

* Manager of Marine Operations/Harbour Master
* the relevant Port Authority
* the water police
* the Collector of Customs.

[4.14] Repairs

Repairs to the ship should be classified as either minor or major repairs. Minor repairs should be considered as being part of the normal on-going, in port repairs that can be carried out by the crew, by the ship’s engineers or under their supervision. To affect this class of repair equipment, hardware, tools and other materials and supplies may need to be ordered by the Marshal. As an example a special piece of equipment may need to be manufactured on shore to keep the ship’s generators working to be fitted by the ship’s engineers. There may also be a need to engage a chemical consultant to advise on the chemicals needed to flush the ship’s salt water-cooling and piping system in circumstances where the vessel has been under arrest for months.

The Marshal should make it clear to the Master of the ship that under no circumstances should oxyacetylene gas torches be used for repairs without the Marshal’s express approval. Such work may require a ‘hot work permit’ from the Harbour Master or the Port Authority. The Master of the ship would usually make such arrangements with the relevant authority where the Marshal is satisfied that such work can proceed.

Major repairs include those where contractors need to be engaged to remove and repair bulk heads or hatch covers or other repairs that involve the use of oxyacetylene torches and heavy lift equipment.

After categorising repairs as minor or major, the Marshal should then determine whether he or she is prepared to allow the repairs to be undertaken. When making this determination, the Marshal should assess:

* the relative risk to the ship and its crew.;
* whether the repairs are necessary to maintain the safety, condition or value of the ship or its equipment;
* whether the ship’s Master or agent will bear the cost of the repairs or whether they can be justified as part of the Marshal’s expenses of arrest – this can be a particular issue where there is no local agent for the ship and/or the Master does not have access to funds, either directly or through the operator/owner.

Where the repairs are categorised as major repairs, the Marshal should not permit them to proceed. The owner/operator or their agent should apply to the Court for an order that would include the party providing an indemnity and undertaking to protect the Marshal.

This above approach should be adopted regardless of whether it is the ship’s agent or Master seeking to arrange repairs or maintenance on a ship whilst it is under arrest or the repairs were booked by the Master or operator before the ship was arrested. The Marshal should assess the relative risks and may have to visit the ship to examine the repair work to be undertaken. The Marshal should also ask the local AMSA inspector to attend the ship with him/her to explain how the repair work would be undertaken and the risks associated with it. Details of any expected repairs or maintenance work should be obtained from the Master and/or agent at the time of arrest.

If there is any doubt about the necessity for the repairs or the appropriate source of responsibility for payment then the Marshal should give the plaintiff an opportunity to express a view regarding their inclusion as part of the expenses of arrest. Where the costs are likely to be significant and/or the plaintiff has any objections then the matter can be brought before the Court for directions.

In any case the Marshal should keep a close and detailed record in the arrest log of the request, the nature and extent of the repairs, the costs and the content of discussions with the various parties.

Where the cost of repairs is part of the expenses of arrest then the Marshal should be particularly careful to obtain an appropriate number of independent quotations prior to approving the work.

[4.15] Moving the ship

There are a large number of circumstances where it may become necessary to consider moving a ship that is under arrest. Some of the most common are where:

* the arrested ship is at a berth that is unsuitable for a longer term stay
* the arrested ship is at a working berth and port operators or authorities require the use of the berth for other incoming ships
* the berthage costs are high and the costs of arrest need to be kept to a reasonable level
* the ship is at anchor or at a non working berth and needs to be berthed at a working berth for taking on fuel and/or provisions
* an order for sale has been made by the Court and the berth is unsuitable for the conduct of the sale or inspections by prospective buyers
* the ship is not at a working berth and needs to be taken to a working berth to undertake cargo operations (this may involve two moves – one to the working berth and one back to the original berth or to anchor).

Rule 47(2)(d) provides the Marshal must take all steps to retain safe custody of, and to preserve, the ship or property, including moving the ship that is under arrest. An application can be made to the Court by the Marshal or a party for the ship to be moved.

Co-operation of the Master and crew should be confirmed prior to making any arrangements for the move.

The cost of moving a ship, even a relatively short distance, can be substantial and may include:

* pilotage fees
* channel clearance fees
* tugs
* line handling charges.

Prior to making arrangements to move a ship the Marshal should ensure that the responsibility for costs is clear. This can be done by seeking a direction from the Court that the costs form part of the costs and expenses of arrest or are to be met by a particular party, or by obtaining an undertaking from the interested party to pay the costs associated with the move.

Where the move is being undertaken at the formal request of one of the parties it may be preferable that the Marshal come to an agreement that that party make all the arrangements for the move (subject to the satisfaction of the Marshal) and pay all costs directly. In these circumstances an appropriate indemnity should be obtained from the party concerned.

If the Marshal is making the arrangements for the move at the request of one of the parties (other than the plaintiff) then a separate set of detailed accounts should be kept of all associated costs. At the appropriate time a demand for funds should be made, and a statement of accounts provided, to the relevant party.

Where the Marshal is making the arrangements for the move and will be paying the costs, it will be necessary to obtain quotations for the relevant services. If the ship operator has an ongoing arrangement with a particular tug and mooring service provider then they may be used. Copies of quotations and costs of using existing service arrangements should be obtained and held with the Marshal’s records.

Where the Harbour Master requests the Marshal to move a ship from a berth the Marshal should request a letter setting out the reasons for the move and giving details of the other ships that require access to that berth and their estimates time of arrival and length of stay. A copy of the letter should be provided to all parties in the proceeding seeking their consent to the movement of the ship. These responses will form the basis for obtaining an order of the Court to move the ship.

Depending on the circumstances of the move (its location, timing etc), it is generally preferable for the Marshal or a nominated officer to be present on the ship during the move.

The Marshal should provide details of any move (including the fact that the move is authorised by the Marshal) to the following organisations:

* Manager of Marine Operations/Harbour Master
* the relevant Port Authority
* the water police
* the Collector of Customs
* the Transport Security Coordination Centre of the Office of Transport Security
* the Australian Maritime Safety Authority.

The Master of the ship should be clearly advised that the moving of the ship in no way constitutes either a change in the arrested status of the ship or a release from arrest.

In very rare circumstances it is necessary that a ship under arrest be moved from one port to another. In these circumstances the Marshal should consult with the docket Judge and the parties to ensure that the orders in relation to the move are sufficiently detailed so as to cover all issues involved in the move. The Deputy Registrar (Admiralty and maritime) may also be consulted. The Marshal may need to consider obtaining legal advice and may seek to be heard during the hearing of any application in this regard. The Marshal should obtain appropriate indemnities and undertakings to ensure the costs of the move are fully funded prior to the move taking place. The insurer Arthur J Gallagher & Co should also be informed of any such proposal. While the Court’s insurance policy provides for the movement of vessels in excess of 100 miles between ports and places in Australia the cover is subject to terms and premium rates to be agreed.

In the circumstances where the ship under arrest is to be moved from one port to another (or any other place) the Marshal should make enquiries to ensure that the ship under arrest is insured for Hull and Protection & Indemnity risks.

Where there is any concern as to whether the ship under arrest is in an unseaworthy condition the Marshal should consider appointing a Marine Surveyor to determine whether or not the ship under arrest is seaworthy. In the event of any determination that the ship under arrest is unseaworthy then the move should not proceed.

The Marshal should also take into consideration movements that involve:

* Towage of the ship under arrest, for this presents as an increased risk exposure and should only be permitted following the appointment of a Marine Surveyor to issue a Towage Approval Certificate
* Transportation by land or as deck cargo on board an overseas carrying vessel. Marine Surveyors should be appointed to issue a Stowage Approval Certificate (or such other certificate which attests to the suitability of the loading/lashing arrangements).

**Annexure 13** sets out a movement checklist.

MARITIME SECURITY

[4.16] Ensuring compliance with ship security plans, security directions etc

The maritime transport security legislation imposes a number of obligations upon ship operators and Masters of security regulated ships. These obligations remain in force while the ship is in the custody of the Marshal.

For example, the ship operator and Master of a regulated Australian ship are responsible for ensuring that:

* there is compliance with a direction to implement or comply with additional security measures (section 33)
* the ship is operated in accordance with the ship’s security plan (section 63)
* operation of the ship does not hinder or obstruct compliance with the ship security plan of another ship (section 64)
* any maritime transport or offshore facility security incident is reported to the relevant authorities as soon as possible (sections 178 and 179)
* there is compliance with a ship enforcement order (section 195).

This list is not exhaustive.

Where the Master and/or crew of an arrested Australian ship have been repatriated, the ship operator continues to be responsible for the ship security plan and must provide any caretaker Master and crew with a copy of the plan and any other information and resources needed to implement it.

The ship operator and Master of a regulated foreign ship are responsible for ensuring that:

* the ship implements applicable International Ship and Port Facility Security (ISPS) Code measures (section 94)
* the operations of the ship do not hinder or obstruct compliance with the maritime security plan of a maritime industry participant or the ship security plan of a regulated Australian ship or the offshore security plan of an offshore industry participant in a way that compromises the security of the operations of the participant or the regulated Australian ship (section 97)
* there is compliance with a control direction requiring the ship operator or Master to take specified action, or refrain from taking specified action, in relation to the ship (section 99)
* any maritime transport or offshore facility security incident is reported to the relevant authorities as soon as possible (sections 178 and 179).

This list is not exhaustive.

The information sheet ‘Continuing Obligations of Ship Operators and Masters of Arrested Vessels under the *Maritime Transport and Offshore Facilities Security Act 2003*’ may be provided to relevant personnel. A copy of the information sheet is annexed to **Annexure 1B** and is also available from the Court’s web site.

CHAPTER 5: RELEASE

[5.1] The legal framework

Division 3 of Part VI (Rules 51-53) of the Admiralty Rules sets out the rules for the release of a ship or other property.

If the Court or a Registrar orders release of a ship, the Court or Registrar must give the Marshal a notice of the release in accordance with Form 19A and an entered order.

[5.2] The release

**Annexure 14** sets out a release checklist that must be completed by the responsible Marshal. A release will involve the following steps:

1. Relinquishing any controls the Marshal has over the ship.

2. Ensuring the warrant, writ and affidavit are removed from the ship.

3. Notifying the following of the release by providing them with a copy of the order:

* the Plaintiff’s and owner’s solicitors
* the Ship
* the Ship’s Keeper
* Transport Security Coordination Centre of the Office of Transport Security
* Manager of Marine Operations/Harbour Master
* the relevant Port Authority;
* the water police (if previously notified)
* the Collector of Customs
* the Australian Maritime Safety Authority
* Arthur J Gallagher & Co (see [5.3]).

4. Notifying the people on the distribution list (ie those notified of the arrest) of the release.

5. Notifying the relevant District Registry of the release so that Casetrack may be updated.

6. Update the Admiralty Arrest Register, see [3.24] for further details.

7. Finalise invoices and accounts, including return of any outstanding deposit:

* Sample of Return of Balance of Deposit.

[5.3] Notification of insurer

On release of the ship the section titled ‘release of ship’ on the Declaration of Arrested Ship form (see **Annexure 4**) should be completed and the entire form retransmitted to Arthur J Gallahger & Co.

The insurer’s contact details are at [3.25].

CHAPTER 6: VALUATION AND SALE OF SHIP

**Note:** The work involved for the valuation and sale of a ship may vary according to the circumstances of the case and the orders made by the Court. This chapter attempts to provide a general outline of the matters to be considered and how to conduct a sale by tender.

[6.1] Who may apply for order for sale

Any party may apply to the court for an order that a ship or other property that is under arrest in the proceeding be valued, valued and sold, or sold without valuation (subrule 69(1)). In most cases the Marshal will, through dealings with the parties, be aware of a party’s intention to file an application for an order for valuation and sale.

If the applicant for sale has not commenced *in rem* proceedings against the ship then the Court will require that they do so before an order for valuation and sale will be made.

PREPARATION BEFORE ORDER FOR VALUATION AND SALE

[6.2] Third party property

The Marshal should ascertain whether there is any equipment or other property on board the ship that is not owned by the owner, operator or charterer of the ship and could be the subject of a claim by a third party (eg leased equipment).

[6.3] Contact ships brokers

The order for valuation and sale will usually include an order that the Marshal engage a ships broker. The Marshal should make contact with brokers to ascertain if they will act for the Marshal in the sale of the ship and if they deal in that type of ship. Brokers should be asked to provide career details of each broker employed by the company and a list of sales and purchases undertaken over (say) the last twenty years. The Marshal may also ask the broker to provide proposed terms of engagement that sets out the obligations of the broker in conducting the sale of the arrested ship on behalf of the Marshal. These obligations should include:

1. providing for a valuation to be sent directly to the Marshal in accordance with Court orders
2. arranging and undertaking an advertising and marketing program in accordance with Court orders (with actual costs of advertising to be reimbursed by the Marshal on presentation of copies of the relevant invoices)
3. providing prospective buyers with general information, copies of the ship’s plans and copies of the Marshal’s Conditions of Sale
4. arranging on-board inspections
5. if the sale is by closed bid tender – receiving sealed bids and presenting them to the Marshal on the tender closing date
6. acting solely on behalf of the Court as brokers only.

The engagement proposal will include the broker’s remuneration (usually 0.75 to 1% of the final accepted gross price of the ship). The remuneration should expressly exclude the value of bunkers and lubricants.

[6.4] Legal advice

The order for valuation and sale may include an order that the Marshal retain a solicitor to act on the sale of the ship. If so, the Marshal should arrange for the solicitor (or otherwise a Registrar) to review the Marshal’s Conditions of Sale (see **Annexure 15**) to ensure that they are up to date and all the terms are appropriate for the sale of the ship.

[6.5] Estimate of costs of valuation and sale

The Marshal should prepare an ‘Estimate of Costs of Marshal’s Expenses in relation to the Valuation and Sale of MV (*Insert name*)’. The broker may be the best (only) valuer. This estimate should be based on a period of eight weeks from the date the order for sale was made to the date of delivery of the ship. Although the sale period may take ten weeks to complete any remaining costs not funded by the plaintiff can be met from the sale fund. Costs to be estimated may include:

* Marshal’s solicitor’s and counsel’s fees
* brokerage fee
* advertising
* inventory survey
* bunkers and lubes survey
* repatriation of any remaining crew
* berthage/mooring charges
* insurance
* effluent waste removal
* garbage waste removal
* marine gas oil and bunker fuel
* provisions for the crew
* laundry expenses
* medical expenses
* ship’s mobile phone hire and call charges
* chemical, stores and equipment for the ship
* Marshal’s car and taxi hire
* Marshal’s water taxi and launch hire
* Helicopter hire.

[6.6] Seek money on account of costs and expenses of sale

Subrule 69(4) of the Rules provides that an application for an order for valuation or sale constitutes an undertaking by the party who made it to pay, on demand, to the Marshal an amount equal to the amount of the costs and expenses of the Marshal in complying with the order.

If the Marshal is provided with an advance copy of the application for sale then it may be prudent to forward, as a draft, a copy of the estimated expenses addressed to the parties care of their solicitors and identifying the amount on account of expenses that will be sought.

If the application for sale has been filed then a formal demand pursuant to subrule 78(b) based on the costs estimate should be made to ensure the Marshal has sufficient funds to pay accounts as they fall due (see *Waitemata Stevedoring Services Pty Ltd v The Ship “Rangitata” & Anor* [1998] FCA 441 where Lindgren J held that Rule 78(b) clearly empowers the Marshal to make one or more demands for interim payments on account of fees or expenses yet to be incurred, and is not confined to enabling the making of demands for interim payments on account of fees or expenses already incurred).

If the party making the application is out of the jurisdiction there may be difficulties enforcing any undertaking. In this case, expenditure should not be incurred unless funds have already been received from the applicant or some other form of acceptable security has been given.

If the Marshal is any doubt then the Deputy Registrar (Admiralty and maritime) may be consulted.

ORDER FOR VALUATION AND SALE

[6.7] Order for valuation and sale

Precedent orders for valuation and sale are set out at **Annexure 16**.

Other precedent orders can be found in Casetrack, on the Intranet (Casetrack Precedent Order Text) and on the Internet at the Law & Practice section and select 'Admiralty and maritime NPA', followed by the "More Practice Notes" option and then select "Precedents for Admiralty Orders". The address is: [www.fedcourt.gov.au/law-and-practice/national-practice-areas/admiralty/more#Practice](http://www.fedcourt.gov.au/law-and-practice/national-practice-areas/admiralty/more#Practice).

[6.8] Notify broker that order for sale has been made

Sealed copies of the orders should be provided to the broker as soon as possible. The terms of engagement should be executed if this has not already been done.

[6.9] The valuation

The Marshal should ensure that a valuation is received from the broker. The envelope containing the valuation should be properly sealed and held in the District Registrar’s safe until further directions are made by the docket Judge or until after the time for bids has closed.

The valuation is confidential and should not be disclosed to anybody unless ordered by the Court to do so.

[6.10] Advertising the sale

The broker may, in addition to making recommendations about the method of sale, make recommendations about the advertising strategy, including the length of any advertising campaign, to be adopted.

The Court orders will set out the publications in which the advertisements are to be placed.

The broker should be required to seek the Marshal’s approval of any advertisement before going to press and should supply the Marshal with a copy of all advertisements. An alternative is for the Order to also include the wording and form of advertisement so this cannot be changed. This may be a more acceptable to the Auditors although means the Marshal would need to seek orders quickly.

[6.11] Foreign currency account

The Marshal needs to obtain an order to open any foreign currency and investment accounts. Principal Finance looks after the opening and managing of all investment accounts

Should the type of ship to be advertised locally be a small ship such as a trawler, cruiser or yacht, and it is solely advertised in the South Pacific region, an investment ‘at call’ account should be opened in Australian dollars. Principal Registry will arrange with the bank to open the account even though there are no funds to be deposited. The name of the account is “Admiralty Marshal – Sale of the MV (*name of the ship)*”*.*

The Court has opened a US currency account and a pounds sterling account with the Westpac Bank. The accounts are available for practitioners to deposit US or pounds sterling funds in relation to an admiralty or maritime dispute. This can be done at short notice and without the need for a previous order of the Court. The accounts have been opened as Litigant’s Fund under Division 2.5 of the Federal Court Rules 2011. An order of the Court would be required to withdraw or transfer the funds.

The US account details are:

|  |  |
| --- | --- |
| Account Name | Federal Court of Australia |
| Account designator | Marshals Account |
| BSB | 034702 |
| A/C no | 826486 |
| Swift code | WPACAU2S |

The pounds sterling account details are:

|  |  |
| --- | --- |
| Account Name | Federal Court of Australia |
| Account designator | Marshals Account |
| BSB | 034-703 |
| A/C no | 805740 |
| Swift code | WPACAU2S |

For audit reasons the Marshal is not made a signatory to these accounts only senior officers at Principal Finance are the signatories. For this reason Principal Registry require an order or direction signed by the Court for any money to be withdrawn.

The Marshal is to establish a separate set of accounting records in which to record receipts and payments from that account. It is good administrative practice to maintain separate folders for this account to file correspondence with the bank, bank statements and reconciliations statements and accounting records to assist Principal Finance for accurate reconciliation records.

[6.12] Conditions of Sale

When the Admiralty Marshal’s Conditions of Sale (see **Annexure 15**) are complete and have been approved they can be provided to the broker to give to prospective purchasers.

[6.13] Inventories

A certified marine surveyor should be engaged to carry out the following inventories and provide reports:

* inventory of stores and equipment (with photographs);
* bunkers and lubes survey to establish quantities and types of fuel and lube oils on board.

The bunker survey is not carried out until 3 days after the sale (in accordance with the Conditions of Sale).

It is preferable to be in receipt of the inventory report before any inspections take place by prospective purchasers.

[6.14] On-board inspections

The Marshal should provide the brokers with an authority to attend the ship at their discretion to obtain plans and to accompany prospective purchasers to conduct an inspection of the ship. The authority should be effective from a specified date and cease on the closing date for bids.

All visitors are required to sign a waiver and indemnity form in accordance with **Annexure 17**. A copy of the form should be provided to the broker and the Master of the ship.

[6.15] Terminate contracts and request final accounts

The Marshal should formally notify all suppliers and service companies including any employment agency that orders have been made to sell the ship and request that all outstanding accounts be submitted for payment. It is important that the Marshal regularly follows up these accounts.

AFTER BIDS CLOSE

[6.16] Recording the bids

Consult the docket Judge as to the practice to be followed on closure of the bids. The usual practice is that the Marshal, the Marshal’s solicitor (if any), District Registrar (or some other senior officer nominated by the District Registrar) and the broker(s) meet in the Registry, in private, to open and formally record details of each bid. It is preferable to keep the envelopes with each bid. Some bids will have been sent by facsimile to the broker who will place them in an envelope.

You may find that a bid is received after the closing time. One or more of the bids may be defective because the bidder has imposed conditions, it is not signed or for some other reason. You should be guided by legal advice in these circumstances.

[6.17] Accepting a bid

After all the bids have been opened the Marshal should open the valuation from the broker.

Where the highest bid or a number of bids are above the valuation and are acceptable bids the usual practice is that the Marshal accepts the highest bid. The docket Judge should be advised of the outcome.

On the Court return date for the acceptance of the tender the Marshal should inform the Court that there are a number of bids above the valuation and that the Marshal proposes to accept the highest bid. If all the bids are below the valuation the Marshal should prepare short minutes of order seeking an order to accept the highest bid (**see Annexure 18**).

[6.18] Preserving confidentiality on the return date

There are issues as to how much should be said in open Court on the return date given that on that date it is unknown whether or not the highest bidder will proceed to buy the ship.

The brokers strongly recommend that, as the offers are open for 5 business days, the name of the bidders, their offers and the valuation should remain confidential until the sale is completed and the ship is transferred to the purchaser.

In any case, it is the practice of the Marshal never to release details of the bids (offeror or amount) and the valuation, as they are confidential and subject to Court orders.

[6.19] After the return date

The following steps are required to complete the sale:

1. Request that the broker communicate the acceptance to the highest bidder as specified in the offer and reaffirm the payment requirements contained in the Conditions of Sale.
2. Liaise with the bank to check that the 10% deposit has been received and recorded on the bank ledger. The bank should be requested to formally confirm the payment has been received and that they are cleared funds and provide a copy of the ledger by facsimile.
3. Arrange for a bunker survey to be conducted in accordance with the Conditions of Sale.
4. Ascertain the current net spot market price for fuel oil, diesel oil and lubricating oils as detailed in the bunker survey report. Contact the various suppliers of the type of fuel or lubricant and ask for written advice on the price. The price of some lubricants may have to be for an equivalent product that is available here, as the actual type may have been purchased overseas and not available in Australia. All prices should be obtained in Australian dollars so that GST at the rate of 10% can be added to the price per litre. If necessary, the Marshal should convert the amounts to US dollars.
5. The Marshal or his/her solicitor should formally communicate with the authorised representative of the buyer and set out the quantity, type of fuel and lubricant, the price per litre, GST, price per litre inclusive of GST and the total amount for each type that is payable. The letter should include the total sum payable for bunker fuel and unused lubricants in accordance with the Conditions of Sale and also acknowledge receipt of any other payments made. If necessary, the Marshal should convert the total sum payable to US dollars.
6. The Marshal or his/her solicitor should ask the authorised representative of the buyer for a copy of the authority for the agent to act on behalf of the buyer. As most buyers are based overseas the authority will take the form of a ‘Notarial Acknowledgement’ of that authority.
7. The Marshal or his/her solicitor should prepare a draft Bill of Sale in conformity with the standard form (see **Annexure 19** and sample **Bill of Sale**).
8. The Marshal or his/her solicitor should seek formal confirmation of the buyer’s intention in relation to:

* any existing crew
* when the buyer’s crew will be available
* attendance for execution, notarisation and delivery of the bill of sale
* the buyer’s agreement not to commence any works on the ship until the buyer has taken delivery
* payment of the sum for bunkers and unused lubricants
* the date on which the Marshal’s responsibility for the crew and berthing etc ceases – this date would usually be the date of execution, notarisation and delivery.

1. Notify the insurer of the execution, notarisation and delivery arrangements and the date on which the insurance is to terminate, and request a final invoice.
2. Terminate all other service and supply arrangements and request final accounts including berthing and mooring.
3. Terminate any contracts for equipment hire and make arrangements with the Master of the ship to allow collection by the hirer and to obtain a receipt.
4. Notify the following organisations in writing of the sale:

* Manager of Marine Operations/Harbour Master
* the relevant Port Authority
* the water police (if previously notified)
* the Collector of Customs
* the Australian Maritime Safety Authority
* Transport Security Coordination Centre (Office of Transport Security).

1. Liaise with the bank to verify that funds have been deposited for the balance of the purchase price and the bunkers and lubricants. The bank should be requested to formally confirm the payment and provide a copy of the ledger by facsimile. Delivery of the ship cannot take place until this amount is received and funds are cleared.

[6.20] If the deposit is not received

If payment of the 10% deposit has not been received at close of business on the third day after acceptance then the Marshal should give effect to the terms of the Conditions of Sale and move to accept the second highest bid provided it is higher than the valuation. The docket Judge in any event should be kept informed of the position. If the bid is below the valuation then the matter should be referred to the docket Judge so that the matter can be listed in Court. The Marshal is not permitted to sell the ship below the appraised value without an order from the Court. See **Annexure 21** for GST implications.

[6.21] Executing the Bill of Sale

The Marshal should attend for the execution of the Bill of Sale with his/her solicitor or a Registrar with the final form of the Bill of Sale as approved for execution.

After obtaining the signatures, witnessed by the Notary Public, the Marshal should make sufficient copies of the Bill of Sale and the Notary Public’s Certification for the Marshal’s records.

[6.22] Rule 71

Rule 71 provides that the Marshal shall, as soon as practicable after the sale of the ship or property:

* file a return of sale
* pay into court the proceeds of sale
* file an account of sale and documents in support of the account for taxation.

**Return of Sale**

A standard form of Return of Sale is at **Annexure 20**. A copy of the Bill of Sale, Notary Public’s certificate and Conditions of Sale must be annexed to the Return of Sale.

The Return of Sale should be prepared before the next directions hearing or within 7 days whichever is the earlier.

It is suggested that the Marshal file and serve the Return of Sale on the parties.

**Proceeds of Sale**

As the monies are being held in the foreign currency account (opened in accordance with the Court’s order) it will be necessary to obtain an order from the Court in the following form dispensing with compliance with Rule 71(b):

The Marshal need not pay the proceeds of sale into Court, but except for payments ordered to be paid out of the proceeds of sale, the Marshal keep the proceeds of sale in United States Dollars in an interest bearing account at the Commonwealth Bank of Australia.

The Order must be provided to Principal Finance to arrange disbursement of the funds in the Account.

**Account of Sale**

The account of sale should comprise copies of all invoices for payments made in respect of the sale of the ship together with a statement of the Marshal’s costs and expenses, if any.

It is suggested that the Marshal file and serve the Account of Sale on the parties.

[6.23] Poundage

No poundage is payable in respect to a sale under the Admiralty Act.

[6.24] GST on the Sale of Ships

A paper on ‘GST as it Relates to Marshal’s Costs and Expenses and the Sale of Ships’ is set out at **Annexure 21**. Where a Marshal is selling a ship, the practice set out in that paper should be adopted.

Of particular assistance are the comments on 3(a) Conditions of Sale and 3(b) Export Exemption. However, where a Marshal is selling a ship, the paper should be read in its entirety.

CHAPTER 7: APPLICATION TO DETERMINE PRIORITIES

[7.1] Who may apply for determination of priorities

Subrule 73(1) provides that:

If a ship or other property has been arrested in a proceeding, a person who has obtained a judgment in a court (including a judgment in a court of a foreign country) against the ship or property, being a judgment that is enforceable in a court of Australia, may apply to the court for determination of the order of priority of claims against the ship or property.

[7.2] Notice of application

The Court may order the Marshal to publish a notice of the application in domestic and international publications. The prescribed form of notice is Form 28, Notice of application to determine priorities. Always obtain proofs of the advertisement and the costs for each advertisement before it is published and formally notify approval to the publishers. The Marshal will also require a ‘cutting’ of each advertisement showing the date, page number and the name of the publication or the printed page containing the advertisement. Advertisements for the Lloyds List are published in the London edition. Some advertisers will only accept credit cards and card details are required at the time of placing the advertisement.

[7.3] Affidavit of publication

The Marshal should prepare an affidavit stating he/she caused the notices to be published in accordance with Form 28 of the Admiralty Rules. A copy of each advertisement should be annexed to the affidavit, together with a schedule of the costs incurred and a copy of all accounts payable for advertising.

If the Marshal has not complied with the Court order this should be addressed in the affidavit. Any affidavits sworn and filed by the Marshal should be served on all the parties.

[7.4] Paying monies out of the proceeds of sale

To comply with accounting and audit requirements, the Marshal should only pay money out of the proceeds of sale in accordance with an order that payment be made to a particular claimant for an amount as stated. This is the case even if a general order has previously been made that the expenses of arrest or sale are to be paid out of the proceeds of the sale. The Marshal will need to provide the Order and direction to pay out to Principal Finance.

[7.5] Protecting the proceeds of sale

The Marshal has a responsibility to maintain and protect the proceeds of sale. As a general policy, unless otherwise ordered, the proceeds should be preserved in the same currency as the ship was sold.

CHAPTER 8: ACCOUNTING AND RELATED MATTERS

[8.1] Marshal’s fees

In-house Marshal’s fees (staff costs) and the fee charged by Australian Border Force when an ABF Officer undertakes the arrest are borne by the Court and should not be recovered from the plaintiff or other party or *res* unless, for example, additional staff are required to replace, or perform the usual duties of, the Marshal. However, a log of the time spent on an arrest should be kept so that the impact of the arrest on the resources of the registry can be monitored. **Annexure 2(b)** is an example of a log for this purpose.

All expenses reasonably incurred by the Marshal are recovered from the relevant party or proceeds of sale.

The Court’s Admiralty Committee discussed this issue at its March and August 2006 meetings in light of the impact of the Federal Court of Australia Regulations (item 21 (previously item 17) of Schedule 1).

[8.2] Marshal’s remuneration

For in-house Federal Court Marshals the level of remuneration that may be recovered is that of Federal Court Staff Level 6 (FCSL 6). Marshals who are beyond this salary level are paid at their current salary rate.

In accordance with the Enterprise Agreement 2018-2021 a Marshal is paid an on-call allowance that commences with the arrest of a vessel and ceases on its release unless the relevant District Registrar and the Marshal agree that an earlier date is appropriate in the circumstances of a particular arrest (see para 43.1 of the agreement).

[8.3] Marshal’s delegations

Section 23 of the Public Governance, Performance and Accountability Act 2013 gives the accountable authorities of non-corporate Commonwealth entities power to enter into arrangements, and approve commitment of relevant money, on behalf of the Commonwealth. The Registrar has delegated this power to those Court Officials listed in the Schedule of Delegations, see at http://fca.intranet.fedcourt.gov.au/general/Finance/rmi/delegations.

The Marshal’s financial delegation is up to $5,000 or to the value of funds held against the matter in the Court’s Special Public Money Account (Official Marshals Account). The amount held against the matter is the balance of the Marshal’s Receipt and Expenditure Record as reconciled with the project code balance.

[8.4] Marshal’s Account

The Marshal’s bank account is a separate account to the Court’s other funds. The following documents will be of assistance in using the Marshal’s bank account:

* Guide to Admiralty Processing
* **Annexure 24(a)** Financial One Code Structure
* **Annexure 24(b)** Sample Project Code Ledger
* **Annexure 24(c)** Project Code Balances.

Otherwise, contact Matthew Davis, Director, Financial Accounting, in the Principal Registry on 02 9230 8823 for further assistance.

Where a registry is seeking reimbursement for the salaries and expenses of a Marshal incurred during an arrest, money will need to be moved from the Marshal’s account into the Marshal’s section 31 account. Instructions for this transfer are at:

* Instructions for the Transfer of Moneys to Marshal Section 31 Account.

[8.5] GST on Marshal’s costs and expenses

The Marshal’s costs and expenses under rules 41 and 69 of the *Admiralty Rules 1988* payable in respect of the arrest, custody and sale or release of a ship or other property under the *Admiralty Act 1988* are covered under Div 81 of the *A New Tax System (Goods and Services Tax) Act 1999* exempt from GST from 1 January 2007. These fees and charges are included in fees and charges which do not constitute consideration and therefore are excluded from being taxable by provisions 81-15.01(d) or (e) of A New Tax System (Goods and Services Tax) Regulation.

The effect of these provisions is that GST is not payable on Marshal’s costs and expenses nor on any demand made by the Marshal.

[8.6] Tax invoices

The Australian Taxation Office has issued a publication on valid tax invoices and GST credits. Tax invoices are important documents for the operation of the GST system. They must contain certain information to be valid.

A supplier **must** issue a tax invoice if any taxable sales made are more than $82.50 (including GST) and the purchaser requests it.

For taxable purchases the Court can use tax invoices to claim the correct amount of GST credits for those purchases.

To claim a GST credit for purchases that cost more than $82.50 (including GST) the purchaser must be registered for GST and have a valid tax invoice. If an incorrect or incomplete tax invoice is used to claim a GST credit, the GST credit may not be allowed by the ATO.

To claim GST credits for purchases that cost $82.50 or less (including GST) the purchaser must keep documents such as cash register dockets, receipts or invoices to support the claim.

The supplier must be registered for GST before a claim of the GST credit on a purchase can be made.

**W****hat is a valid tax invoice?**

A valid tax invoice for taxable sales that total **less than $1,000** or $1,000 or more must contain the following:

|  |  |
| --- | --- |
| **Taxable sales that total less than $1,000** | **Taxable sales that total $1,000 or more** |
| * the words ‘tax invoice’ stated prominently | * the words ‘tax invoice’ stated prominently |
| * the name of the supplier | * the name of the supplier |
| * the ABN of the supplier | * the ABN of the supplier |
| * the date of issue of the tax invoice | * the date of issue of the tax invoice |
| * a brief description of the goods or services sold | * the name of the recipient |
| * the total price of the sales (including GST). | * the address or ABN of the recipient |
|  | * the quantity of the goods or the extent of the services sold |
|  | * a brief description of the things sold |
|  | * the total price of the sale (including GST) |

Where the GST to be paid is:

* exactly one-eleventh of the total price, the tax invoice should show the GST amount separately **or** provide a statement such as ‘total price includes GST’; **or**
* less than one-eleventh of the total price, the tax invoice should show the GST amount **and** the total amount excluding GST for the sales.

A valid tax invoice for both a **taxable sale and either a GST-free or input taxed sale**, must also:

* clearly identify each taxable sale
* show the total amount of GST to be paid; and
* show the total amount payable for the sales.

The tax invoice must contain this information before it can be used to work out the correct amount of GST credit that can be claimed. This is because the amount of GST included on such an invoice will be less than one-eleventh of the total price you are liable to pay.

[8.7] Vehicle costs

The costs of vehicle usage for the arrest of a ship during the custody and on release of the ship should be applied as follows:

(a) where Court vehicles are used the costs will be borne by the Court

(b) where a non-Court vehicle is used (such as a rental car or the Marshal’s private vehicle) the costs will be recovered from the plaintiff.

**Annexure 2(c)** provides a sample vehicle log.

[8.8] Procurement of large expense items

It will be necessary from time to time for the Marshal to procure large expense items (over $20,000) during an arrest and custody of a ship. The policy on procurement of these items is set out in the Chief Executive Instructions and generally provides that three quotations are to be obtained. Expenses incurred by the Marshal that may fall within this category include berthing charges; bunkers and lubricants, tugs, specialised equipment, provisions and other services. The procurement of these items or services may be from a sole supplier based at or near the port or berth where the ship is held under arrest. It is the case in some smaller ports that there will be one tug provider, one company that provides linesmen, one ships’ providores and more than likely one agent of a fuel supplier that can arrange bunker supplies.

Usually berthing arrangements are made by the ship’s agent prior to the ship berthing and in any event the port authority may be the only provider for the size of ship that is under arrest. It is incumbent upon the Marshal to secure the most economical rate for any cost or expense incurred by the Marshal regardless of whether there is a sole supplier or competitive quotes can be obtained. Where the port authority controls the berth experience has shown that they will negotiate a much cheaper rate for the Marshal and more so if there are indications that the arrest will be prolonged or the vessel will be sold.

In other circumstances the ship’s agent or the charterer or owner of the ship may have an agreement with a supplier such as ship’s providore to victual the ship (food and stores). The arrangement can continue while the ship is in custody provided there is no excessive charging and the rates of charge are similar to previous prices charged by that supplier. All lists prepared for food and stores must bear the Master’s signature and the ship’s stamp.

In the circumstances where there is a sole provider of the goods and services the Marshal should make a file note of the enquiries made to establish there is no other provider of those goods and services and the rates are reasonable. In the case of berthing charges, a letter from the Harbour Master (or other appropriate person) stating that they are the sole provider and setting out the agreed rates would suffice.

Where there are other competing suppliers of the goods and services copies of the quotations obtained should be retained on the Marshal’s file for internal checking and audit purposes.

[8.9] Court orders for supplies and services

It would not generally be the case that where there is a sole provider of goods and services the Marshal obtains a Court order or a direction to engage that supplier. It is more the position where the Court has ordered a ship to be sold and payments are to be made from the sale Fund (the *res*). It is the practice of the Court that payments from the sale Fund are transparent and controlled by the Court. In this way the sale is supervised by the Court. The Court order that is made to open a foreign currency account provides the name and position of the signatories and limits the amount of a payment that can be made by the Marshal from the Fund. Usually the amount is limited to US$2,000.00 to be drawn from the account without the further order of the Court.

In practice payments are usually scheduled in an affidavit and an order is obtained and this is the preferred course to take.

There are occasions where the Marshal may approach the Court for an order such as moving a ship to another berth, mooring or to anchor at the request of the Harbour Master. Whilst the Court order may not approve the payment it does order the Marshal to move the ship and should include that the costs of the move form part of the Marshal’s cost and expenses of the arrest. The Marshal should make arrangements at reasonable rates within the time constraints.

Shortly after an arrest and where the need arises the Marshal may approach the Court for an omnibus order. That order may allow the Marshal at his or her discretion to take measures to preserve the ship; move the ship within the limits of the port; supply reasonable victuals, fuel, water and communications and to arrange medical attention for any member of the crew. Where the circumstances allow the Marshal should provide the supplies and services at competitive rates unless there are existing arrangements or a sole supplier.

The Marshal may at any time apply to the Court for directions pursuant to rule 48. This process has been used by the Marshal when seeking large amounts of funds to cover the supply of provisions, marine gas oil, berthing charges, insurance and other Marshal’s expenses where the ship had exhausted its provisions and required an urgent fuel delivery. It has been used to obtain orders to replace essential officers and crew, for example, the Master, engineers and other key crew members where they were randomly leaving the ship during the sale process. As the cost of engaging crew was significant and crew levels had to be maintained until the ship was sold the Marshal obtained orders that the crew costs be funded by the plaintiff as Marshal’s costs and expenses.

[8.10] Reconciliation of accounting records

In accordance with audit requirements, the Marshal must reconcile his/her accounting records monthly, when the ship is released from arrest, when it is sold and when the project code or account is closed.

A procedure setting out the process to be followed by the Marshal is at **Annexure 22**. Included with the procedure is the Finance One code structure and copies of a Project Code ledger and Project Code balances. The Form of Reconciliation can be found at **Annexure 2(e)**. The procedure also addresses the transfer of funds where amounts need to be charged to the Marshal’s account to reimburse Court funds for payments incorrectly coded. It also sets out what should be done to close the account.

[8.11] Review of Marshal’s records

There needs to be a review of the final reconciliation of invoices and expense logs to arrest accounts prior to closure of the arrest account. The review and signing off of checklists, reconciliations and other documents will be undertaken by staff within the arresting Registry appointed by the District Registrar.

That person will also sign the Control Sheet as Checking Officer for the Control Sheet (see **Annexure 23**).