FEDERAL COURT OF AUSTRALIA

# ADMIRALTY AND MARITIME PRACTICE NOTE (A&M-1)

National Practice Area Practice Note

## 1. INTRODUCTION

1.1 This practice note sets out arrangements for the management of Admiralty and maritime cases within the National Court Framework ("**NCF**"). It:

(a) is to be read together with the:

- Central Practice Note (CPN-1), which sets out the fundamental principles concerning the NCF of the Federal Court and key principles of case management procedure. The Central Practice Note is an essential guide to practice in this Court in all proceedings; and
- *Federal Court of Australia Act 1976* (Cth) ("**Federal Court Act**") and the *Federal Court Rules 2011* (Cth) ("**Federal Court Rules**");

(b) takes effect from the date it is issued and, to the extent practicable, applies to proceedings whether filed before, or after, the date of issuing;

(c) is intended to set out guiding principles for the conduct of these proceedings but is not intended to be inflexibly applied; and

(d) applies to all Admiralty and maritime matters. However, practitioners should also familiarise themselves with the Court's general practice notes that operate across National Practice Areas ("**NPAs**") and may apply to this NPA. Admiralty and maritime-specific practice information is available on the Court's Admiralty & Maritime NPA "homepage" and all practice notes are available on the Court's website.

1.2 Parties should be aware of innovative Federal Court filing and case management mechanisms available to be applied in appropriate Admiralty and maritime matters so that proceedings may be commenced and managed in the manner best suited to the character and needs of each case. These mechanisms include a method for applicants to state their case concisely and the ability to utilise targeted document production and evidence procedures akin to those commonly adopted in international commercial arbitration (see Central Practice Note at paragraph 6.8 and following, and the Commercial and Corporations Practice Note (C&C-1), including paragraphs: 5.4 and following, 8.4 and following and 8.8 and following).

## 2. OVERVIEW AND DEFINITION

2.1 This practice note sets out the arrangements for the management of the Admiralty and Maritime NPA. The Admiralty and Maritime NPA incorporates proceedings that relate to Admiralty or maritime disputes, including:

(a) *in personam* proceedings;

(b) *in rem* proceedings;

(c) insurance of property arrested under the *Admiralty Act 1988* (Cth) ("**Admiralty Act**"); and

(d) cargo claims.

2.2 More particularly, the Admiralty and maritime work of the Court includes any matter or proceeding under or by reference to the *Admiralty Act* and *Admiralty Rules 1988* (Cth) ("**Admiralty Rules**") and any of the following Acts (and related Regulations thereunder):

- *Australian Maritime Safety Authority Act 1990* (Cth)
- *Carriage of Goods by Sea Act 1991* (Cth)
- *Coastal Trading (Revitalising Australian Shipping) Act 2012* (Cth)
- *Environment Protection (Sea Dumping) Act 1981* (Cth)
- *Export Control Act 1982* (Cth)
- *Fisheries Management Act 1991* (Cth)
- *Limitation of Liability for Maritime Claims Act 1989* (Cth)
- *Marine Insurance Act 1909* (Cth)
- *Maritime Transport and Offshore Facilities Security Act 2003* (Cth)
- *Navigation Act 2012* (Cth)
- *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth)
- *Protection of the Sea (Civil Liability) Act 1981* (Cth)
- *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth)
- *Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund Customs) Act 1993* (Cth)
- *Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Funds - Excise) Act 1993* (Cth)
- *Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Funds - General) Act 1993* (Cth)
- *Protection of the Sea (Oil Pollution Compensation Funds) Act 1993* (Cth)

- *Protection of the Sea (Powers of Intervention) Act 1981* (Cth)
- *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth)
- *Protection of the Sea (Shipping Levy) Act 1981* (Cth)
- *Protection of the Sea (Shipping Levy Collection) Act 1981* (Cth)
- *Sea Installations Act 1987* (Cth)
- *Seafarers Rehabilitation and Compensation Act 1992* (Cth)
- *Shipping Reform (Tax Incentives) Act 2012* (Cth)
- *Shipping Registration Act 1981* (Cth)

2.3 Any proceeding that raises issues under these Acts (and related Regulations thereunder) is an Admiralty or maritime matter.

2.4 In addition, causes of action under any such legislation and administrative or other proceedings brought in connection with such legislation (or any Commonwealth legislation that has an Admiralty and maritime context), are Admiralty and maritime matters. These include applications under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), appeals from the Administrative Review Tribunal, applications under ss 39B(1) or 39B(1A) of the *Judiciary Act 1903* (Cth) and the *Cross-Border Insolvency Act 2008* (Cth) ("**Cross-Border Insolvency Act**").

2.5 The attention of practitioners is drawn to the general conferral of civil jurisdiction upon the Court in all matters arising under a law of the Commonwealth Parliament. For instance, a marine insurance dispute involving an issue under the *Marine Insurance Act 1909* (Cth) could be brought in the Federal Court as a matter arising under a law of the Parliament and would be dealt with under these arrangements.

## 3. OPERATION OF THE NPA

3.1 A national allocations system is in place, with a dedicated group of judges with special expertise in the Admiralty and Maritime NPA who will be allocated these matters. A comprehensive list of all Admiralty and Maritime NPA Judges nationally, and in each registry, is available on the Court's website.

3.2 The Admiralty and Maritime NPA, as with all other NPAs, will be overseen and managed by National and Registry Coordinating Judges who will harmonise procedure in actions in the Admiralty and Maritime NPA so that they are dealt with expeditiously and consistently by the Court nationally.

3.3 The individual docket system referred to in paragraph 4.1 of the Central Practice Note that generally applies in the Court shall be modified in the case of the Admiralty and Maritime NPA.

3.4 Upon filing, an Admiralty and maritime proceeding will be provisionally allocated to the Admiralty and Maritime Registry Coordinating Judge in the relevant registry who will be responsible for case managing the proceeding until such time as the proceeding is allocated to a trial docket judge in the Admiralty and Maritime NPA who will then be responsible for case managing the proceeding, hearing and determining the matter.

## 4. URGENT APPLICATIONS

4.1 Most urgent Admiralty and maritime applications are originating applications. Urgent originating Admiralty and maritime applications should be made as set out below.

***Applications to a Registrar for Arrest of a Vessel***

4.2 Contact should be made to the Duty Registrar who, with the assistance of a Marshal, can calculate the possible fees and expenses for the arrest.

4.3 The Duty Registrar or Marshal will usually require the legal practitioner to provide the following details:

- the name and location of the vessel to be arrested, if known;
- when the legal practitioner intends to file the application to arrest the vessel;
- any information that the practitioner is aware of that may assist the Marshal to execute the arrest, such as any safety issues that may cause a risk to the Marshal from the ship or crew;
- confirmation that the legal practitioner has the necessary funds to pay for the Marshals' fees and expenses to execute the arrest.

***Any Urgent Application to a Judge (including Applications to a Judge for Arrest of a Vessel)***

4.4 All urgent applications to be made to a judge (such as an application to arrest a vessel that may be affected by an order under the Cross-Border Insolvency Act or any other urgent application), should be made by the filing party approaching the Admiralty and Maritime Registry Coordinating Judge in the relevant registry through his or her associate (or, if he or she is unavailable or unable to assist, the approach should be made to another Admiralty and Maritime NPA Judge in the registry or to the National Operations Registrar). Admiralty and Maritime NPA Judges in each registry are identified on the Court's website.

4.5 Matters involving issues under the Cross-Border Insolvency Act should proceed as contemplated in *Yu v STX Pan Ocean Co Ltd*[1] and *Yakushiji v Daiichi Chuo Kisen Kaisha*[2] (see *Cross-Border Insolvency Practice Note (GPN-XBDR)*).

[1] (2013) 223 FCR 189; [2013] FCA 680 at [2], [3] and [39] *et seq*.
[2] [2015] FCA 1170 at [16]-[25].

***After-hours Applications to a Judge or Registrar***

4.6 Applications to arrest vessels or applications in respect of arrests may be made at any time and the Court is available at all times to deal with such applications. For urgent applications outside business hours, practitioners may contact the relevant registry using the after-hours telephone numbers listed on the Court's website. The legal practitioner should be in a position to give sufficient reasons for the after-hours application.

4.7 The arrangements referred to in paragraphs 4.4 and 4.5 above are not intended to change the ordinary procedure under the Admiralty Rules as to applications for arrest that are made to a registrar which are set out in Part 8 below.

***Urgent Interlocutory Applications***

4.8 Urgent (and non-urgent) interlocutory applications should be brought to the attention of the docket judge (or the provisional docket judge / list judge as the case may be) who has the responsibility for hearing or case managing the proceeding at the time of the filing of the interlocutory application.

4.9 If, after approaching the chambers of the docket judge, it is clear that the docket judge is uncontactable or otherwise clearly unavailable to hear the urgent interlocutory application within the timeframes relevant to that application (eg. the judge is on extended leave and the matter requires immediate attention), then the urgent interlocutory application should be brought to the immediate attention of another Admiralty and Maritime NPA Judge in the registry or to the National Operations Registrar in the same manner as set out for urgent originating applications (see paragraph 4.4 above).

## 5. COMMENCING PROCEEDINGS

5.1 Subject to the matters clarified below, the Federal Court Rules and the Admiralty Rules and *forms* apply to the commencement of proceedings in this NPA. These Rules and forms can be found on the Court's website.

5.2 It is important that the nature of the proceeding and the likely issues for resolution are made clear as early as possible. This will be aided by the applicant making clear in the originating application and supporting material what the case is about.

5.3 Parties should consider the filing of a document at an early stage to be entitled "Summary of Principal Issues" in which the essential nature of the proceeding is summarised with a clear identification of issues. This is not to be taken as a replacement for any pleading, but it may provide an early focus for the ascertainment of the essentials of the dispute between the parties.

## 6. CASE MANAGEMENT – GENERALLY

***Approach to Case Management in Admiralty and Maritime Proceedings***

6.1 At some early point in the procedural conduct of the matter, the Court must be informed of the nature of the dispute, the real issues in dispute, how the essential facts are to be proved, whether or not there are technical issues and whether there are any particular evidential difficulties because of expert or overseas witnesses.

6.2 The Court appreciates that in Admiralty and maritime matters both the plaintiff and the defendant may, on occasions, need extra time to obtain instructions from overseas clients and to ascertain what did or did not happen in places or on ships that may be both far away and inaccessible. Nevertheless, the Court expects the parties and their legal representatives promptly to ascertain, as far as is reasonably possible, the nature and extent of the facts which pertain to any particular case. This is not limited to the particular points that the party wants to prove. It is not an acceptable way of conducting litigation to "put the other side to proof" on all issues.

6.3 The parties are expected to identify the real and genuine issues in dispute, whether of fact or law, after due investigation. Parties and their representatives have a duty to assist the Court in resolving disputes in accordance with the overarching purpose in ss 37M and 37N of the Federal Court Act (see also Part 7 of the Central Practice Note). The Court may make special orders where that duty has not been observed. In this context, parties should expect that the Court will be ready to use s 190(3) of the *Evidence Act 1995* (Cth) ("**Evidence Act**") in appropriate circumstances to lessen the cost of proving matters not *bona fide* in dispute.

6.4 How the parties co-operate to identify the issues in dispute, and to agree on facts that are not truly in dispute, is a matter for the legal representatives and their commercial clients. An aspect of the co-operation between the parties' representatives that the Court expects, however, is the provision of information and documentation in a prompt and timely fashion.

6.5 Where legal practitioners make reasonable requests for documents or information (whether strictly "particulars" or not) those requests should generally be met without delay. Although in some cases, the formality (and cost) of a verified list of documents may be necessary.

6.6 These matters should be made plain to clients. In dealing with questions of costs the Court will presume that clients have been made aware of the general approach and the expectations of the Court reflected in this practice note.

***Case Management Hearings***

6.7 In addition to the matters referred to above, in respect of all Admiralty and maritime matters, parties and their representatives should familiarise themselves with the guiding case management information set out in Part 8 of the Central Practice Note. This practice note should always be read with the Central Practice Note.

6.8 In addition to the Case Management Imperatives set out in paragraph 8.5 of the Central Practice Note, parties should consider, with a view to raising the issue with all parties and the Court at the earliest possible opportunity, whether the case is of a character that merits its direct referral to a Full Court.

6.9 The first case management hearing will, wherever possible, take place within 5 weeks of the filing of the proceeding.

6.10 Parties are urged to agree upon short minutes of order sufficiently prior to any scheduled case management hearing so that they can be sent, where agreed, by email to the judge's associate. Where possible, a case management hearing will be vacated if the parties can agree upon an appropriate regime prior to the nominated time and date of the case management hearing. An exception to this procedure is where one (or more) of the parties is or has been in significant default of existing orders, or where there are difficult issues which need, sooner rather than later, to be ventilated.

## 7. CASE MANAGEMENT – CONDUCT OF CARGO CLAIMS

7.1 The Court expects practitioners to approach the resolution of cargo claims in the manner most conducive to a speedy and cost-efficient resolution and, where possible, to avoid disputes about pleadings and the provision of information.

7.2 Once a cargo claim proceeding has been commenced, the Court expects the parties to consider actively what steps (including the making of offers) have been, or should be, taken to settle or mediate the matter. The Court may order parties to mediate or attend a case management conference before a registrar to explore alternative dispute resolution ("**ADR**") possibilities and/or the narrowing of issues.

7.3 The Court expects the parties to address at least the following matters with the aim of defining or eliminating issues:

(a) The identification of the relevant bill of lading or sea carriage document ("**SCD**") or other transport document.

(b) The identity of the carrier, or carriers, contractual and actual, and the nature of any dispute about that.

(c) If the party said to be the actual carrier is different from the contractual carrier, the terms under which the actual carriage is said to have been performed.

(d) If the goods were containerised, whether the container was packed or stuffed by or on behalf of the shipper or other cargo interest or by or on behalf of the carrier.

(e) The description of the goods in the SCD or other transport document.

(f) The legal regime said to govern the carriage: which national law and through it, or otherwise, which convention or regime applies: Hague Rules ("**HR**") or Hague-Visby Rules ("**H-VR**") or Australian Amended Hague-Visby Rules ("**AAH-VR**") or Hamburg Rules ("**Ham R**") or other variant.

(g) Whether any limitation of liability or time bar argument arises or may arise by reference to such provisions as Article 4 r 5 of the HR, H-VR, Ham R or AAH-VR or other variant.

(h) The causes of action relied upon against each defendant.

(i) Provision of proper particulars of:

(i) any claims (eg. failure to comply with Article 3 of the HR by exercising due diligence to make the ship seaworthy);

(ii) any defences.

(j) If title to sue is in issue, the facts said to give rise to the title to sue under the relevant SCD or otherwise.

(k) The nature of the damage and the detailed breakdown of the claim.

7.4 If, after the parties have had due opportunity to consider all relevant issues and after the close of pleadings, it appears that the matter is likely to proceed to final hearing, the parties are expected to consult and co-operate in the production of a document entitled "**Agreed Statement for Court**" which sets out:

(a) Relevant matters not in dispute which can form the basis of an agreed statement of facts to be tendered at the trial.

(b) Matters in dispute and the basis for the dispute.

(c) Whether the plaintiff or defendant will or may:

(i) ask the Court to have resort to s 190(3) of the Evidence Act to waive the rules of evidence in respect of issues not genuinely in dispute or in respect of issues where the application of the provisions referred to in s 190(1) of the Evidence Act would cause or involve unnecessary expense or delay;

(ii) seek summary judgment or disposal under s 31A of the Federal Court Act or otherwise.

(d) A skeleton description of the general nature of the evidence to be led in the proceeding, identifying lay and expert evidence and what issues are to be proved by such evidence.

(e) Any need for video link evidence and any restriction upon, or protocols concerning, the giving of evidence by video link in the country from which the witness would give evidence.

(f) The position taken by the parties as to referral of the dispute to ADR before a registrar or a person of the parties' choosing.

7.5 To the extent that there are multiple defendants and cross-claims the Court will expect the parties to prepare documents referable to the position of each party.

7.6 The parties, in any Admiralty and maritime matter other than cargo claims, should consider raising the above procedures with the Court if they consider that these procedures may be usefully applied to their dispute.

## 8. CASE MANAGEMENT – CONDUCT OF *IN REM* PROCEEDINGS

8.1 Applications for arrest are made under the Admiralty Rules to a registrar. If, however, an application is required to be made to a judge, parties should first approach the Admiralty and Maritime Registry Coordinating Judge through his or her associate (see Part 4 above).

8.2 The Marshals are available to arrest a vessel anywhere in Australia at any time on any day of the year. The Marshals have maritime skill and experience or have persons with that skill and experience readily available to them.

8.3 The Court has its own Marshals in every state and territory and suitably qualified staff from relevant agencies, who are usually the Sheriff's officers or local police in relation to small vessels and Australian Border Force Officers (formerly Customs Officers) in relation to large vessels at major ports around Australia, can be appointed as Marshals.

8.4 Arrangements are also in place in each registry for the urgent appointment of a Marshal. A Marshal may be appointed, for example, when there is insufficient time for a registry-based Marshal to reach the vessel before it leaves the jurisdiction or when the cost of sending a registry-based Marshal to the vessel is excessive. Such appointments are strictly supervised by the principal Marshal in the relevant registry of the Court.

8.5 There is no poundage in the Federal Court. It was abolished in the Federal Court in 2004.

8.6 The approach of the Court to the Marshal's costs is to restrict the costs charged to the parties to the direct third party costs involved in the arrest, other than in exceptional cases, for example where the amount of work necessitates the provision of additional staff, or staff are required to work overtime.

## 9. INSURANCE OF PROPERTY ARRESTED UNDER THE ADMIRALTY ACT

9.1 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.

9.2 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.

## 10. ALTERNATIVE DISPUTE RESOLUTION

10.1 Parties and their representatives should familiarise themselves with the guiding ADR information set out in Part 9 of the Central Practice Note. The thoughtful and creative use of ADR techniques (including confidential conferences) for both substantive and procedural issues should be recognised by the parties as potentially very important in resolving or streamlining the running of Admiralty and maritime cases.

10.2 As well as its registrar mediators, the Court has other staff with skills and expertise in maritime matters, some of whom are Marshals. These members of the Court staff are available as required in any registry to conduct, or assist in the conduct of, ADR carried out by registrars. By way of example, registry staff includes persons who have expertise in cargo claim handling, loss adjusting and navigation.

10.3 In appropriate cases the Court is prepared to make available outside persons with relevant skills retained by the Court on an *ad hoc* basis. They would assist in the resolution of matters using ADR including mediation or early neutral evaluation. The engagement of such persons would generally be through the offices of professional or industry associations.

10.4 The Court has power to refer matters (by consent) to arbitration under s 53A of the Federal Court Act. If parties want a registrar to act as an arbitrator, this can be arranged. Speedy procedures akin to those of the London Maritime Arbitration Association Small Claims Procedures can be used. This may be particularly suitable in small cargo claims. If this course were taken, parties could agree to deal with the matter on the papers, or with minimal oral evidence, waiving rules of evidence. If a registrar acts as arbitrator, fees (hearing and room) are not incurred. Sections 53AA and 53AB of the Federal Court Act provide for referral of questions of law and review on a question of law to the Court (see r 28.12 of the Federal Court Rules). By this mechanism appeals on factual questions can be eliminated.

## 11. DISCOVERY

11.1 Any request for discovery should be raised at a case management hearing and its appropriateness will be carefully considered by the Court at that point.

11.2 Where a discovery process is necessary the parties and their representatives should familiarise themselves with the discovery information set out in Part 10 of the Central Practice Note.

## 12. EVIDENCE AND WITNESSES

12.1 Parties and their representatives should familiarise themselves with the guiding evidence and witness-related information set out in Part 11 of the Central Practice Note.

12.2 In relation to witnesses resident overseas, or outside the jurisdiction working on a ship, it may be agreed between the parties if there is no controversy as to their evidence for them to give it formally by way of an affidavit as evidence–in–chief.

12.3 A party using an interpreter should ensure that the interpreter is appropriately instructed prior to the relevant hearing, is familiar with the language and dialect of the witness and that the interpreter is capable of interpreting the technical and other matters the subject of the proceeding.

D S Mortimer
Chief Justice
14 October 2024