

Federal Magistrate Toni Lucev
Federal Magistrates Court of Australia

“Jurisdiction of the Federal Magistrates Court
of Australia in maritime matters”

JURISDICTION OF THE FEDERAL MAGISTRATES COURT OF AUSTRALIA IN MARITIME MATTERS

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(*Federal Magistrate, Perth. B.Juris (Hons); BA; LLB. The views expressed in this paper are the views of Federal Magistrate Lucev. They are not, and do not purport to be, the views of the Federal Magistrates Court or any other Federal Magistrate.)

Introduction

The Federal Magistrates Court was established by the *Federal Magistrates Act 1999*.

The Federal Magistrates Court's jurisdiction in admiralty was conferred in 2006.

Jurisdiction

Jurisdiction in Admiralty

The *Federal Magistrates Court Legislation Amendment Act 2006* conferred jurisdiction on the Court in certain proceedings under the *Admiralty Act 1988* with effect from 4 May, 2006. By clause 2 of Schedule 3 to the *Amendment Act*, the amendment of s.9 of the *Admiralty Act 1988* applies in relation to matters arising before, on or after the conferral of jurisdiction. The intention was to give the Federal Magistrates Court "other suitable, less complex jurisdiction under the *Admiralty Act*": *Jurisdiction of the Federal Magistrates Court Legislation Amendment Bill 2005, Explanatory Memorandum*.

The principal section of the *Admiralty Act* conferring jurisdiction on the Federal Magistrates Court is s.9, which is in the following terms:

9 Admiralty jurisdiction in personam

- (1) *Jurisdiction is conferred on the Federal Court, the Federal Magistrates Court and on the courts of the Territories, and the courts of the States are invested with federal jurisdiction, in respect of proceedings commenced as actions in personam:*
 - (a) *on a maritime claim; or*
 - (b) *on a claim for damage done to a ship.*
- (2) *Subsection (1) does not confer on a court other than the Federal Court or a Supreme Court of a Territory, or invest a court of a State other than the Supreme Court of a State with, jurisdiction in respect of limitation proceedings.*

The phrase *maritime claim* is defined extensively in s.4 of the *Admiralty Act*. That section is set out as an appendix to this paper. The phrase includes proprietary maritime claims (as defined in s.4(2) of the *Admiralty Act*) and general maritime claims (as defined in s.4(3) of the *Admiralty Act*). Such claims, irrespective of their nature, may be commenced in the Court by a proceeding *in personam*.

In addition to the more general provisions relating to transfers to and from the Federal Magistrates Court or to and from the Federal Court noted below, the *Admiralty Act* also provides for transfers of proceedings. Section 27 of the *Admiralty Act* enables a matter to be transferred from the Federal Court (or

any other Court exercising jurisdiction under the *Admiralty Act*, including a state court) to the Federal Magistrates Court.

Section 28 of the *Admiralty Act* provides for the remittal of *in rem* proceedings from the Federal Court or a State Supreme Court to the Federal Magistrates Court if the proceedings would otherwise have been within the jurisdiction of the Federal Magistrates Court had the proceedings been commenced as a proceeding *in personam*.

Associated Jurisdiction

In addition to the jurisdiction which is expressly conferred on the Federal Magistrates Court, the Court also has associated jurisdiction. The associated jurisdiction of the Court is provided for in s.18 of the *Federal Magistrates Act*:

18 Jurisdiction in Associated Matters

To the extent that the Constitution permits jurisdiction is conferred on the Federal Magistrates Court in respect of matters not otherwise within its jurisdiction that are associated with matters in which the jurisdiction of the Federal Magistrates Court is invoked.

The *Admiralty Act* also contains an associated jurisdiction provision as follows:

12 Jurisdiction in associated matters

The jurisdiction that a court has under this Act extends to jurisdiction in respect of a matter of Admiralty and maritime jurisdiction not otherwise within its jurisdiction that is associated with a matter in which the jurisdiction of the court under this Act is invoked.

Section 32(1) of the *Federal Court of Australia Act 1976* which provides for the Federal Court to have associated jurisdiction was considered by the High Court in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457. In that case Mason J said of s.32(1) (at p. 506):

"Plainly it was intended to vest a jurisdiction in the Federal Court to hear and determine matters not otherwise within its jurisdiction, matters that are 'associated' with matters in which the jurisdiction of the Court is invoked. The expression 'to the extent that the Constitution permits' suggests that s 32 is directed, not merely to jurisdiction to hear and determine matters arising under federal laws not otherwise vested in the Federal Court, but also to jurisdiction arising under state or other non federal laws. Problems of constitutional validity arise in relation to the latter, but not in relation to the former. The opening words of section 32(1) would serve no purpose at all if the sub-section was exclusively directed to matters arising under federal laws."

There is some need to be cautious when seeking to engage the associated jurisdiction of the Federal Magistrates Court. That need is demonstrated by

Ogawa v Federal Magistrate Phipps [2006] FCA 361. In that case Finkelstein J held that notwithstanding that the Federal Magistrates Court had jurisdiction in certain claims under the *Trade Practices Act* 1976, s.18 of the *Federal Magistrates Act* was insufficient to give it jurisdiction in matters associated with that claim but arising under other parts of the *Trade Practices Act* in respect of which another federal court had “exclusive jurisdiction”.

Conduct of Admiralty Work

The Court has issued a Notice to Practitioners entitled “Conduct of Admiralty and Maritime Work in the Federal Magistrates Court of Australia” and a copy is appended to this paper.

The Notice to Practitioners has been revised and reissued in the last year as a consequence of work done by the combined Federal Court – Federal Magistrates Court admiralty user group. The revised version clarifies that the use of Federal Court forms constitutes sufficient compliance with the admiralty proceedings form requirements in the *Federal Magistrates Court Rules*. Additionally, the Federal Magistrates Court has arranged for all of its general federal law forms to be available from its website in unprotected format to enable practitioners to make changes to the Federal Magistrates Court General Federal Law Application to comply with any requirements under the *Admiralty Rules*.

Concerns have been raised in relation to the enforceability of judgments of the Federal Magistrates Court in many jurisdictions where flag carriers, charterers, shippers or stevedores are located. In short, although the Federal Magistrates Court is a court of record, it is not a superior court, and therefore its judgments may not be automatically enforced in some foreign jurisdictions. This impediment to the exercise of its admiralty jurisdiction may have impacted on the number of filings in the Federal Magistrates Court since jurisdiction was conferred on it in 2006. The Attorney-General's Department has been asked to consider ways in which the enforcement difficulties may be overcome. In the interim, any cases in which enforcement concerns are raised are transferred to the Federal Court by the Federal Magistrates Court.

Federal Magistrates Act 1999

Objects of the *Federal Magistrates Act*

The objects of the *Federal Magistrates Act* are expressed to be:

3 Objects

(1) *The main object of this Act is to create the Federal Magistrates Court under Chapter III of the Constitution.*

(2) *The other objects of this Act are:*

- (a) *to enable the Federal Magistrates Court to operate as informally as possible in the exercise of judicial power; and*
- (b) *to enable the Federal Magistrates Court to use streamlined procedures; and*
- (c) *to encourage the use of a range of appropriate dispute resolution processes.*

Primary Dispute Resolution

The *Federal Magistrates Act* has a significant emphasis upon primary dispute resolution. Provisions about primary dispute resolution procedures are contained in Part 4 of the Act. That Part provides that:

- The Court must consider whether or not to advise the parties to proceedings before it about the primary dispute resolution processes that could be used to resolve any matter in dispute (s.22);
- If the Court considers that a primary dispute resolution process may help the parties to a dispute before it to resolve that dispute, the Court must advise the parties to use that primary dispute resolution process and may adjourn the proceedings then before it to allow that to occur (s.23);
- A legal practitioner acting in proceedings in the Court, or consulted by a person considering instituting such proceedings, must consider whether or not to advise the parties to the proceedings, or the person considering instituting proceedings, about the primary dispute resolution processes that could be used to resolve any matter in dispute (s.24);
- The Court may, with or without the consent of the parties, refer proceedings, or any part of them or any matter arising out of them, for conciliation (s.26) or for mediation (s.34);
- The Court may, with the consent of the parties, refer proceedings, or any part of them or any matter arising out of them, for arbitration (s.35)

If the Court:

- refers any or all of the matters in dispute in proceedings before it for a primary dispute resolution process (other than arbitration); or
- refers any proceedings before it, or any part of them or any matters arising out of them, for a primary dispute resolution process (other than arbitration); or

- requires either or both of the parties to a proceeding before it to attend a primary dispute resolution process (other than arbitration);

a party to that PDR process may, subject to certain formal requirements set out in the Act, make an application to the Court for determination of a question of law arising out of the proceedings (s.27). The Court's decision on such a question so referred binds each of the parties (s.27(4)).

Arbitrators appointed in particular matters may apply to the Court for leave to refer a question of law to the Court for determination (s.36). Arbitral awards can be challenged on questions of law (s.37) and the Court may make an order in terms of an arbitral award (s.38).

The Court is mandated by the Act to develop procedures that are as simple and efficient as possible, and to that end:

- the Court has power to make rules (which have been made) to set time limits for witnesses and to limit the length of both written and oral submissions;
- there is decreased emphasis on discovery and interrogatories – the leave of the Court is needed for either of these; and
- there is the use of an individual docket system similar to that used by the Federal Court.

Practice and Procedure

Proceedings must not be instituted in the Court in respect of a particular matter if proceedings in respect of an associated matter are pending in the Federal Court (s.19). Similarly, proceedings must not be instituted in the Federal Court in respect of a matter if the Federal Magistrates Court has jurisdiction in that matter and proceedings in respect of an associated matter are pending in the Federal Magistrates Court (s.32AA(1) of the *Federal Court of Australia Act 1976*).

The Court may transfer proceedings before it to the Federal Court, either on its own motion or on the application of a party (ss.39 and 41). Similarly, the Federal Court may transfer a proceeding to the Federal Magistrates Court. In that respect, s.32AB(8) of the *Federal Court Act* provides, in effect, that any proceeding at all may be transferred by the Federal Court to the Federal Magistrates Court whether or not the Federal Magistrates Court would otherwise have jurisdiction in the matter. The subsection concludes: "*To avoid doubt, the court's jurisdiction under this subsection is not subject to limits set by another provision.*"

There is no appeal available against a discretionary decision to transfer, or to refuse to transfer a proceeding to or from the Federal Magistrates Court (s.39(6) of the Act and s.32AB(8) of the *Federal Court Act*).

Appeals from a decision of a Federal Magistrate in admiralty are made to the Full Court of the Federal Court of Australia. The Full Court may be constituted by a single justice for the purpose of hearing such an appeal.

In proceedings before it, the Federal Magistrates Court must proceed without undue formality and must endeavour to ensure that the proceedings are not protracted (s.42).

The practice and procedure of the Federal Magistrates Court is to be in accordance with Rules of Court made under the Act. However, that is subject to any provision made by or under any other Act with respect to practice and procedure (s.43).

The Federal Magistrates Court has established rules for the conduct of proceedings in the Court: *Federal Magistrates Courts Rules* 2001. The *FMCR* apply to proceedings in the Court with some exceptions. First, if in a particular case the *FMCR* are insufficient or inappropriate, the Court may apply the *Federal Court Rules* in whole or in part and modified or dispensed with, as necessary: *FMCR* 1.05(2). Second, certain provision of the *Federal Court Rules* are expressly adopted and applied. Which of the *Federal Court Rules* falls into that category will be found in Part 2 of Schedule 3 *FMCR*.

The *Admiralty Rules* 1988 make provision for the practice and procedure to be followed in courts exercising jurisdiction under the *Admiralty Act* and matters incidental to such practice and procedure (s.41 (1) of the *Admiralty Act*). Those rules do not exclude or limit the operation of the *FMCR*, however, except where there is inconsistency (r 6(1) *Admiralty Rules*).

Where the *Admiralty Rules* fail to provide a form or procedure, the rules and forms of the court seized with jurisdiction should be followed, as will be the case with actions *in personam*. Unless otherwise expressly provided for, actions *in personam* will be commenced by the usual initiating process of the court in question, although that proceeding must contain a heading in accordance with Form 1 of the *Admiralty Rules* (*Admiralty Rules* r.5).

In the Federal Magistrates Court a proceeding must be started by filing an application in accordance with the approved form (*FMCR* 4.01). The application must be accompanied by either an affidavit or a statement of claim or points of claim. If interlocutory relief is sought, the application must be accompanied by an affidavit (*FMCR* 4.05).

Chapter 1 Part 5 *FMCR* provides for the making of urgent applications and Chapter 1 Part 6 *FMCR* provides for service of process.

A respondent to proceedings in the Federal Magistrates Court must file and serve a response to the application within 14 days of service (*FMCR* 4.03(2)). The response must be accompanied by either an affidavit setting out the facts upon which the response is based, or where a statement of claim or points of claim accompanied the application, a defence or points of defence (*FMCR* 4.05).

Upon filing an application is given a first court date. What may happen at a first court date is provided for in *FMCR* r 10. At the first court date the Court may make orders or directions in relation to the following:

- (a) the manner and sufficiency of service;
- (b) the amendment of documents;
- (c) defining of issues;
- (d) the filing of affidavits;
- (e) cross-claims;
- (f) the joinder of parties;
- (g) primary dispute resolution;
- (h) the admissibility of affidavits;
- (i) discovery and inspection of documents;
- (j) interrogatories;
- (k) inspections of real or personal property;
- (l) admissions of fact or of documents;
- (m) the giving of particulars;
- (n) the giving of evidence at hearing (including the use of statements of evidence and the taking of evidence by video link or telephone or other means);
- (o) expert evidence and court experts;
- (p) transfer of proceedings;
- (q) costs;
- (s) any other matter that the Court or Registrar considers appropriate.

Interrogatories and discovery are not allowed in relation to proceedings in the Court unless a Federal Magistrate declares that it is appropriate, in the interests of the administration of justice, to allow the interrogatories or discovery (s.45(1)). In deciding whether to make such a declaration a Federal Magistrate must have regard to:

- (a) whether allowing the interrogatories or discovery would be likely to contribute to the fair and expeditious conduct of the proceedings; and
- (b) such other matters (if any) as the Federal Magistrate considers relevant.

Chapter 1 Part 14 *FMCR* deals with disclosure. In the event that a declaration is made under the *Federal Magistrates Act* permitting disclosure, the Rules provide for either general disclosure, or disclosure of limited classes of documents. Interrogatories can only be delivered with leave.

As mentioned earlier, proceedings may be transferred to the Federal Court. The considerations relevant to exercising the discretion to transfer proceedings are set out in Chapter 1 Part 8 *FMCR*. When deciding whether to transfer a proceeding to the Federal Court, the Court must have regard to (see s.39(3), *Federal Magistrates Act*):

- (a) any Rules of Court made for that purposes;
- (b) whether proceedings in respect of an associated matter are pending in the Federal Court; and

- (c) whether the resources of the Federal Magistrates Court are sufficient to hear and determine the proceeding; and
- (d) the interests of the administration of justice.

In addition to the factors required to be considered by the Federal Magistrates Court under subsections 39(3) of the *Federal Magistrates Act* for transfer of proceedings to the Federal Court, the following factors are relevant:

- (a) whether the proceeding is likely to involve questions of general importance, such that it would be desirable for there to be a decision of the Federal Court on one or more of the points in issue;
- (b) whether, if the proceeding is transferred, it is likely to be heard and determined at less cost and more convenience to the parties than if the proceeding is not transferred;
- (c) whether the proceeding will be heard earlier in the Federal Magistrates Court;
- (d) the availability of particular procedures appropriate for the class of proceeding;
- (e) the wishes of the parties.

Similar factors must be considered by the Federal Court when deciding to transfer matters to the Federal Magistrates Court (s.32AB(6) *Federal Court of Australia Act*; 0.82 r.7 *Federal Court Rules*).

The Court

The Court comprises justices who are styled Federal Magistrates. Federal Magistrates are appointed pursuant to Chapter III of The Constitution and have the same tenure as other federal judges.

The Court is a court of record and a court of law and equity (see s.8(3)). Accordingly, the decisions of the Court are recorded in writing and the Court has power to punish for contempt. Official records of the Court are permanently maintained and matters recorded may be pleaded and relied upon in any subsequent proceedings.

As a modern court of equity, subject to the limits of its jurisdiction, the Court has power to grant relief both at law and in equity. Significantly this includes the ability to grant injunctive relief and make declaratory orders. The Court has power to award equitable damages or compensation.

The process of the Federal Magistrates Court runs, and the judgments of the Federal Magistrates Court have effect and may be executed, throughout Australia.

For the purposes of exercising its jurisdiction, the Court is constituted by a single Federal Magistrate. The Chief Federal Magistrate is responsible for ensuring the orderly and expeditious discharge of the business of the Federal Magistrates Court. The Chief Federal Magistrate has made, pursuant to the *Federal Magistrates Act*, arrangements as to the Federal Magistrates who are

to constitute the Federal Magistrates Court in particular matters or classes of matters. In particular specialist panels have been established in each of the Court's major registries in relation to each of the main areas of the Court's work, including admiralty.

Conclusion

The jurisdiction of the Federal Magistrates Court in admiralty is still in its infancy.

The provisions of the *Admiralty Act* and the *Federal Magistrates Act* and *FMCR* provide an opportunity for practitioners to utilise the simpler and speedier procedures of the Federal Magistrates Court, including provisions concerning dispute resolution, for less complex admiralty work.

Appendix - Section 4 Admiralty Act 1988

4 Maritime claims

- (1) A reference in this Act to a maritime claim is a reference to a proprietary maritime claim or a general maritime claim.
- (2) A reference in this Act to a proprietary maritime claim is a reference to:
 - (a) a claim relating to:
 - (i) possession of a ship;
 - (ii) title to, or ownership of, a ship or a share in a ship;
 - (iii) a mortgage of a ship or of a share in a ship; or
 - (iv) a mortgage of a ship's freight;
 - (b) a claim between co-owners of a ship relating to the possession, ownership, operation or earnings of the ship;
 - (c) a claim for the satisfaction or enforcement of a judgment given by a court (including a court of a foreign country) against a ship or other property in a proceeding *in rem* in the nature of a proceeding in Admiralty; or
 - (d) a claim for interest in respect of a claim referred to in paragraph (a), (b) or (c).
- (3) A reference in this Act to a general maritime claim is a reference to:
 - (a) a claim for damage done by a ship (whether by collision or otherwise);
 - (b) a claim in respect of the liability of the owner of a ship arising under Part II or IV of the *Protection of the Sea (Civil Liability) Act 1981* or under a law of a State or Territory that makes provision as mentioned in subsection 7(1) of that Act;
 - (c) a claim for loss of life, or for personal injury, sustained in consequence of a defect in a ship or in the apparel or equipment of a ship;
 - (d) a claim (including a claim for loss of life or personal injury) arising out of an act or omission of:
 - (i) the owner or charterer of a ship;
 - (ii) a person in possession or control of a ship; or
 - (iii) a person for whose wrongful acts or omissions the owner, charterer or person in possession or control of a ship is liable;being an act or omission in the navigation or management of the ship, including an act or omission in connection with:
 - (iv) the loading of goods on to, or the unloading of goods from, the ship;
 - (v) the embarkation of persons on to, or the disembarkation of persons from, the ship; and
 - (vi) the carriage of goods or persons on the ship;
 - (e) a claim for loss of, or damage to, goods carried by a ship;
 - (f) a claim arising out of an agreement that relates to the carriage of goods or persons by a ship or to the use or hire of a ship, whether by charterparty or otherwise;
 - (g) a claim relating to salvage (including life salvage and salvage of cargo or wreck found on land);
 - (h) a claim in respect of general average;
 - (j) a claim in respect of towage of a ship;
 - (k) a claim in respect of pilotage of a ship;
 - (m) a claim in respect of goods, materials or services (including stevedoring and lighterage services) supplied or to be supplied to a ship for its operation or maintenance;
 - (n) a claim in respect of the construction of a ship (including such a claim relating to a vessel before it was launched);
 - (o) a claim in respect of the alteration, repair or equipping of a ship;
 - (p) a claim in respect of a liability for port, harbour, canal or light tolls, charges or dues, or tolls, charges or dues of a similar kind, in relation to a ship;
 - (q) a claim in respect of a levy in relation to a ship, including a shipping levy imposed by the *Protection of the Sea (Shipping Levy) Act 1981*, being a levy in relation to which a power to detain the ship is conferred by a law in force in Australia or in a part of Australia;

- (r) a claim by a master, shipper, charterer or agent in respect of disbursements on account of a ship;
- (s) a claim for an insurance premium, or for a mutual insurance call, in relation to a ship;
- (t) a claim by a master, or a member of the crew, of a ship for:
 - (i) wages; or
 - (ii) an amount that a person, as employer, is under an obligation to pay to a person as employee, whether the obligation arose out of the contract of employment or by operation of law, including the operation of the law of a foreign country;
- (u) a claim for the enforcement of, or a claim arising out of, an arbitral award (including a foreign award within the meaning of the Arbitration (Foreign Awards and Agreements) Act 1974) made in respect of a proprietary maritime claim or a claim referred to in one of the preceding paragraphs;
- (w) a claim for interest in respect of a claim referred to in one of the preceding paragraphs.



FEDERAL MAGISTRATES COURT OF AUSTRALIA

CONDUCT OF ADMIRALTY AND MARITIME WORK IN THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

NOTICE TO PRACTITIONERS IN ALL STATES AND TERRITORIES

Jurisdiction has been conferred upon The Federal Magistrates Court by the *Federal Magistrates Jurisdiction Amendment Act 2006*. It is expected that the Court will provide an alternative venue for the hearing of smaller cargo claims within the federal system. *In personam* jurisdiction has been conferred, not *in rem* jurisdiction.

The purpose of this notice is to set out the arrangements that the Court has put in place for the conduct of Admiralty matters. This notice deals with: the new national arrangement, the identification of Admiralty matters covered by the new arrangements, *in personam* proceedings, assisted or alternative dispute resolution, Court annexed arbitration, and the proper approach to Admiralty litigation.

National Arrangement

A national arrangement has been established whereby nominated Federal Magistrates will undertake the Admiralty work of the Court. They will be assisted in undertaking the work by nominated Registrars, and skilled Registry officers. These Registrars and skilled Registry Officers will be the same people who undertake this work in the conduct of admiralty and maritime jurisdiction by the Federal Court. The Court will seek to co-ordinate the work and harmonise practice and procedure in accordance with this notice to practitioners.

The Federal Magistrates involved and their contact details are as follows:

Western Australia, South Australia & Northern Territory	Raphael FM	Associate: Sharon Brant Tel: 02 9377 5576 Fax: 02 9230 8469 E-mail: sharon.brant@fmc.gov.au
Victoria & Tasmania	O'Dwyer FM Burchardt FM	Associate to FM O'Dwyer: Gail Car Tel: 03 8600 4010 Fax: 03 8600 4445 E-mail: gail.car@fmc.gov.au Associate to FM Burchardt: Brooke Evans Tel: 03 8600 4324 Fax: 03 8600 4493 E-mail: brooke.evans@fmc.gov.au
New South Wales & Australian Capital Territory	Raphael FM Emmett FM	Associate to FM Raphael: Sharon Brant Tel: 02 9377 5576 Fax: 02 9230 8469 E-mail: sharon.brant@fmc.gov.au Associate to FM Emmett: Serena Kwong Tel: 02 9377 5542 Fax: 02 9377 5543 E-mail: serena.kwong@fmc.gov.au
Queensland	Jarrett FM	Associate: Susan Haysom Tel: 07 3361 3084 Fax: 07 3361 1689 E-mail: susan.haysom@fmc.gov.au
Registrar	First point of contact should be District Registrar in each State	

Admiralty and maritime matters

The Admiralty and maritime work of the Court is limited to proceedings under ss.9, 27 and 28 of the *Admiralty Act 1988* (Cth) and any matters referred by the Federal Court.

When a matter falls within the Admiralty and maritime work, practitioners should ensure that the Registry staff are advised at the time of filing that the matter is of that nature so it can be allocated to one of the nominated Admiralty Federal Magistrates.

***In Personam* Proceedings and Nominated Federal Magistrates**

The nominated Federal Magistrates will attempt to harmonise procedure in *in personam* actions so that they are dealt with consistently by the Court nationally and as far as is relevant with the national Federal Court arrangements. But matters will be assigned directly to the docket(s) of the Admiralty Federal Magistrates in the Registry and that Federal Magistrate will conduct all interlocutory proceedings and act as trial judge of the action.

Urgent Admiralty or maritime applications should be made to the docket Admiralty Federal Magistrate or, if he or she is unavailable, to another Admiralty Federal Magistrate in the nearest Registry.

Forms

The *Admiralty Rules 1988* (the 'Admiralty Rules') do not provide for how an action *in personam* is to be commenced other than to state that such an action cannot be commenced by the same initiating process as the process initiating an action *in rem*. However, the Admiralty Rules prescribe the title of documents for use in proceedings under the *Admiralty Act 1988*.

In personam applications are to be commenced in the Court on the Application form approved for use for general federal law proceedings pursuant to the *Federal Magistrates Court Rules 2001*. Alternatively, Federal Court form 5 can be used in accordance with Subrule 2.04(2) of the *Federal Magistrates Court Rules 2001*. However, both forms require amendment to the header so as to comply with the title prescribed in the Admiralty Rules. An amended version of the header is attached.

If proceedings are transferred from the Federal Court to the Federal Magistrates Court and comply with the form requirements prescribed for use in the Federal Court, there will no need for new forms/pleadings to be prepared.

Pleadings - points of claim

The grounds of an application must explain briefly the basis on which the orders are sought. Where appropriate, pleadings will be ordered. In such instance an applicant may attach a pleading by way of points of claim. Such pleading should observe the

requirements of the *Federal Court Rules*. It should identify in summary form the material facts on which the applicant relies, but not the evidence by which those facts are to be proved. All necessary particulars must be given.

Assisted or Alternative Dispute Resolution (ADR)

Sections 34 and 35 of the *Federal Magistrates Act 1999* provide for Court ordered mediation and arbitration (the latter only with consent). Immunity is conferred on the mediator or arbitrator. The parties are expected to discuss the utility of any such ADR mechanism in their case. The Court has Registry officers shared with the Federal Court who are knowledgeable in maritime matters and cargo claims and who are trained mediators. Early mediation or early neutral evaluation by a Registrar or a third party will be encouraged and sometimes ordered. Mediation can also be used to help identify and reduce issues in dispute, or to eliminate procedural arguments, as well as for the purposes of resolving the whole matter.

It is expected that parties will always seek an early resolution of matters and that they will consider Court annexed mediation or early neutral evaluation. This is especially so for the resolution of small cargo claims in a speedy and inexpensive manner.

In appropriate cases directions will be made on the first return date, or shortly thereafter, for a case management conference to be held before a Registrar or the Federal Magistrate as soon as possible. At this conference the Federal Magistrate or Registrar will seek to identify whether the matter is appropriate for an early mediation (perhaps undertaken on the basis of the parties' instructions, as opposed to statements), what issues are involved and the most timely and efficient method of disposing of the matter.

As well as its Registrars, the Court has the use of other staff from the Federal Court with skills and expertise in maritime matters, some of whom are Marshals. These members of the Court staff will be available as required in any Registry to conduct or assist in the conduct of mediations carried out by Registrars. By way of example, Registry staff include persons who have expertise in cargo claim handling, loss adjusting and navigation.

***Ad Hoc* retained expertise and ADR**

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 mediation or early neutral evaluation. The engagement of such persons would generally be through the offices of professional or industry associations.

Court annexed arbitration

The Court has power to refer matters to arbitration under s.35 of the *Federal Magistrates Act 1999*. If parties desire a Registrar to act as an arbitrator, this can be arranged. Speedy procedure using procedures akin to those used in 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 they so wished. If a Registrar acted as arbitrator, fees (hearing and room) would be eliminated. Sections 36 and 37 of the *Federal Magistrates Act 1999* provide for referral of questions of law and review on a question of law to the Court. By this mechanism, if the parties wish it, appeals on factual questions can be eliminated.

Approach of Practitioners and Litigants to Admiralty and Maritime litigation

There will always be a hearing on the first court date at which a final hearing date will generally be fixed or the proceeding referred to mediation or arbitration. Parties are encouraged to agree upon draft short minutes of orders and send them by email to the Federal Magistrate's associate prior to any scheduled directions hearing. In some instances, **apart from the first court date**, the need for a hearing may be avoided should the parties agree on minutes of orders and the Federal Magistrate approves of them in chambers.

At the first court date the court will explore the nature of the dispute and the issues raised, whether technical or evidentiary – including any difficulties in obtaining instructions and the availability of witnesses. The parties should attend the first court date prepared and fully informed in order to partake in a vigorous exploration of the proceeding and its management in the court. The court adopts the view expressed by the Federal Court that it is not an acceptable way of conducting litigation to “put the

other side to proof' on all issues. It is the duty of the parties and their legal representatives promptly to ascertain, as far as reasonably possible the nature and extent of the facts which pertain to any particular case. This is not limited to the particular points which the party wants to prove. The parties are expected to identify the real and genuine issues in dispute, whether of fact or of law after due investigation.

It is the duty of the profession to assist the Court in the performance of its duty to resolve disputes by reference to what truly is, or should be, in dispute: see generally *Ashmore v Corporation of Lloyds* [1992] 1 WLR 446, 453, and see the speech by Hayne J 'Judicial Case Management and the Duties of Counsel', Wednesday 24 February 1999 to the Readers of the Bar Practice Course, Brisbane, contained on the High Court Website under the link 'publications'. In this context, parties should expect that the Court will be ready to use s.190(3) of the *Evidence Act 1995* (Cth) in appropriate circumstances to lessen the cost of proving matters not bona fide in dispute.

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 profession and their commercial clients. An aspect of this co-operation between the parties' representatives that the Court expects, however, is the provision of information and documentation in a prompt and timely fashion. Where legal practitioners make reasonable requests for documents or information (whether strictly 'particulars' or not) those requests should generally be met without the delay. In some cases, for various reasons, the formality (and cost) of a verified list of documents is necessary.

It is inappropriate for one party to send submissions, letters and partisan documents to the Federal Magistrate. The facsimile machine and the email system are not to be used for private or unilateral filings of submissions or complaints without the leave of the court. But if all parties agree on a communication being sent to a Federal Magistrate it may be forwarded, without leave, to the associate.

These matters should be made plain to clients. This could be achieved by providing this Notice to Practitioners to them. 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 Notice to Practitioners.

Aim of the new arrangements

The underlying idea of this new arrangement is the provision by the Court of the full range of its facilities, including mediation, early neutral evaluation, arbitration and judicial hearing to bring matters flexibly, cheaply and speedily to resolution. The Court encourages the use of external mediation and arbitration. Equally it is able, should parties and the profession desire it, to provide specialised, skilled Federal Magistrates and Registrars who can deal with matters in a variety of ways best suited to the particular maritime dispute. The work of the court in this area in conjunction with the work of the Federal Court in this area sharing as they do, the skilled Registrars and other court officers, will create an integrated Federal Admiralty and Maritime Jurisdiction for matters of all types and sizes.

This notice to practitioners can be found on the Court's website: www.fmc.gov.au.



J PASCOE

Chief Federal Magistrate

IN THE FEDERAL MAGISTRATES COURT
OF AUSTRALIA
REGISTRY:
IN ADMIRALTY

File number:

.....
Plaintiff

.....
Defendant

Repeat as necessary for additional parties