

15.3 MLAANZ Response to Finkelstein J paper by Street SC, April
2003

**COMMENTS ON
“RECOMMENDATIONS CONCERNING ASPECTS OF THE ADMIRALTY
RULES RELATING TO UNDERTAKINGS AND BAIL BONDS”**

1. In summary, I agree with the need for amendment in each of the areas identified except Recommendations 9 and 11. The amendments that I would recommend for discussion are in the draft amendments annexed hereto, which has been circulated for consideration to the Admiralty Rules Committee of the Supreme Court of New South Wales. The attached draft amendments emanate from myself and Stuart Hetherington for the purpose of discussion and go beyond the topics addressed in Recommendations 1 to 11. I have circulated the attached recommendations to a number of legal practitioners practising in the field both in New South Wales and interstate.
2. In specific response:
 - a) **Recommendation 1:** This does not, in my opinion, adequately address the need for alternatives to an undertaking from the legal practitioners. The solicitor or a firm should be able to give the undertaking. In the alternative the client should be able to give an indemnity together with a limited form of security. The Marshal should be permitted to operate an overdraft facility taking into account the value of the ship or property under arrest.
 - b) **Recommendation 2:** This again, does not in my opinion, adequately address the need for alternative forms of undertaking and security as suggested above.
 - c) **Recommendation 3:** I agree with the need for harmonisation.
 - d) **Recommendation 4:** I agree with the tenor of Recommendation 4, but, again, it does not quite go far enough in addressing the solution. The Rules should facilitate certainty in the amount of exposure under an existing undertaking and when release of that exposure occurs. This is also an area which I think should be dealt with by a judge of the Court.
 - e) **Recommendation 5:** This overlaps, in part, the alternatives that I consider should be available in relation to Recommendations 1 and 2.
 - f) **Recommendation 6:** I agree with the tenor of the requirement to provide information reasonably requested but automatic periodical reports may unnecessarily add to costs.
 - g) **Recommendation 7:** In my opinion, the scope for alternatives in relation to Recommendation 1 should be implemented. I agree that there are circumstances where immediate demands are unreasonable and the proposed alternatives together with the Court's ultimate control should avoid unnecessary or oppressive demands.
 - h) **Recommendation 8:** I agree with the need for further information, but the affidavit should also include facts (whether or not hearsay) supporting a *prima facie* case and should then be considered in the exercise of the ex parte power for the issue of an arrest warrant by a judge. This is a significant ex parte power and the risk of vexatious arrest is minimised by judicial consideration and determination.

- i) **Recommendation 9:** In my opinion sufficient discretion already exists for the Court to dispense with the requirement for undertakings where that would otherwise stifle a strong *prima facie* case by master and crew.
 - j) **Recommendation 10:** I agree with the need for amendment, but, again, the changes do not, in my opinion, go far enough. Corporations should be able to give bail bonds and an on-going obligation to notify of material change should be imposed.
 - k) **Recommendation 11:** In my opinion the Court already has, and exercises, a power to overcome impediments in this area. In my view, all applications concerning arrest, release or security should be dealt with by a Judge of the Court and not by a Registrar given the significance of the powers being exercised and at the arrest stage if facts to support the cause of action are to be included in the affidavit for arrest.
3. I note that in relation to the issue of fees and expenses of the Marshal (in respect of which I have no objection to the proposed clarification) whilst it is appropriate to permit recovery on a commercial basis of the Marshal's costs it remains, in my opinion, unfair (both to creditors and debtor) and inappropriate to obtain poundage on top of these Marshal's costs. This is particularly the case as the sale is in effect carried out through an ordinary commercial broker who charges on a percentage basis and where the Invitation to Tender and Bill of Sale are prepared by solicitor's on behalf of the Marshal at commercial rates.
4. Consideration does perhaps need to be given to the International Ship and Port Facilities Security Code (IPSO Code) and its ramifications for the Marshal whilst having custody of arrested property. It may be that the ship security plan (if in existence) will suffice but there will be circumstance where the Marshal may need to prepare an appropriate plan and means of addressing the needs of a Ship Security Alert System pending sale. A specific Rule is not necessarily needed but a clear internal policy for the Marshal on this area should exist.

24 April 2003

A W Street SC