HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **PALMANOVA PTY LTD**
Appellant

AND:

COMMONWEALTH OF AUSTRALIA
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

PART I INTERNET PUBLICATION

This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

1. The relevant object of movable cultural heritage in this proceeding is an ancient basalt artefact which is pre-Columbian in origin and originates from Tiwanaku, an ancient city the monumental ruins of which lie in Bolivia near Lake Titicaca. There is no dispute that the artefact is a "protected object of a foreign country" within the meaning of s 3(1) of the *Protection of Movable Cultural Heritage Act 1986* (Cth) (the **Act**) (**Vol 1, Tab 3**).

2. Section 14(1) of the Act is contained within Part II of the Act, titled "Control of Exports and Imports". It provides that an object is liable to forfeiture when the three circumstances in s 14(1)(a), (b) and (c) are satisfied. Properly construed, the circumstance in s 14(1)(a) — that the protected object "has been exported from that country" — is limited in application to a protected object of a foreign country exported after the date of commencement of the Act (1 July 1987). This construction is supported by the statutory text, its context, purpose and the extrinsic materials.

3. As for the text, Parliament's choice to use the present perfect tense in sub-paragraph (a) of s 14(1), as compared to the past tense of sub-paragraph (b), should be given work to do. The present perfect tense conveys a situation taking place in the past which is related to the present. The relationship with the present conveyed by sub-paragraph (a) is

between the completed act of export and the present time at which Parliament is speaking in enacting s 14(1): on or after 1 July 1987.

4. This construction is supported by the presumption against surplusage and redundancy. That the effect of the statutory regime is to interfere with private property rights — i.e., by forfeiture — is again a reason not to favour a broad, rather than narrower, available construction; as is the fact that the majority's construction strains the connection between any unlawful act of export and the legislated consequence of forfeiture: **AS [21]-[23].**

5. As for context, s 14(2)(a) uses the same phrase "has been exported". In the context of a penal provision, a narrower available construction should be preferred to a broad one, and s 14(1)(a) should be construed consistently with s 14(2)(a): *R v A2* (2019) 269 CLR 507 at [52] (Kiefel CJ and Keane J) (**Vol 3, Tab 18**). The broader construction may introduce unreasonable and unworkable outcomes for individuals seeking not to engage in contraventions of both the civil and criminal law: see **FC [88] CAB 146** (Downes J); **AS [24]-[26]; AR [6]**; *Stephens v The Queen* (2022) 273 CLR 635 at [33] (**Vol 4, Tab 20**); *Acts Interpretation Act 1901* (Cth), s 15AB(3) (**Vol 2, Tab 4**).

6. As for the extrinsic material, both the Explanatory Memorandum and the Minister's Second Reading Speech support the forward-looking nature of the import controls, with the Minister indicating that neither the Convention nor the proposed legislation were concerned with the restitution to their country of origin of cultural objects removed in "past years". Both also make clear that one purpose of the Act was to enable Australia to become a party to the 1970 *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (**Convention**): see **Vol 6, Tab 30** (Explanatory Memorandum) and **Vol 6, Tab 28** (Second Reading Speech): **AS [33]-[40]**.

7. As for the Convention, there is interpretative assistance to be drawn from the Convention notwithstanding that the terms of the Act do not correlate to it in some respects: *cf* the majority in the Full Court (**FC [28], [32] CAB 131-132)** and Perram J **(PJ [375] CAB 111**). The Minister expressly stated the legislation would result in Australia's accession to the Convention. There is no doubt that Article 7 of the Convention (which imposes obligations on state parties to prevent the importation by museums of cultural property illegally exported after the date of the Convention) has only non-retroactive operation (**Vol 6, Tab 29**). In that context, a construction which is consistent with the temporal

operation of the Convention should be preferred to one which cuts across it: *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [44] (Gageler J) (**Vol 4, Tab 22**); *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at [34] (**Vol 3, Tab 15**). The constructional choice should be resolved by concluding that s 14(1) enacts a liability to forfeiture in respect of objects unlawfully exported only *after* enactment: **AS [41]-[48]**.

8. The text, context and extrinsic material all demonstrate that the purpose of the import control regime introduced by the Act is to inhibit the unlawful removal from foreign countries of movable cultural objects which represent an irreplaceable part of that country's cultural heritage. The majority's overbroad attribution of purpose (protection of movable cultural heritage *simpliciter*) does not pay sufficient regard to either the structure or content of Part II of the Act, or the extrinsic material: **AS [27]-[32]; AR [8]**; *cf* **FC [16] CAB 128.** Rather, as Downes J concluded, the concern of Parliament is forward-looking: **FC [76] CAB 143-144**.

Dated: 13 June 2025

Richard Lancaster **Naomi Wootton**