HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S147/2024

BETWEEN:

PALMANOVA PTY LTD
Appellant

and

COMMONWEALTH OF AUSTRALIA
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

PART I CERTIFICATION

1. This outline is in a form suitable for publication on the internet.

PART II OUTLINE OF ORAL ARGUMENT

2. The issue on the appeal is the question identified in RS [3] of the correct interpretation of s 14(1) of the *Protection of Movable Cultural Heritage Act 1986* (Cth) (**Act**). That reduces to whether s 14(1) excludes from liability for forfeiture any object that has been exported from a foreign country prior to the commencement of the Act. The Respondent and the majority of the Full Court of the Federal Court of Australia answer "No".

3. This is consistent with the use of the present perfect "has been" in s 14(1)(a). The present relevance (at the time of post-commencement importation) of the completed export is supplied by the object (still) being a protected object of a foreign country, with the characteristic of having been exported from that country at a time falling within s 14(1)(b). Also, the focus of s 14(1)(a) upon the object being one that is a protected object of a foreign country at the time of importation itself explains the use of the present perfect in the following expression "has been": RS [5], [11], [18].

4. The text of ss 14(1) and (2) supports the Respondent for a number of reasons.
    a. The plain meaning of s 14(1)(a) itself, as found by the majority (at [14], [21]-[25]): RS [14]. As the majority held (at [14]), the circumstances in s 14(1)(a) and (b) "are current circumstances which exist at the time of the import". Also,

"has been" is broad enough to capture any completed act, at least if it has present relevance: RS [15].

b. Paragraphs (a) and (b) of s 14(1) are to be read in the context of each other, and the section as a whole. Paragraph (b) is the only limitation as to the time of the completed export ("the export" in paragraph (b) is that referred to in paragraph (a)): RS [16].

c. Section 14(1) comes to be applied at the time of post-commencement importation into Australia, but that is not to say that exports of protected objects from a foreign country prior to the date of commencement must be ignored for the purposes of determining whether s 14(1), read as a whole, is satisfied: RS [17]-[18].

d. Section 14(2) supports the above construction, as found by the majority: RS [19]-[20].

e. Contrary to the reasoning of the primary Judge, the Respondent's construction does not lead to "redundancy" or "superfluity": RS [21].

f. Nor, contrary to AS [22], is there "ambiguity": RS [22].

g. The majority's construction is consistent with the tense of s 14(1), but it is also supported by the other matters to which they referred: RS [23].

h. The Respondent's construction does not involve any "retroactivity" or "retrospectivity" (as the primary Judge found, at [348]-[350], and the majority agreed, at [33]): RS [24].

i. The fact that s 14(2) is a criminal provision does not assist the Appellant. Rather, as shown by the majority at [21]-[25], the terms of s 14(2) supported its construction of s 14(1): RS [25].

j. There is also no inconsistency between the majority's construction and the way in which expressions in s 14 are defined in s 3(5) of the Act. Also, clear words would be expected if Parliament's intention was to exclude all pre-commencement exports: RS [26] and majority at [17]-[18].

k. The Appellant's criticism of the construction of the Respondent and the majority as being "unjust", "unworkable", "unreasonable" or "inconvenient" (and what is said by Downes J at [88] as to forensic difficulties) comes down to a criticism of Parliament's legitimate policy choice, reflected in a contextual

and correct reading of its language, and does not displace the majority's interpretation: RS [27]-[28].

5. The context of s 14(1)(a) also supports the Respondent's and the majority's construction in the ways set out at RS [30]-[31].

6. So too does the purpose of the Act: see RS [32]-[36].

7. The extrinsic material does not tell against the Respondent's or the majority's construction (as it found, at [27]):
   a. None of the Judges below referred to the explanatory memorandum as useful in resolving the constructional issue. There was no error in that respect: RS [37]. Nor does the passage from the explanatory memorandum quoted at AS [34] say that pre-commencement exports from a foreign country are excluded from the operation of the Act: RS [38].
   b. The second reading speech does not suggest that s 14(1) is designed to be limited to objects exported post-commencement. That is supported by the reasons of the majority (at [29], summarized at RS [42]). To the extent that the primary Judge found (at [365]-[372]) that the second reading speech provided some limited support for the Appellant's construction, that was affected by error in seeing the expression "line across history" as doing more than indicating that s 14(1) would only capture protected objects of foreign countries imported into Australia after the commencement date: RS [41]. Contrary to the Appellant's submissions, the Respondent's interpretation does not give the Act a "restitutory" operation, as it only captures imports prospectively occurring, meeting s 14(1)(a)-(c): RS [41], majority at [29].
   c. The primary Judge and the majority were correct to find that the Convention was of no assistance: RS [43], the primary Judge at [375], majority at [32]. For the reasons given at RS [44], those findings are to be preferred to the contrary view of Downes J. See otherwise RS [45]-[46].

Dated: 13 June 2025

Geoffrey Johnson SC
Nicholas Swan