HIGH COURT OF AUSTRALIA

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Details of Filing

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Form 27A—Appellant's submissions

Note: See rule 44.02.2.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **CSL AUSTRALIA PTY LTD ACN 080 378 614**

Appellant

and

TASMANIAN PORTS CORPORATION PTY LTD ACN 114 161 938
First Respondent

INCITEC PIVOT LTD ACN 004 080 264
Second Respondent

INCITEC FERTILIZERS PTY LTD ACN 103 709 155
Third Respondent

VIVA ENERGY AUSTRALIA LTD ACN 004 610 459
Fourth Respondent

PERSONS WHO MAY HAVE A CLAIM WITHIN THE MEANING OF ARTICLE 2 OF CONVENTION ON LIMITATION OF LIABILITY FOR MARITIME CLAIMS 1976 (AS AMENDED BY THE 1996 PROTOCOL TO AMEND CONVENTION ON LIMITATION OF LIABILITY FOR MARITIME CLAIMS 1976)
Fifth Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Concise statement of the issues

2. The appeal raises a single issue: whether certain claims made by the First Respondent (**TasPorts**) against the Appellant (**CSL**) are limitable under Art 2(1)(a) of the *Convention on Limitation of Liability for Maritime Claims, 1976* as amended by both the *Protocol of 1996 to amend the Convention on the Limitation of Liability for Maritime Claims, 1976* and *Resolution LEG.5(99) (2012) of the Legal Committee of the International Maritime Organisation* (collectively, **the 1976 Convention**). The provisions of the 1976 Convention (with the exception of Art 2(1)(d) and (e)) have force of law in Australia pursuant to s 6 of the *Limitation of Liability for Maritime Claims Act 1989* (Cth) (**LLMCA**).

3. This issue turns on the proper construction of Art 2(1) of the 1976 Convention, and more particularly whether a claim within the plain meaning of the express terms of Art 2(1)(a) is excluded from limitation because it is also within the meaning of Art 2(1)(d), where Art 2(1)(d) is not a part of Australian law by operation of s 6 of the LLMCA and Art 18 of the 1976 Convention.

Part III: Section 78B of the Judiciary Act 1903

4. No notices under s 78B of the *Judiciary Act 1903* (Cth) are required.

Part IV: Citations of the decisions below

5. The decision of the Federal Court of Australia is *CSL Australia Pty Ltd v Tasmanian Ports Corporation Pty Ltd (The Goliath)* [2024] FCA 824 (Stewart J) (**PJ**) (CAB 5-58).

6. The decision of the Full Court of the Federal Court of Australia is *Tasmanian Ports Corporation Pty Ltd v CSL Australia Pty Ltd (The Goliath)* (2025) 310 FCR 64; [2025] FCAFC 53 (Burley, SC Derrington and O'Sullivan JJ) (**AJ**) (CAB 68-109).

Part V: Background

7. On 28 January 2022, and whilst manoeuvring to berth, *MV Goliath* allided with the tugs *York Cove* and *Campbell Cove* moored alongside the wharf in Devonport. *MV Goliath* was owned and operated by CSL. The tugs were damaged, sank and

emitted diesel fuel and other hydrocarbons into the adjacent waters. The wharf was also damaged. The wharf and both tugs were owned by TasPorts (PJ [1] CAB 12; AJ [8] CAB 74).

8. In May 2022, TasPorts brought an action against CSL in the Federal Court of Australia claiming damages of approx. $ 22m for loss and damage suffered as a result of the allision (PJ [2] CAB 12). That included a claim for the loss of and damage to its tugs, as well as a claim for $ 17,245,743 for the "*costs of and associated with the containment, removal and disposal of hydrocarbons, and the removal and disposal of the Tugs*" (the ***para 22(e) claim***) (PJ [3], [4] CAB 12; AJ [9] CAB 75). The Fourth Respondent (**Viva**) has also brought a claim against CSL for damages of approx. $ 2.4m (PJ [13] CAB 14).

9. In September 2022, CSL commenced a separate proceeding in the Federal Court seeking both (a) a declaration that it was entitled to limit its liability for all claims within the meaning of Art 2(1) of the 1976 Convention arising out of the allision, including the whole of TasPorts' claims, and (b) to establish a Limitation Fund in respect of that limited liability under Art 11 of the 1976 Convention (PJ [6] CAB 13; AJ [9] CAB 75). Pursuant to orders made on 21 June 2023, CSL established a Limitation Fund of $ 15,704,201 (PJ [9] CAB 13; ABFM, 4-8, 9-11).

10. In its defence of CSL's limitation claim, TasPorts contended (*inter alia*) that its *para 22(e) claim* was not limitable under the 1976 Convention as given force of law in Australia by the LLMCA, because that claim was within Art 2(1)(d) of the Convention, which does not have force of law in Australia (PJ [7] CAB 13).

11. On 25 September 2023, Rares J made the declaration of limitation sought by CSL, subject to a reservation (*inter alia*) that TasPorts could contend that its *para 22(e) claim* was a claim described in Art 2(1)(d) and as such not limitable by operation of s 6 of the LLMCA (PJ [10] CAB 14; ABFM 12-15). It is common ground that all of TasPorts' other claims against CSL (including its claim for the loss of the tugs) are limitable and subject to the limitation decree. As is Viva's claim.

12. TasPorts filed a cross-claim in which it sought (*inter alia*) a declaration to the above effect (PJ [7], [11] CAB 13-14; ABFM, 16-19, 20-23). That cross-claim was heard in June 2024.

13. In July 2024, the primary judge delivered judgment. His Honour declined to make the declaration sought by TasPorts and dismissed prayers 1 and 3 of its cross-claim (CAB 59), holding (at PJ [99], [153] and [191]; CAB 34, 47, 57) that:

    a. TasPorts' *para 22(e) claim* was a claim within the text of Art 2(1)(a) and is on that basis *prima facie* subject to limitation under the LLMCA;

    b. there is no reason to limit the meaning of Art 2(1)(a) by reference to Art 2(1)(d), which whilst overlapping with Art 2(1)(a) also has its own non-overlapping sphere of operation; and

    c. the fact that TasPorts' *para 22(e) claim* also came within the natural meaning of Art 2(1)(d), which is not a part of Australian law, did not have the effect of excluding that *claim* either from Art 2(1)(a) or from being subject to limitation under the LLMCA by Australia's exercise of its right of reservation under Art 18 of the Convention not to implement Art 2(1)(d).

14. The Full Court allowed an appeal from the decision of the primary judge and made the declaration sought by TasPorts in its cross-claim (CAB 110-111). In doing so, the Full Court adopted the reasoning of Keane NPJ in the Hong Kong Court of Final Appeal in ***The Star Centurion***[1] (AJ [44]-[62] CAB 87-92). The Full Court rejected the primary judge's criticisms of that reasoning (AJ [63] CAB 93; *cf* PJ [143]-[145] CAB 44-45) and held that Art 2(1)(d) exclusively encompassed all claims for wreck removal expense and that a Contracting State's exercise of the Art 18(1) reservation operated in respect of **all** claims described in Art 2(1)(d) (AJ [86] CAB 98) with the result that such claims cannot be the subject of limitation in Australia (AJ [123] CAB 107-108), including under Art 2(1)(a). This is despite those claims also falling within the express terms of Art 2(1)(a).

15. Whilst acknowledging the UK Supreme Court's finding in ***The Flaminia UKSC***[2] that "*Art 2(1) does not preclude the dual characterisation of claims*" (AJ [42] CAB 87), the Full Court nevertheless dismissed that judgment as being of no "*material assistance*" (AJ [25] CAB 83) and adopted an approach that diverged from it in

1 *Perusahaan Perseroan (Persero) PT Pertamina v Trevaskis Ltd (The Star Centurion and The Antea)* (2023) 26 HKCFAR 297; [2023] HKCFA 20 (***The Star Centurion***).

2 *MSC Mediterranean Shipping Company SA v Conti 11 Container Schiffahrts-GmbH & Co KG MS "MSC Flaminia"* [2025] 1 WLR 1835; [2025] UKSC 14 (***The Flaminia UKSC***).

significant respects, and without fully engaging with its reasoning.

16. CSL challenges the Full Court's above conclusion and underlying reasoning on the grounds set out in paras (2) and (3) of its Notice of Appeal (CAB 130-132).

Part VI: **Argument**

Summary of CSL's argument

17. The issue raised by this appeal is whether TasPorts' *para 22(e) claim* is subject to limitation under Art 2(1)(a) as an *applied provision* of the 1976 Convention,[3] and despite possibly falling within Art 2(1)(d) which has no force of law in Australia. The resolution of that issue turns on the proper construction of Art 2(1)(a).

18. CSL contends that TasPorts' *para 22(e) claim* is clearly within the express terms and thereby the ambit of Art 2(1)(a) of the 1976 Convention as given force of law in Australia, and is thereby limitable under the LLMCA – as the primary judge found (see [13] above). Moreover, this is so, notwithstanding that that claim may also be of the type described in Art 2(1)(d) (which does not have force of law).

19. The Full Court erred in accepting TasPorts' submissions that its *para 22(e) claim* is not limitable under the applied provisions of the 1976 Convention and thereby the LLMCA, even if that claim is within the express terms of Art 2(1)(a), because (i) that claim is also of a type described in Art 2(1)(d) and (ii) Art 2(1)(d) has not been given force of law in Australia. In particular, the Full Court erred in adopting a construction of Art 2(1) that gives para (d) exclusive operation over claims of the type described therein, regardless of whether that claim is also within another paragraph or head of Art 2(1), such as Art 2(1)(a).

20. The mere fact that a claim may also be of the type described in Art 2(1)(d) does not have the effect of removing it from Art 2(1)(a). Nor should Art 2(1)(a) be read as not including claims of the type described in Art 2(1)(d), where they also fall within the express terms of Art 2(1)(a). The paragraphs in Art 2(1) have overlapping spheres of operation and are not mutually exclusive. This is consistent with the text of Art 2, the objects and purpose of the Convention, the *Travaux Préparatoires* and the approach in *The Flaminia UKSC*.

21. In concluding as it did, the Full Court also failed to recognise (i) the non-

[3] i.e. a provision of the 1976 Convention that has force of law in Australia (s 3(1) LLMCA).

overlapping operation of Art 2(1)(d) and (ii) the thereby limited scope of the reservation of Art 18(1) (*cf* PJ [153]-[154] CAB 47).

22. Contrary to the conclusions of the Full Court (AJ [50]-[51] CAB 89), CSL's construction of Art 2(1) is not incoherent or liable to rejection on the grounds of incoherence. Nor is the Full Court's construction of Art 2(1) mandated by its reliance on comity (*cf* AJ [114], [115] CAB 106).

23. Accordingly, on the proper construction of Art 2(1) of the 1976 Convention, claims within the ordinary meaning of the express terms of Art 2(1)(a) – such as TasPorts' *para 22(e) claim* here – are limitable under the applied provisions of that Convention. Moreover, this is so even if that claim may also fall within Art 2(1)(d) or (e), and despite those provisions not having force of law in Australia.

Principles of interpretation

24. The correct approach to the interpretation of an international instrument such as the 1976 Convention, including by the application of Arts 31 and 32 of the ***Vienna Convention***[4], is well established.[5] Its provisions must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.[6] That purpose includes the protection of a shipowner engaged in maritime trade from financial ruin where its vessel causes damage of the kind described in Art 2,[7] and preventing the frustration of the right of limitation granted to shipowners and enjoyed indirectly by P&I insurers.[8] This is as reflected by the modern view that limitation encourages maritime trade by ensuring that insurance is available at reasonable cost, and that there are insurance monies to back the enforcement of claims.[9]

4 *Vienna Convention on the Law of Treaties 1969* 1155 UNTS 331 (entered into force 27 January 1980) (***Vienna Convention***).

5 *MSC Mediterranean Shipping Co SA v Stolt Tankers BV (**The Flaminia (No 2)**)* [2024] 1 Lloyd's Rep 535 [2023] EWCA Civ 1007 at [59]; ***Qenos** Pty Ltd v Ship 'APL Sydney'* (2009) 187 FCR 282 at [11]; PJ [89], [90] CAB 31; AJ [20] CAB 80-81.

6 *Vienna Convention Art 31*; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 231, 253-56; *Kingdom of Spain v Infrastructure Services Luxembourg SARL* (2023) 275 CLR 292 at [39]; ***Strong Wise** Ltd v Esso Australia Resources Pty Ltd* (2010) 185 FCR 149 at [46], [47]; *Qenos* (op cit) at [12]-[15].

7 *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 185 (about ss 503 and 504 of the *Merchant Shipping Act 1894* (Imp)), endorsed in *Strong Wise* (op cit) at [31].

8 *Strong Wise* (op cit) at [36]; *The Flaminia (No 2)* (op cit) at [62]-[65].

9 *The Flaminia UKSC* at [42]; *The Flaminia (No 2)* (op cit) at [63]; *Strong Wise* (op cit) at [35].

25. Courts have rejected the use of common law concepts to govern the construction or application of the 1976 Convention because of its international character and application to both civil and common law jurisdictions with varying juridical bases on which liability could be established.[10] Whilst the 1976 Convention should be interpreted uniformly by Contracting States, and as a matter of comity, the ultimate question remains what the words of the Convention provide and how that international obligation is carried into effect into Australian municipal law.[11]

26. In construing the 1976 Convention, reference may be made to the *Travaux Préparatoires* to confirm the meaning of the text resulting from the application of Art 31 or to determine that meaning in the circumstances envisaged by Art 32(a) and (b) of the *Vienna Convention.*[12]

The proper construction of Art 2(1)

27. The *applied provisions* of the 1976 Convention include Art 2(1)(a), which confers a right to limit three categories of claims.[13] Of these, the third is relevant here. For this category, Art 2(1)(a) has *three key integers* which must be met if a claim is to be limited. *First*, the claim must be in respect of loss of or damage to property. *Secondly*, that loss or damage must have occurred "*in direct connexion with the operation of*" a ship, being the ship by reference to whose tonnage the limit claimed is calculated (the **limiting ship**). *Thirdly*, the claim for loss and damage includes a claim for "*consequential loss resulting therefrom*". The most obvious reason for including this third category "*is to cater for cases of collision with another ship*". That is because loss of or damage to that other ship is "*loss of or damage to property … occurring … in direct connexion with the operation of the [limiting] ship*".[14] TasPorts' claims against CSL, including its para 22(e) claims, satisfy each

10 *Commonwealth of Australia v Shenzhen Energy Transport Co Ltd* (2015) 234 FCR 113 at [27] citing *Strongwise* (op cit) at [67], [75]; *Qenos* (op cit) at [16].

11 ***Povey*** *v Qantas Airways Ltd* (2005) 223 CLR 189 at [24]; see also PJ [89] CAB 31.

12 *The Flaminia (No 2)* (op cit) [36], [60], [61], [76]; *CMA CGM SA v Classica Shipping Co Ltd (**The "CMA Djakarta"**)* [2004] 1 Lloyd's Rep 460, [10]; This is consistent with the way in which this Court has considered other international Conventions: e.g. *Povey* (op cit) at [60], [136].

13 namely, (i) claims for loss of life or personal injury, (ii) claims in respect of loss of or damage to property on board a ship, and (iii) claims for "*loss of or damage to property … occurring … in direct connexion with the operation of the ship*".

14 ***The "Ocean Victory"*** [2017] 1 WLR 1793 at [80] per Lord Clarke citing with approval the dicta of Longmore LJ in *The "CMA Djakarta"* (op cit) at [23].

of the three integers.[15] Plainly, in that context, the third integer covers (*inter alia*) the raising, removal or rendering harmless of the damaged tugs.

28. In construing Art 2(1)(a), it is also appropriate to recognise (i) the distinction between "*concrete*" and "*abstract*" damage; (ii) that both fall within Art 2(1)(a); and (iii) that "*consequential loss*" means physical as well as abstract loss and damage arising out of loss and damage that in a concrete sense is itself subject to limitation of liability under Art 2(1)(a).[16]

29. It follows that if TasPorts' claim for the loss of or damage to its tugs[17] is limitable under Art 2(1)(a),[18] then so too is its claim for "*consequential loss*" resulting from that limitable damage, including consequential loss in the nature of the costs of the removal and disposal of the sunken tugs,[19] and containment, removal and disposal of hydrocarbons from the tugs (PJ [99] CAB 34).

30. Article 2(1)(d) lacks the same integers. It is not predicated on a claim in respect of loss of or damage to property or in direct connexion with the operation of a ship. It does not expressly extend to consequential loss. Its focus is simply on the state of a ship – being the ship referred to in para (d) and which is or may be the limiting ship (*cf* Art 2(1)(a))[20] – and the nature of the costs sought to be limited.

31. Determining the scope of Art 2(1)(d) is not as straightforward as simply saying that it in some way takes precedence over Art 2(1)(a), so that the meaning of the latter is both governed and restricted by the former (as the Full Court found). For example, claims against the owner of a wrecked ship for the costs of the removal of that ship are not "*consequential loss resulting*" from loss or damage to property limitable under Art 2(1)(a), and are therefore not limitable by the owner of that wrecked ship under Art 2(1)(a). That is because the limiting ship cannot be the property which has been damaged for the purpose of Art 2(1)(a), and as such any consequential loss flowing from that damage is also not limitable under Art

15 See [7] above. Its claim includes a claim for loss of and damage to its tugs and wharf (*first integer*), which occurred in direct connection with the operation of *MV Goliath* (*second integer*).

16 *Qenos* (op cit) at [18]-[20]; *MSC Mediterranean Shipping Co SA v Stolt Tank Containers BV (The Flaminia)* [2022] EWHC 2746 at [76].

17 as well as its claims for damage to its wharf and the loss of hydrocarbons from the tugs.

18 as was common ground by the time of the Appeal before the Full Court (see para [11] above).

19 ***The "Arabert"*** *(No. 2)* [1961] 1 Lloyds Rep 363 at 366, 371; see also PJ [165] CAB 50.

20 for the reasons explained in para [31] below.

2(1)(a).[21] But such a claim would be limitable under Art 2(1)(d) where enacted. It is to *inter alia* such a claim and those circumstances that Art 2(1)(d) is directed, as the primary judge found (PJ [112]-[120] CAB 37-39, [190] CAB 56).[22] Moreover, this is in addition to any claim for wreck removal costs that may be otherwise limitable (including in other circumstances) under other paragraphs of Art 2(1), including as consequential loss under Art 2(1)(a).[23]

32. This is not to say that Art 2(1)(d) can only cover a claim by a public authority in the above circumstances. It is plainly not limited in that way. Nor did the primary judge find that Art 2(1)(d) or its non-overlapping application was so confined (*cf* AJ [78] CAB 96; see [59] below). Rather, it is to point out (by way of example) that a direct claim by an authority for removal of a third party's ship is not limitable by that third party under Art 2(1)(a) because it is not a claim in respect of loss or damage to property, consequential or otherwise, anchored in a property interest relevant to the claim. But such a claim would be limitable under Art 2(1)(d), if enacted. It is the extension of limitation both to such claims and beyond what is otherwise limitable under other heads of Art 2(1) including para (a), that Art 2(1)(d) achieves and was intended to achieve.

33. Further, in reserving to States the right to exclude the application of Art 2(1)(d) when implementing the 1976 Convention, Art 18(1) permits a State to not implement or introduce into domestic law that extension of the right to limit wreck removal claims provided by Art 2(1)(d) over and above any right to limit claims of that nature available under other paragraphs of Art 2(1), such as (a).

34. Properly construed, Art 18(1) does not confer on States an option to remove from limitation all wreck removal claims completely, including any such claims within the natural meaning of the express terms of Art 2(1)(a) and which would be limitable under Art 2(1)(a). Article 18(1) contains no reservation to exclude the operation of Art 2(1)(a), even partially. It allows Art 2(1)(d) to be removed from

21 *The "Ocean Victory"* (op cit) at [80], [81], [86] affirming *The "CMA Djakarta"* (op cit) at [26]. Whilst the consequential losses claimed in *The "Ocean Victory"* included wreck removal expenses of US$34.5m (at [6]), they were held to be not limitable under Art 2(1)(a) because they emanated from loss of or damage to the limiting ship, which is ***not*** property for the purpose of Art 2(1)(a).

22 noting that Art 2(1)(d) also applies to ships that have been sunk, stranded or abandoned.

23 for example a claim by the owner of the wrecked ship against the ship responsible for it being a wreck and which includes a claim for wreck removal costs, as in *The Arabert* (op cit) and as here.

those provisions of the Convention introduced into domestic law, thereby removing from the scope of limitation claims that are **only** limitable under Art 2(1)(d). Art 21(1)(a) of the *Vienna Convention* makes clear that the legal effect of a treaty reservation is to modify for the reserving State the provisions of the treaty to which the reservation relates to the extent of the reservation. A reservation made under Art 18(1) should not be misunderstood as going further. Yet that is what Keane NPJ in *The Star Centurion* and the Full Court (at AJ [62] CAB 92) erroneously did, in concluding (i) that the purpose of Art 18(1) could only be achieved if the reservation to disapply Art 2(1)(d) extended to all wreck removal claims within Art 2(1) including in paragraphs other than para (d) – such as para (a) – and (ii) that this supported a broad construction of Art 2(1)(d) and a construction of Art 2(1)(a) narrower than the plain meaning of its express terms.

35. As the primary judge explained (PJ [141]-[142] CAB 44), the apprehension of incoherence that it was said in *The Star Centurion* would result from CSL's construction of Art 2(1) is unfounded and rests on the misconception identified at PJ [143] CAB 44, namely, that unless what is within Art 2(1)(d) is carved out of Art 2(1)(a) and (c), Art 2(1)(d) would have no work to do. However, disclaiming Art 2(1)(d) still serves a useful purpose. The universe of claims brought in respect of a ship which is sunk, wrecked, stranded or abandoned within Art 2(1)(d)) will not perfectly overlap with and is broader than the circumstances in which claims of that description are covered by Art 2(1)(a).[24] It is to those other wider range of claims that Art 2(1)(d), and the option to exclude it in Art 18, are directed.

36. Consistent with the purpose and objects of the 1976 Convention, there is no conceptual difficulty in differentiating between (i) on the one hand limiting a claim by a shipowner for the costs of removing its sunken ship where those costs are consequential loss resulting from the operation of another ship and the owner of that other ship seeks to limit liability, and (ii) on the other hand where Art 18 has been invoked, not limiting a claim for costs of the same nature, where the claim is not predicated or consequential upon an interest in property damaged by the operation of the limiting ship, or limitation of that claim is sought to be invoked by the owner of the sunken ship.

[24] see for example *The Flaminia (No 2)* (op cit) [88] – [89].

37. It would be a peculiar result if in a collision the innocent owner of a damaged ship could suffer limitation for property damage and consequential loss under Art 2(1)(a) when its ship remains afloat but not for largely the same loss and damage if the ship sinks or is a wreck.[25] Yet that is the effect of the Full Court's decision. This may also result in a perverse outcome if (following a collision) an innocent shipowner could, by letting its damaged ship sink or abandoning its damaged ship, avoid its claim against the wrongdoing ship for the costs of trying to save its ship from sinking or becoming a wreck from being the subject of limitation.

The Travaux Préparatoires[26]

38. The construction of Art 2(1) of the 1976 Convention advanced by CSL and found by the primary judge is supported and confirmed by reference to the *Travaux* of the 1976 Convention and to earlier Conventions and the history of limitation (as the primary judge demonstrated: PJ [157]-[180] CAB 48-54).

39. Reference to the *Travaux* reveals that para (a) of Art 2(1) was the "*hard core*" in the definition of limitable claims: claims arising from loss of life or personal injury or loss of or damage to property. It was made clear that claims for such loss or damage, including consequential loss, shall be subject to limitation provided that the loss or damage in question is caused in a certain connection with the limiting ship.[27] Paras (d) and (e) of Art 2(1) "*are not on the same level*", and were included insofar as they were necessary to define limitable claims which are *not covered by* paras (a) and (b).[28] This would include those common cases where limitation is not available under Art 2(1)(a) because the damaged "*property*" is the limiting ship itself.[29] The drafters of the Convention expressly recognised the possible overlap between the paragraphs of Art 2(1) and noted that the inclusion of limitation for claims such as wreck removal and the rendering harmless of the cargo under paras

25 as the primary judge acknowledged (PJ [155] CAB 47-48; see also **Norman Martinez-Guiterrez**, *Limitation of Liability in International Maritime Conventions* (2011) at pp 99-102.

26 The preparatory work to the 1976 Convention relevantly includes: (i) material published in the Documentation of the Comité Maritime International (**CMI Doc**) 1974-I, II and III; (ii) the Reports of the IMCO Legal Committee on the work of its 23rd (**LEG XXIII/4**), 25th (**LEG XXV/4**), and 28th (**LEG XXVIII/7**) sessions; and (iii) the *Official Records of the International Conference on the Limitation of Liability for Maritime Claims, 1976* (International Maritime Organization, 1983) (**IMO Records**).

27 CMI Doc 1974-I, 20, 22; CMI Doc 1974-III, 400; LEG XXV/4, 4.

28 CMI Doc 1974-I, 20, 22; CMI Doc 1974-III, 402, 404.

29 see para [31] above.

(d) and (e), could be "*misleading insofar as they provide for limitation of liability for claims* ***which are limitable*** *under (a) or (b)….*"[30] Consistent with CSL's construction, it is apparent from the *Travaux* that Art 18 (and right of reservation re Arts 2(1)(d) and (e)) was included due to concerns that allowing limitation for such claims may discourage a shipowner from removing its wrecked ship, thereby shifting that burden to port authorities or the State.[31]

40. This construction is also consistent with the "*guiding principle*" for the drafting of the Convention being the "*commercial insurability*" of claims.[32] In contrast, where an Art 18 reservation has been made, the Full Court's construction of Art 2(1) introduces an inherent uncertainty in both the potential exposure of a shipowner's insurer and the level of insurance which that shipowner needs to obtain for third party claims arising from the operation of the insured ship which results in the wreck of another ship, contrary to the above "*guiding principle*".

The approach in The Flaminia UKSC

41. *The Flaminia UKSC* concerned claims by the owner of *The Flaminia* against its charterer. The vessel had been damaged by explosion of the carried cargo and resulting fire while on charter. It was common ground that the charterer had no right to limit its liability in respect of claims by the shipowner for loss of or damage to the chartered vessel under Art 2(1)(a) (see [31] above). The central issue was the characterisation of claims. The particular arguments concerned how to differentiate between claims between owners and charterers given the accepted principle that limitation was not available for loss and damage to the limiting vessel under Art 2(1)(a) (see at [89]).

42. The UKSC rejected an approach which involved reading in words of qualification in order to give a gloss to 'claims' (at [92] and [116]). The correct approach was recognised as applying the ordinary meaning of the claims described in Art 2(1) and holding to that meaning in all contexts. That is fundamentally a matter of claim characterisation. Dual characterisation of claims was not precluded (at [156]).

30 CMI Doc 1974-I, 20, 22.

31 LEG XXVIII/7, 4-5, 14; LEG XXV/4, 5-6; IMO Records, 215-216, 203-204, 230-236, 377-380, 383-384, 487-489. See also PJ [182] CAB 55 and fn 39 below.

32 CMI Doc 1974-III, 412, 414, 418. See also CMI Doc 1974-I, 26; LEG XXIII/4, 2-3, 9-10; LEG XXV/4, 9-13; IMO Records, 209-214 and the cases at fn 9 above.

43. The UKSC confirmed that the owners' claims for discharging sound and damaged cargo and for decontamination of cargo were limitable under Art 2(1)(e), notwithstanding that the same claims were non-limitable claims in respect of damage to the ship under Art 2(1)(a) (see [151]-[152]). The nature of the claim and whether it fell under the plain language of a head of limitation was the extent of the inquiry.

44. The UKSC (with respect correctly) adopted an approach to the proper construction of Art 2 which is significant for this appeal in *three respects*. *First,* the UKSC recognised that the heads of limitation within Art 2(1) overlap. Article 2(1) does not preclude dual characterisation of claims (at [156]). The focus is on the nature of the claim made and whether it is within a category of limitation within Art 2(1) (at [155]). There are no additional requirements, such as to read down one head of Art 2(1) in light of another. The UKSC recognised, for example, that cargo removal costs under Art 2(1)(e) will often overlap with mitigation costs under Art 2(1)(f). It also recognised the fact that the claim arises as a consequence of damage to the limiting ship should not preclude its characterisation as a claim falling within a sub-paragraph other than Art 2(1)(a) (at [156]).

45. *Secondly,* the UKSC said that Art 2(1) does not involve unstated exceptions (at [159]-[160]). The heads of limitation in Art 2(1) do not create exceptions between each other, in some way additive to the express exceptions in Art 3 (at [160]). There is no mutual exclusivity within the categories in Art 2(1). To hold otherwise undermines the purpose of the Convention (at [161]).

46. *Thirdly,* the way in which a claim is characterised for the purposes of Art 2(1) is not affected by the making of a reservation under Art 18(1) (at [158]). It follows that if, as the UKSC found, a claim may fall within both Art 2(1)(e) and Art 2(1)(f), such a claim will be limitable under Art 2(1)(f) notwithstanding that Art 2(1)(e) may not have force of law (where a reservation under Art 18(1) has been exercised in respect of Art 2(1)(e)). Similarly, the fact that Art 2(1)(d) does not have force of law where the Art 18(1) reservation has been exercised does not detract from the conclusion that, in terms, Art 2(1) contemplates limitable claims which result from damage to the limiting ship notwithstanding those claims are not within Art 2(1)(a) (at [158]). That is, the meaning of an operative head in Art 2(1) does not change

because another head has not been enacted. Relatedly, Art 2(1)(a) and (d) may cover the same claims but para (d) covers wreck removal claims in respect of a wrecked limiting ship, whereas para (a) does not. The removal of such claims from limitation by the non-enactment of Art 2(1)(d) does not result in the removal from Art 2(1)(a) of claims in relation to damage caused to a ship other than the limiting ship and which are otherwise within the express terms of para (a).

The Full Court's error

47. Having identified the issue raised by the appeal below in terms of the scope of Art 2(1)(d) and whether the reservation under Art 18(1) means TasPorts' claims for wreck removal costs were not subject to limitation by CSL, the Full Court proceeded to answer that question by reference to what it described as *four textual features* of Art 2(1)(d). But in adopting this approach, the Full Court erroneously paid no or insufficient attention to the express terms of Art 2(1)(a), the head of limitation invoked by CSL under the applied provisions of the 1976 Convention.

48. In doing so, the Full Court also adopted an approach that is irreconcilable with that taken in *The Flaminia UKSC*. Other than expressing agreement with the UKSC that Art 2(1) does not preclude dual characterisation of claims (AJ [42] CAB 87) but then finding otherwise in relation to Art 2(1)(a) and (d), the Full Court did not consider any of the three points raised by the UKSC (and referred to in [44] to [46] above) and which were the subject of CSL's supplementary submissions (AJ [23] CAB 82), stating that it did not find the decision of the UKSC "*to be of material assistance*" (AJ [25] CAB 83 and [42] CAB 87).

49. Instead, the Full Court followed and extended the reasoning of Keane NPJ in *The Star Centurion.* It approached the task of construing Art 2(1) to give Art 2(1)(d) an exclusive meaning covering (relevantly) all claims for wreck removal costs. This was on the basis that Art 2(1)(d) explicitly refers to wreck removal but Art 2(1)(a) does not, that a reservation in respect of Art 2(1)(d) could not be partial, and giving less than full scope to Art 2(1)(d) would result in incoherence. As already explained, that is not so. The Full Court did not consider whether TasPorts' claims were claims for damage to property caused in direct connection with the operation of the *MV Goliath*, or consequential loss resulting therefrom, and thus within the ordinary meaning of the words of Art 2(1)(a).

50. Whilst *The Flaminia UKSC* did not concern the reservation via Art 18(1) or Art 2(1)(d) directly, it did concern issues of proper construction of the same limitation regime and whether the coverage of one head had any bearing on the coverage of another. In the latter regard, the UKSC recognised the different operation of paras (a) and (d) as indicative of different **and** overlapping operation (at [156]-[159]). That recognition specifically and the UKSC's approach to construction more broadly is irreconcilable with the approach and reasoning of both the Full Court and in *The Star Centurion*. There is no suggestion in the reasoning of the UKSC that a reservation in relation to one head of limitation within Art 2(1) affects the limitation available on the face of another head.

51. In this way, the Full Court's consideration and construction of Art 2(1)(d) is inconsistent with the consideration and construction of Art 2(1)(e) in *The Flaminia UKSC*. In respect of the former, the Full Court said that Arts 2(1)(a) and (d) are mutually exclusive (AJ [101] CAB 102) and that claims of the type described in para (d) which also fall within the express terms of para (a) are not within Art 2(1)(a) properly construed and are therefore not limitable by reason of the non-enactment of Art 2(1)(d). That reasoning would also apply in Australia to claims within Art 2(1)(a) of the type described in Art 2(1)(e)[33] which also does not have force of law in Australia by reason of s 6 of the LLMCA. However, in *The Flaminia UKSC*, the Court held that Arts 2(1)(a) and (e) are not mutually exclusive and share an overlapping sphere of operation. It is not consistent with the text or object of the 1976 Convention to construe Arts 2(1)(d) and (e) in this contradictory manner[34] where related claims are involved and where both paras (d) and (e) are subject to the same reservation in Art 18(1) of the Convention.

52. Whilst recognising CSL's construction of Art 2(1) concerned claims which may arise in different ways in the same scenario, the Full Court erroneously rejected that construction on the basis that the chapeau to Art 2(1) states '*whatever the basis of liability may be*' (AJ [37] CAB 85). But that rejection misunderstood the point. CSL's submission was in line with the analysis in *The Flaminia UKSC* and *The Ocean Victory* (which included a wreck removal claim at [6]). The words

[33] e.g. cost of removing damaged cargo as a consequential loss to damage to that cargo or the ship.

[34] as the Full Court noted at AJ [36] CAB 85, the proper construction of Art 2(1) must be the same in each Contracting State and regardless of whether a State has exercised its right of reservation.

"*whatever the basis of liability may be*" recognise that the liability may arise on any basis, whether in tort, contract or statute.[35] Article 2(1) directs attention to the nature of the claim made against the shipowner seeking to limit its liability, and whether it is a claim within the ordinary meaning of the words of that Article.[36]

53. In effect, the Full Court confused the effect of the chapeau as concerning a *factual question* as distinct from eschewing domestic legal concepts, consistent with limitation as an international Convention. As *The Flaminia UKSC* makes clear (at [138]-[139], [154]), Art 2(1) is concerned with the '*nature and characterisation*' of a claim and whether that claim meets the plain meaning of any operative paragraph within Art 2(1). The nature of the claim (in a factual sense) is therefore significant insofar as it correlates with the elements expressly identified in Art 2(1). For example, a claim in respect of damage to a ship is limitable under Art 2(1)(a) but not where the damaged ship is the limiting ship.[37] That answer is supplied by the facts, not domestic law. The nature and characterisation of the claim in that sense must be assessed beyond both the mere description of the claim and the underlying factual basis, that is, the underlying cause or causes of the claim.[38] Otherwise the exercise becomes a kind of *specialis* test involving comparison between the paragraphs of Art 2(1), an approach rejected by the UKSC in *The Flaminia UKSC* at [156].

54. The Full Court's error was to read down the scope of Art 2(1)(a) (and by inference other heads of Art 2(1)) either to give Art 2(1)(d) an exclusive meaning and coverage for *all* wreck removal expense claims (AJ [46] CAB 88) or in reliance upon its erroneous finding that Art 2(1)(d) was to be read in that way. Either way, this amounts to informing the proper construction of Art 2(1)(a) by the possibility of reservation of Art 2(1)(d) under Art 18(1) (AJ [62] CAB 92), contrary to the plain text of Art 2 and principle recognised in *The Flaminia UKSC* at [130] that the Convention should be applied according to its terms i.e. the ordinary meaning of the words used. Having identified and accepted that principle (AJ [24]-[25] CAB 82-83), the Full Court did not apply it. Its reasons do not address whether the *para*

35 ***The Breydon Merchant*** [1992] 1 Lloyd's Rep 373, 375; *The Cape Bari* [2016] UKPC 20 at [13].
36 *The CMA Djakarta (op cit)* [34]; *The Breydon Merchant (op cit)* 375; *The Flaminia UKSC*, [138].
37 see para [31] above.
38 *The Flaminia UKSC* (op cit) at [138].

22(e) claim falls within Art 2(1)(a) according to its terms.

55. The Full Court fixed on the phrase "*in respect of*" in Art 2(1)(d) to extend its coverage to consequential loss in the nature of a recourse claim and to thereby conclude that all wreck removal expenses are covered by Art 2(1)(d) (AJ [57]-[58] CAB 91). This was in line with dicta in *The Star Centurion.* It added a gloss that if a claim under Art 2(1)(d) was also under Art 2(1)(a) or (c) then that would be to allow an excluded claim in by the back door (AJ [87] CAB 98). But that gloss is just a variant of the approach rejected in *The Flaminia UKSC* at [156].

56. Having found that the exercise of the Art 18(1) reservation in respect of Art 2(1)(d) and (e) does not change the construction of Art 2(1) as a whole (AJ [36] CAB 85), the Full Court erred by going on to find a construction of Art 2(1) which required reading down the ordinary language of para (a) in reliance upon the claimed "*evident purpose*" of Art 18(1) (AJ [62] CAB 92), notwithstanding that no reservation to Art 2(1)(a) is permitted under Art 18(1) or otherwise.

57. Contrary to the conclusions of the Full Court, there is no consequential difficulty in the approach or construction advanced by CSL and found by the primary judge. It does not lead to redundancy; Art 2(1)(d) and excluded claims will still arise, for example where the wreck is itself the limiting ship. Contrary to AJ [50] and [51] (CAB 89), the outcome is not uncertainty; it is merely a differential allocation of risk. That is unarguably a feature of Art 2(1) regardless of the construction of Art 2(1)(d). This is because (for example) Art 2(1)(a) does not include property or consequential loss claims in respect of the limiting ship itself (*cf* Art 2(1)(d)). The allocation of risk is clear. Nothing the Full Court identified speaks to difficulty or uncertainty. Moreover, the Full Court's approach tends to enhance uncertainty because (to borrow from *The Flaminia UKSC* at [162]) it introduces a twilight zone in which the right to limit depends on whether the ship is going to sink. On the Full Court's approach, following a collision, an expense incurred before sinking would be limitable under Art 2(1)(a), but afterwards not.

58. The Full Court drew support for its construction of Art 2 from a reading of the *Travaux* to the effect that it was not contemplated that *any* claims for wreck or cargo removal would fall within para (a), hence the need to add paras (d) and (e) to Art 2(1) to make claims for wreck removal and removal of cargo subject to

limitation (AJ [101], [103] CAB 102-103). But that involves a mis-reading of the *Travaux* (see [39] above). It also requires acceptance of the broad proposition that if Art 2(1)(d) had never been added to the Convention, then claims for wreck removal costs would not have been limitable under the Convention including in the present circumstances under Art 2(1)(a). That proposition cannot be sustained having regard to the terms of Art 2(1)(a), and is inconsistent with *The Flaminia UKSC*. The reason for and effect of the introduction of Art 2(1)(d) as an extension of the right to limit, rather than providing exclusive coverage for any and all wreck removal claims (as the Full Court found) has been explained ([31], [35] and [39] above). The Full Court's conclusion that the reservation in Art 18 was intended to be in respect of all claims of the type described in para (d) is also inconsistent with the concern that prompted that reservation, as recorded in the *Travaux*.[39]

59. In dismissing the judgment below, the Full Court also erroneously attributed to the primary judge a holding that Art 2(1)(d) and the non-overlapping sphere of its operation was only concerned with strict liability statutory claims of a public authority against the owner of a wreck (AJ [78] CAB 96). But Art 2(1)(d) is not limited only to such claims, although that may be how claims under Art 2(1)(d) commonly arise as a public authority is most likely to incur the cost of wreck removal costs where the owner of the wreck fails to fund same: *The Flaminia UKSC*, [153]. A claim by the private owner of a wharf or terminal facility against the owner of a sunken vessel would also come within Art 2(1)(d), as would a claim by the owner of a repair yard against the owner of a vessel abandoned at that yard. The primary judge should not be understood as suggesting the contrary. The non-overlapping sphere of claims identified by the primary judge was to answer TasPorts' redundancy argument (AJ [31] CAB 84), and not to restrict the application of Art 2(1)(d) only to harbour authority claims.

60. Additionally, the Full Court's reasoning at AJ [50(b)] (CAB 89) suggests that on CSL's construction of Art 2(1), there would be some difference in the treatment of a claim brought by an innocent owner of a wrecked ship, compared to an identical claim by a harbour authority. That is not CSL's position. Nor is it a necessary consequence of its construction of Art 2(1). CSL does not suggest that there would

[39] LEG XXV/4, 5-6 ("*existence of a limitation might, regrettably, be conducive to the neglect of wreck removal by shipowners*"); see also [39] above.

be any different treatment of an identical claim. In a claim by either the innocent shipowner or by a harbour authority against the wrongdoing ship in respect of loss or damage to the innocent ship, the claim described by the Full Court would be limitable under Art 2(1)(a) if the claim were for loss or damage occurring in direction connection with the operation of the wrongdoing ship. If that requirement were not satisfied, then limitation would depend on whether Art 2(1)(d) was in force. Different considerations would apply in respect of a claim by a harbour authority against the innocent ship or wreck but that is self-evident.

Academic writings

61. As the Full Court acknowledged (AJ [55] CAB 91), there is academic commentary supporting the view that a wrongdoing ship can limit claims pursuant to Art 2(1)(a) even if they include a wreck removal component.[40] The Full Court's dismissal of that commentary (AJ [56] CAB 91) should be rejected, based as it is on the Full Court's erroneous construction of Art 2(1)(d) and thereby Art 2(1)(a) and erroneous finding that claims of the type described in Art 2(1)(d) and (e) are removed entirely from the scope of Art 2(1) and thereby the applied provisions of the 1976 Convention by the exercise of the reservation in Art 18(1).

Comity and the decisions of other jurisdictions

62. The Full Court found the decisions in *The Star Centurion* and *The Wisdom*[41] to be persuasive and that in interpreting an article of an international Convention, "*it would be contrary to the principles of comity to adopt an alternative construction unless convinced that those decisions were plainly wrong in the context of the enactment of the 1976 Convention by the Parliament of Australia*" (AJ [115] CAB 106). But its reliance upon those decisions was misplaced; and its reliance upon comity alone cannot resolve the issue in this appeal. Nor does comity, and the Full Court's reliance upon it, require following these decisions.

63. The decision in the *Star Centurion* was based on the same mutual exclusivity and erroneous construction of Art 2(1) that underlies the reasoning of the Full Court.

40 *Marsden & Gault on Collisions at Sea* (14th ed) (2016) at 710; *The Law of Wreck* (Informa Law, 2019) at 104-05; *Martinez-Gutierrez* (op cit) at pp 99-102.

41 *MS Amasus BV v ELG Haniel Trading GmbH* ECLI:NL:HR:2018:140, Supreme Court of the Netherlands, 16/04439 (***the Wisdom***), as well as the judgment of the same Court to the same effect in *The Sichem Anne and The Margreta* (AJ [69] CAB 94).

As such, it is also inconsistent with *The Flaminia UKSC*. It also relied upon the fundamental misconception identified by the primary judge (PJ [143] CAB 44) who rightly found that case to have been incorrectly decided (PJ [145] CAB 45).

64. In *The Wisdom*, the Dutch Court found that there was an overlap between Arts 2(1)(a) and (d) and that they were not mutually exclusive, consistent with both CSL's contentions and *The Flaminia UKSC*. However, the Court also went on to hold that if a reservation is made under Art 18(1) ***and*** the State applies a different (limitation) regime to the reserved claims, then that different regime takes precedence as a *lex specialis*. That characterisation of the domestic Dutch regime does not assist the issue at hand which turns on the proper construction of provisions of the 1976 Convention. The primary judge found this decision to be of no particular assistance for that reason (PJ [147]-[148] CAB 45-46). It is not the same as saying that Art 2(1)(d) takes precedence over Art 2(1)(a). It is also tantamount to creating exceptions between categories of limitation, contrary to approach in *The Flaminia UKSC*. The Full Court erred (AJ [68] CAB 94) in relying upon this distinction in the Dutch domestic regime in construing the 1976 Convention and as support for its construction of Art 2(1). It also erred in dismissing the primary judge's treatment of that case.

65. The construction of Art 2 contended by CSL (and found by the primary judge) is consistent with the decision and reasoning of the Norwegian Hordaland District Court in ***Twitt Navigation*** *Ltd v The State (by the Defence Department)* Case No. 21-058354TVI-THOD/TBER, which considered and rejected the possibility that the specificity of Art 2(1)(d) meant that all claims falling within it were removed from Art 2(1)(a). Neither the text nor context required that conclusion. Significantly, the Court did not see any incoherence in that distinction. It also expressed disagreement with *the Wisdom*. Accordingly, the Court found that Norway's reservation in relation to para (d) of the Convention did not have the effect of excluding the State's claim for limitation under para (a). The Full Court's rejection of this decision and its conclusion that it was of little assistance (AJ [75]-[77] CAB 96) should be rejected. As should the criticism of this judgment in the *Star Centurion,* for the reasons found by the primary judge (PJ [151] CAB 46).

66. Whilst the Full Court's decision is consistent with that of a majority of the Full

Court of the Queensland Supreme Court in *Barameda Enterprises Pty Ltd v O'Connor (**The Tiruna**)* [1988] 1 Qd R 359, that case addressed the earlier 1957 Convention which included different wording in material respects and was therefore found by the Full Court to be of "*limited assistance*" (AJ [53]-[54] CAB 90). In any event, the majority reasoning was *obiter* and each of the majority judges adopted a different and inconsistent reasoning. However, CSL's construction of Art 2(1) is supported by the judgment of the dissenting judge (Macrossan J), whose reasoning the primary judge found to be "*compelling*" (PJ [133] CAB 42). The criticism of that judgment in *the Star Centurion* (at [48]-50]) which the Full Court embraced (AJ [54] CAB 90) should be rejected, including for the reasons stated by the primary judge (PJ [133] CAB 42).

Conclusion

67. The determination of the issue in this appeal turns on the ultimate question noted in the final sentence of para [25] above; what does the 1976 Convention provide and how is that obligation carried into Australian municipal law? In this regard, CSL submits that *The Flaminia UKSC*, which emphasised the primacy of the plain language of the Convention, should be followed and applied, to that part of the *applied provisions* of the 1976 Convention on which CSL relies and within whose terms TasPorts' *para 22(e) claim* plainly falls, namely Art 2(1)(a), and so as to entitle CSL to limit its liability (if any) for that *claim* under Art 2(1)(a) and pursuant to its existing Limitation Decree, as the primary judge rightly found.

Part VII: Form of order

68. The orders sought are as set out in the Notice of Appeal.

Part VIII: Time required for presentation of oral argument

69. The Appellant estimates that it requires 4 hours to present its oral argument in chief and 1 hour in reply.

Dated: 23 October 2025

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10 **ANNEXURE TO APPELLANT'S SUBMISSIONS**

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1	*Limitation of Liability for Maritime Claims Act 1989* (Cth)	Compilation No. 4 (8 June 2015)	s 3, s 6 Sch 1, 2, 3	Act in force at the time of the allision	28 January 2022, current
2	*Convention on Limitation of Liability for Maritime Claims*, opened for signature 19 November 1976, 1456 UNTS 221 (entered into force 1 December 1986)	As amended by both the as amended by the *Protocol of 1996*, opened for signature 2 May 1996, and further amended by *Resolution LEG.5(99)* of the Legal Committee of the International Maritime Organization, 19 April 2012.	Arts 1, 2, 3, 11, 18	Convention in force at the time of the allision	28 January 2022, current