HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S137/2025
File Title:	CSL Australia Pty Ltd ACN 080 378 614 v. Tasmanian Ports C
Registry:	Sydney
Document filed:	Form 27F - R1 Outline of oral argument
Filing party:	Respondents
Date filed:	05 Feb 2026

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

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

OUTLINE OF ORAL SUBMISSIONS

Part I: Internet Publication

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

Part II: Propositions to be advanced in oral argument

A. Introduction

1. The appeal raises an issue of construction of the *Limitation of Liability for Maritime Claims Act 1989* (Cth) (the **Act**). The Act brings into domestic law the provisions of the 1976 Convention, as amended by the 1996 Protocol (together, the **Convention**).

2. The Convention establishes a right for shipowners to limit their liability *'in accordance with the rules of the Convention'* for the six categories of claims set out in Art 2. Art 3 states that the rules of the Convention *'shall not apply'* to 5 categories of claims.

3. One of the *'rules of the Convention'* which governs the right of limitation is Art 18, which, in its form after the Protocol (JBA 1/39), expressly authorises a State at any time to reserve the right: (a) *'to exclude the application of Art 2, paragraphs 1(d) and (e)'*; or (b) to exclude claims for damage within the meaning of a separate convention. Partial reservation is not allowed (cf Art 15). Australia exercised the reservation in respect of both limbs of Art 18(1) and exercised the Art 18(1)(a) right.

B. The position under international law

4. *Re Flaminia* and *Star Centurion* apply similar VCLT approaches to overlapping, but ultimately different, questions. *Re Flaminia* [41]-[43], [100]-[106], [130]-[132], [153]-[156], [158] counsels that the 6 paragraphs of Art 2(1), on their own and *inter se*, should be given neither a narrow nor wide construction, allowing for the possibility of dual characterisation and avoiding glosses: RS [70]-[73].

5. *Star Centurion* [18], [25]-[27], [28]-[30], [35]-[40] applies this approach to paragraph (d), holding that it creates a category of limitation for all wreck removal claims within its terms, unqualified by identity of claimant or whether the wreck is the limiting ship. A paradigm case for wreck removal is the present one, where a wrongdoing ship seeks to limit liability for the expenses of removing the innocent wreck: RS [57]-[60].

6. The Full Court exposed the error in the primary judge (and Appellant's) approach to paragraph (d); reading it down to be a mere *'extension'* of paragraph (a), to catch a sub-set of wreck removal claims not caught by paragraph (a) (in particular claims by harbour authorities in respect to wreck removal): cf PJ [144], [172], [190] and FFC [85]-[89], [100]-[103], [112]; RS [24]-[27]. *Re Flaminia* [153], in the parallel context of paragraph (e), rejects this type of gloss. *Star Centurion* [38] rejects support for it from the *travaux.*

7. The result for non-reserving States is that they must afford limitation to any claims falling within any of the 6 paragraphs of Art 2(1), including all claims of wreck removal attracting paragraph (d); unless the claim also falls within any of the 5 categories of Art 3, in which case the rules of the Convention *'shall not apply'*.

8. The present claims fall within Art 2(1)(d): FFC [57], [117]-[120]; AS [3], RS [2].

9. Next, *Star Centurion* at [31]-[34] correctly holds that an Art 18 reservation in respect to Art 2(1)(d) is no less comprehensive than Art 2(1)(d) itself. The reservation modifies the obligations of the reserving State to all other State parties under the Convention (VCLT Art 21(1)). The rules of the Convention which the reserving State is required to *'apply'* no longer include affording limitation to claims described in Art 2(1)(d).

10. The result is not mere *'silence'* on the topic of the reserving State's obligations in respect to claims described in Art 2(1)(d). Rather, Art 18 evinces an express exclusionary statement that the reserving State owes no obligation to afford limitation to such claims. The Art 18 reservation operates in favour of the reserving State to add the excluded claim to the 5 categories of claim which Art 3 has already excluded for all States.

11. Once the full force of Art 18(1)(a) is understood, the only *'coherent'* construction of the Convention as a whole is that a reserved claim is taken out of limitation for all purposes, even if its facts might also be described by a non-reserved paragraph.

12. The same approach applies to a reservation under Art 18(1)(b).

C. The position under the Act

13. Under s 6 of the Act, Australia has exercised the liberty granted to it by its Art 18(1)(a) reservation not to bring into domestic law the rules of the Convention for limitation of claims described in Art 2(1)(d) or (e). The effect of not bringing this part of the rules of the Convention into domestic law is that these claims join the 5 categories of claims already specified in Art 3 as not receiving limitation: *The Tiruna* at 687-688 per McPherson J; *Star Centurion* at [44]-[50]; Supplementary Hansard materials.

14. Were Australia to amend s 6 to exercise the Art 18(1)(b) right, the result would be the same. Even though such claims would commonly fall within one of the non-reserved paragraphs of Art 2, they would be taken out of limitation for all purposes.

D. Additional support from the *travaux*

15. The *travaux* discloses that: **(1)** the text of the wreck removal provision was settled early on and not thereafter the subject of discussion or consensus that it would have any meaning other than that which its words bear; let alone the Appellant's narrowed meaning that it was to catch only claims falling outside paragraphs (a) or (c), particularly harbour claims; **(2)** conversely, there was detailed debate whether wreck removal

claims, so described, should receive treatment in Art 3, Art 18, Art 6(3), or in Art 2(1) unqualified; **(3)** the agreed compromise was they would be included in limitable claims in Art 2(1) but subject to the right of reservation in Art 18; **(4)** there was no discussion or consensus that an Art 18 reservation would have only the limited effect contended for by the Appellant: RS [44]-[56]; cf AS [38]-[40]; AR [14]-[15].

E. Object and Purpose

16. To the extent that the interests of harbour authorities provide one explanation for the Art 18 ability to reserve against Art 2(1)(d), allowing the Art 18 reservation to take all claims within the ordinary meaning of paragraph (d) out of the Convention's scheme of limitation advances that purpose: *Star Centurion* at [40].

17. The primary judge effectively reasoned that Art 2(1) should be given as wide an application as possible, in support of a supposed principal purpose of the Convention being '*to expand upon and protect the right to limitation':* PJ [93], [145], [153], [190]. That same argument was run, and correctly rejected, in *Re Flaminia* at [130]-[132].

F. Other errors of the primary judge/appellant

18. The primary judge: **(1)** wrongly attributed to Keane NPJ a *'fundamental misconception'* that his construction was necessary to avoid redundancy: PJ [142]-[143], [154]; cf FFC [62]-[63]; **(2)** wrongly distinguished *The Wisdom* (and thereby wrongly diminished the demands of comity) on the basis that it was driven by special provisions of Dutch domestic law: PJ [146]-[148]; cf FFC [68]; **(3)** misread the *travaux* by confusing a report put before the Diplomatic Conference with the debates of the State representatives: PJ [181]; RS [79].

19. The appellant' construction: **(1)** inverts the construction exercise; **(2)** never fully explains how its limiting force can be gleaned from the ordinary meaning of either Art 2(1)(d) or Art 18; **(3)** produces uncertainty for a State contemplating reservation and for parties/courts afterwards (FFC [50]); **(4)** places Australia out of step with international jurisprudence without strong justification; **(5)** elevates *'commercial insurability'* beyond any role it can properly play in the construction exercise: RS [28]-[42].

G. Resolution of the appeal

20. The Full Court's disposition at FFC [123] was correct. The appeal should be dismissed with costs.

Justin Gleeson

Dated: 5 February 2026 **Justin Gleeson SC**