HIGH COURT OF AUSTRALIA

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Details of Filing

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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

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Propositions to be advanced in oral argument

First proposition: on its plain words and proper construction, TasPorts' para 22(e) claim is within of Art 2(1)(a) of the 1976 Convention and thereby subject to limitation

2. The core principles applicable to the proper construction of the 1976 Convention are not in dispute and were summarised by the primary judge (**PJ [90]**) and the Full Court (**AJ [20])** in the same terms. They include that the Convention 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. That purpose includes encouraging international trade by sea carriage by protection of shipowners engaged in maritime trade from financial ruin and by ensuring that insurance is available at reasonable cost.

3. The principles to be applied in construing Article 2(1) are those identified in *The Flaminia*, consistent with the above core principles and as a matter of comity.

4. Considering whether a claim falls within Art 2(1)(a) should start with the express terms of that para, construed in accordance with their ordinary meaning. Attention should be given to whether the claim falls within those terms regardless of whether there is overlap with other paras (*The Flaminia* **[130], [155], [156], [161] JBA 208, 212-213, AS [44]-[46]**). It should also be without any unstated *gloss*, especially (a) by reference to other paras of Art 2(1) and whether or not they apply, and (b) in the nature of an exception. Unstated exceptions to the right to limit undermine the purpose of the Convention. Neither the right of reservation under Art 18(1) nor its exercise affects the proper construction of Art 2(1)(a) (cf [**158], JBA 213**).

5. The most obvious reason for the third category of claims in Art 2(1)(a) is collision cases (**AS [27],** *The CMA Djakarta* at [23] as approved in *The Ocean Victory* **JBA 128**). Amongst the claims limitable in those circumstances are claims for wreck removal costs against a shipowner whose ship has caused another ship to become a wreck (*The Arabert*) (**JBA 339, 347 col 2, cf PJ [113])**, as is clear from the terms of para (a).

6. TasPorts' para 22(e) claims meet the three integers (**AS [27]**) for such a claim under Art 2(1)(a) (**AS [13], [29]**) as the Primary Judge found (**PJ [99], [153], [191] CAB 34, 47, 57**, noted and not disturbed at **AJ [41] CAB 87**)**.** That being so, CSL was entitled to limit any liability it may be found to have for TasPorts' para 22(e), as well as its other claims.

Second proposition: the Full Court adopted a construction of Art 2(1)(a) that erroneously departed from its plain words and introduced an impermissible gloss by reference to the claimed scope and operation of Art 2(1)(d) and Art 18 contrary to the Flaminia UK

7. The Full Court found that TasPorts' para 22(e) claims were within Art 2(1)(d) and concluded that because that was not an applied provision, the claim was not limitable.

8. In so concluding, the Court erred by adopting a wrong starting point, namely Art 2(1)(d) and a consideration of its scope and operation, and in failing to pay attention to the terms of Art 2(1)(a), on which the CSL relied and the Primary Judge had found limitation.

9. Further, the Full Court erred in reading down Art 2(1)(a) to give Art 2(1)(d) an exclusive meaning covering (relevantly) all claims for wreck removal costs (**AJ [103] CAB 103**) (i) by reference to its conclusions as to the scope and operation of para (d), the need to allow for Art 18 (which does not permit of any reservation of para (a)) and an erroneous conclusion as to the effect of the Art 18 reservation; and (ii) despite the express terms of para (a) including claims for consequential loss which can include wreck removal costs, and the resultant overlap of paras (a) and (d). This was inconsistent with *The Flaminia*.

10. Despite conceding "linguistic" overlap between paras (a) and (d), TasPorts says the Full Court did not (i) reason they were mutually exclusive or (ii) read down para (a) because it was concerned about incoherence premised on overlap (**RS [75]-[76]**). However, the Full Court did exactly that in three ways, erroneously following the reasoning Keane NPJ in *The Star Centurion* **(JBA 215)**.

11. First, the Full Court gave Art 2(1)(d) precedence as a *lex specialis* **(AJ [47], [58]-[59] CAB 88, 91).** Regardless of the plain meaning of para (a), para (d) was treated as (relevantly) covering the field for all wreck removal expenses. There is no basis for this in the text of the Convention. On this approach, it matters not what para (a) says at all.

12. Secondly, the Full Court treated Art 18 as allowing the complete exclusion from limitation under Article 2(1) of all claims under para (d) **(AJ [59]-[62] CAB 92).** Despite para (d) having its own unique non-overlapping sphere of operation and its reservation therefore serving a purpose (cf **AS [35]-[36], [57**]), the Full Court held that Art 18 controls the meaning of other paras in Art 2(1), including para (a), to which Art 18 has no application. There is no basis for this in the text of the Convention. In any event, in applying Art 18, the Full Court misconstrued its operation and effect.

13. Thirdly, the Full Court concluded that otherwise incoherence results because there would

be a partial reservation **(AJ [60] CAB 92).** As TasPorts puts it, it would be incoherent to permit limitation under the express terms of paras (a) or (c) where the State has decided that a claim that also fits under para (d) should be excluded **(RS [25]**). To permit limitation in that situation is not incoherent. In any event, that is not what Art 18 does in terms. It gives States the right to exclude the application of paras (d) and (e); not the right to exclude claims of that description from Art 2(1) and thereby limitation completely.

Third proposition: the travaux, authorities and commentary do not justify the Full Court's error

14. The Full Court misconstrued the travaux (**AJ [101], [103] CAB 102-103, JBA 449 cf AS [38]-[40], [58]**, **AR [14])** in holding (inconsistent with the express terms of para (a)) that para (d) reflected an intention to extend limitation to all wreck claims, as distinct from wreck claims not already within the "literal scope" of para (a).

15. The *Star Centurion* should not be followed because its fundamental holdings, that Art 2(1)(d) is comprehensive of all claims for wreck removal and as to the operation of Art 18, are flawed for the same reasons as Full Court's determination (**AS [35], [49], [63]**).

16. In *The Wisdom* the Court recognised the overlap between para (a) and (d) and availability of limitation under para (a) for recourse claims under the Convention, consistent with CSL's construction. As did *Twitt Navigation* as the primary judge correctly identified (**JBA 367, AS [65], PJ [151]).** The Full Court's rejection of *Twitt Navigation* (**AJ [75]-[77])** is misplaced; as is its endorsement (**AJ [68]**) of *The Wisdom* whose outcome rests on the basis that a *lex specialis* arose where a State reserved and applied a special regime to the reserved claims (**JBA 249 at [3.6.8], [3.6.9])** a regime with no equivalence here**.**

17. Comity does not support the Full Court's reasoning or decision (cf **AJ [115]**).

18. As the Full Court acknowledged, some of the academic commentary supports CSL's construction (**AJ [52], [55], [83])**. But that commentary should not be dismissed for the reasons suggested by the Court (**AJ [84]**).

Dated: 5 February 2026

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