HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S147 of 2024

BETWEEN: **PALMANOVA PTY LTD**
Appellant

and

COMMONWEALTH OF AUSTRALIA
Respondent

APPELLANT'S SUBMISSIONS

PART I CERTIFICATION

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

PART II ISSUES PRESENTED BY THE APPEAL

2. The appellant in this Court sought relief in the Federal Court of Australia for recovery of an **Artefact** which has been seized by the Commonwealth on the basis it is liable to forfeiture under the *Protection of Movable Cultural Heritage Act 1986* (Cth) (the **Act**). Section 14(1) of the Act provides that "[w]here: (a) a protected object of a foreign country has been exported from that country; (b) the export was prohibited by a law of that country relating to cultural property; and (c) the object is imported; the object is liable to forfeiture". The Federal Court found (at first instance) that the Artefact is a protected object of Bolivia, and it was exported from Bolivia in contravention of the law of Bolivia relating to cultural property sometime between 1906 and the 1950s.

3. The single issue presented by the appeal is whether s 14(1)(a) of the Act — which applies as a criterion of forfeiture that the "protected object of a foreign country has been exported from that country" — operates where the unlawful act of exportation occurred after the commencement of the Act on 1 July 1987 (as held by the primary judge (Perram J) and Downes J dissenting in the Full Court), or whether it applies to objects unlawfully exported from the foreign country at any time at all (as held by the majority in the Full Court (Banks-Smith and Abraham JJ)).

Filed on behalf of the Appellant by
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PART III SECTION 78B NOTICE

4. The appellant does not consider that notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV CITATION

5. The judgment of the Full Court of the Federal Court of Australia is reported as *Commonwealth of Australia v Palmanova Pty Ltd* (2024) 304 FCR 163 (Banks-Smith, Abraham and Downes JJ) (**FC**).

6. The judgment of the primary judge has not been reported; its medium neutral citation is *Palmanova Pty Ltd v Commonwealth of Australia* [2023] FCA 1391 (Perram J) (**PJ**).

PART V: RELEVANT FACTS

7. In June 2020, the appellant imported the Artefact into Australia, having purchased it online from a gallery in Colorado. It was accompanied by documentation suggesting it was pre-Columbian in origin and came from the ancient city of Tiwanaku, the monumental ruins of which lie in Bolivia near Lake Titicaca (**FC [40] CAB 135**). Upon its entry into Australia, the Artefact was intercepted by officers under the *Customs Act 1901* (Cth) and retained by them (**PJ [1] CAB 8**). On 17 May 2021, the Artefact was seized by an inspector pursuant to s 34 of the Act, which confers power on an inspector to "seize a protected object that the inspector believes on reasonable grounds to be forfeited" (and by operation of s 27(1) of the Act, "forfeited" in s 34 includes "liable to forfeiture") (**PJ [3] CAB 9**).

8. On 16 June 2021, the appellant commenced proceedings in the Federal Court pursuant to s 37 of the Act, which permits the owner of an object to bring an action against the Commonwealth "for the recovery of the object on the ground that the object is not forfeited or liable to be forfeited" (**PJ [3] CAB 9**).

The decision of the primary judge (Perram J)

9. The primary judge found (and it is not contested) that the Artefact was an object forming part of the "movable cultural heritage" of Bolivia and is therefore a "protected object of a foreign country" within the meaning of s 3(1) of the Act. Further, the primary judge found that the Artefact was removed from Bolivia to Argentina sometime after 1906 (**PJ [343] CAB 102**). It was common ground that the Artefact must have been removed prior to 1960, and that under Bolivian law, it was unlawful to remove objects from the ruins at

Tiwanaku from Bolivia after 3 October 1906 (**PJ [5] CAB 10**). The question for the primary judge — and the single issue in this appeal — is whether s 14(1) applies to objects removed from a foreign country only on or after the date of the commencement of the Act, being 1 July 1987, or at any time at all.

10. The primary judge placed particular weight on the use of the present perfect tense ("has been exported") in s 14(1)(a), as compared to the use of the past tense ("the export was prohibited") in s 14(1)(b). His Honour considered that "some meaning has to be attributed to the fact that the Parliament decided to express s 14(1)(a) in the present perfect … and presumably thereby intended to say something different to the past tense" which it used in s 14(1)(b) (**PJ [351] CAB 104-105**). His Honour observed that the present perfect tense "indicates the completion of an event in the past where that completion has some relevance to the present" (**PJ [353] CAB 105**). The "problem of interpretation" was resolving what connection to the present the present perfect tense in s 14(1)(a) was assuming (**PJ [356] CAB 106**). It was noted that reading "has been exported" in s 14(1)(a) so that it reveals a connection to the present constituted *only* by the fact that the protected object "continues still to be in a state of being exported" would involve "redundancy", because looking at s 14(1) as a whole, the reader knows already that the protected object has been imported into Australia (that being the event triggering liability for forfeiture). Because this construction would involve redundancy, the primary judge did not prefer it (**PJ [358] CAB 106-107**).

11. Observing that the meaning of s 14(1) was not clear, the primary judge had recourse to secondary materials in accordance with s 15AB the *Acts Interpretation Act 1901* (Cth) (**PJ [362] CAB 108**). The primary judge considered the Minister's Second Reading Speech offered some limited support for the appellant's preferred construction (**PJ [370] CAB 109**). The Explanatory Memorandum was considered to be of "little interpretative assistance", and his Honour also concluded that the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*[1] was of no assistance, because although it was clear that Parliament's intention was that the Act would be "sufficiently consistent with the Convention to ensure that Australia would be complying with its obligations", the differences between the

[1] Opened for Signature 14 November 1970, 823 UNTS 231 (entered into force 24 April 1972) (**Convention**).

Convention and s 14(1) were "too large to make comparison useful" (**J [375]-[376] CAB 111**).

12. In the result, the primary judge found that s 14(1) of the Act, properly construed, applies to a protected object only if the act of exportation referred to in s 14(1)(a) occurred on or after the commencement of the Act on 1 July 1987, or alternatively, is sufficiently connected with the importation that the importation and exportation together constitute a "transfer" of the relevant object. The primary judge did not consider it necessary to choose between these two constructions, as on either basis the appellant succeeded: the Artefact was exported from Bolivia well before 1 July 1987 and that exportation was entirely disconnected from the act of importation into Australia in June 2020 (**PJ [378], [380] CAB 112**). On that basis, the primary judge ordered the return of the Artefact to the appellant.

The decision of the Full Court of the Federal Court of Australia

13. The majority in the Full Court (Banks-Smith and Abraham JJ) did not agree with the primary judge's focus on the text and use of the present perfect tense in s 14(1)(a). Their Honours concluded instead that the focus of s 14(1)(a) (and the analogous language in s 14(2)(a)) was on the continuing status of the object as a "protected object" at the time of importation (**FC [14] CAB 127-128**). The majority considered that the purpose of the Act was the "protection of movable cultural objects" and that the "critical time for the operation of these provisions is the time of import into, or export from, Australia" (**FC [16] CAB 128**). In relation to the use of the present perfect tense in s 14(1)(a) as compared to s 14(1)(b), the majority stated that s 14(1)(a) was "directed to the time of import" and therefore the "use of the present perfect tense is explicable" (but did not otherwise deal with the redundancy which this construction introduces) (**FC [23]-[24] CAB 130**).

14. The majority also held that the "extrinsic material is unnecessary to consider", because the "construction of s 14 is clear" (**FC [27] CAB 131**), but considered that the material would not have assisted the appellant, because the Second Reading Speech, in their view, made clear the Act "relates to import control" (**FC [29] CAB 132**). The majority concluded that the narrower construction preferred by the primary judge would "significantly confine the operation and effectiveness of the Act", and would be contrary to what their Honours conceived to be the (wide) purpose of the Act, namely: "the protection of movable cultural objects ... [t]he offence and forfeiture provisions are aimed,

inter alia, to limit the black-market trade of [movable cultural] objects" (**FC [29] CAB 132**). Though not explicitly stated, it appears the majority considered their construction of s 14(1)(a) was more consistent with this statement of statutory purpose.

15. Downes J dissented. First, her Honour correctly observed that Parliament's choice to delineate between the export itself with the use of the present perfect tense in s 14(1)(a), and the unlawfulness of that export in s 14(1)(b), cut across any so-called "clear meaning" of s 14(1) (**FC [69] CAB 141**). Second, her Honour made reference to those aspects of the Second Reading Speech which referred to "requisite export authorisations" issued in the country of origin, being a regime which was introduced by the Convention, and emphasised that this language "looks to the future", and is not "the language that one would expect to see if Parliament intended to prevent the importation of cultural objects which were unlawfully exported prior to the Act being passed" (**FC [74]-[76] CAB 142-144**). In this way, the Convention was considered to be of assistance to construction (**FC [78] CAB 144**).

16. Third, her Honour accepted that the Commonwealth's construction introduced superfluity into s 14(1)(a) (which was to be avoided if possible) (**FC [81] CAB 144**). Fourth, her Honour noted that the offence provision in s 14(2) should be construed consistently with s 14(1), and that the Commonwealth's construction would result in unworkable consequences for persons facing potential penal consequences (**FC [88] CAB 146**).

17. Fifth, her Honour considered that the purpose of the Act as confirmed by the Second Reading Speech was *not* to engage in "restitution" but rather the concern of Parliament was to "draw a line across history to ensure that in future years, transfers of important and valuable cultural objects from one country to another take place in a legal and orderly fashion" (**FC [91] CAB 147**). Justice Downes concluded that the appellant's construction of s 14(1)(a) was the one which best achieved the purpose of the Act (**FC [96] CAB 148**). For the reasons which follow, Downes J was correct.

PART VI: ARGUMENT

Method

18. As explained by this Court, the "task of statutory construction must begin with a consideration of the statutory text", and "[s]o must the task of statutory construction end", with that text considered in context which includes both the immediate statutory context,

the legislative history and extrinsic materials.[2] These submissions are structured in accordance with these principles, dealing with text, purpose, context and the relevant extrinsic material, including the Convention. Section 15AB of the *Acts Interpretation Act 1901* (Cth) permits recourse to extrinsic material to confirm the ordinary meaning of the provision as conveyed by the text, to determine the meaning where the provision is ambiguous or obscure, or to reject a manifestly absurd or unreasonable meaning that would arise from the text of the provision.[3] As Edelman J observed in *Harvey v Minister for Primary Industry and Resources*, there will "rarely be a difference in practice between the common law rules of statutory interpretation and the application of the discretion in s 15AB" in relation to the use of extrinsic materials.[4]

Text and textual context

19. The text of s 14(1)-(2) is as follows:

> **14 Unlawful imports**
>
> (1) Where:
>
> (a) a protected object of a foreign country has been exported from that country;
>
> (b) the export was prohibited by a law of that country relating to cultural property; and
>
> (c) the object is imported;
>
> the object is liable to forfeiture.
>
> (2) Where a person imports an object, knowing that:
>
> (a) the object is a protected object of a foreign country that has been exported from that country; and
>
> (b) the export was prohibited by a law of that country relating to cultural property; the person commits an offence.
>
> Penalty:
>
> (a) if the person is a natural person—imprisonment for a period not exceeding 5 years or a fine not exceeding 1,000 penalty units, or both; or

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2 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ) citing *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47].

3 See generally *Harvey v Minister for Primary Industry and Resources* (2024) 278 CLR 116 at [112]-[113] (Edelman J).

4 (2024) 278 CLR 116 at [113] (Edelman J).

(b) if the person is a body corporate—a fine not exceeding 2,000 penalty units.

20. Section 14(1) sets out the criteria which, if they exist, render an object liable to forfeiture to the Commonwealth. If those criteria exist, the consequences for the legal owner of the protected object are severe: forfeiture such that "all title and interest in the object is vested in the Commonwealth without further proceedings" (s 38(a)).

21. Textually, there are three matters which assume importance. First, there is the difference in language between sub-paragraph (a) of both s 14(1) and (2) as compared to sub-paragraph (b) in each case. It is significant that sub-paragraph (a) does not simply adopt the past tense, but rather is expressed in the present perfect. The language is to be contrasted in that respect with sub-paragraph (b), which simply uses the past tense "was". As a result, the presumption arises that the difference in language as between these two sub-sections was used to suggest some difference in meaning.[5] Also relevant is the related presumption that a construction which avoids surplusage or redundancy should be avoided.[6] On the majority's construction, the words "has been exported" mean simply "was exported". This leaves "has been exported" in sub-paragraph (a) with no practical work to do, because any protected object which satisfies s 14(1)(c) (that is, the object is imported) would necessarily satisfy sub-paragraph (a): if the object is imported, it must also have been exported. It also gives no weight to the presumption that "has been" was chosen intentionally (as compared to "was" in sub-paragraph (b)).

22. This gives rise to the second point, which is the construction to be given to that different language in sub-paragraph (a). As the primary judge recognised, the "present perfect" tense as a matter of common grammatical usage "generally refers to a situation that took place in the past, but is related in some way to the present".[7] The use of the present perfect tense *without* the relevant connection to the present, as a matter of ordinary English will "sound odd" and indicate a misuse of the grammar (see the examples given by the primary judge at **PJ [353]-[355] CAB 105-106**). This gives rise to ambiguity as to what

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5 *King v Jones* (1972) 128 CLR 221 at 266 (Gibbs J); *Paul v Cooke* (2013) 85 NSWLR 167 at [44] (Leeming JA, Ward JA agreeing).

6 See, eg, *The Commonwealth v Baume* (1905) 2 CLR 405 at 414 (Griffith CJ), 419 (O'Connor J); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 12-13 (Mason CJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [71] (McHugh, Gummow, Kirby and Hayne JJ); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [39], [41]-[42] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ), [76], [79] (Heydon J).

7 *The Oxford Dictionary of English Grammar* (1st ed, 1998) (online) (entry for "present perfect").

connection Parliament intended. The primary judge identified two available constructions: that it requires the export to have occurred after 1 July 1987 or requires some connection with the act of importation referred to in sub-paragraph (b) (**PJ [361] CAB 107**). On the former construction, the connection with the present which the use of the present perfect tense assumes is afforded by the fact that the act of exportation happened after the Act commenced on 1 July 1987: that is, the connection is supplied by the identity of the speaker (Parliament) and the time at which Parliament is speaking (from 1 July 1987). Having regard to the context and purpose (set out below), that is the construction which should be preferred.

23. Third, accepting that the presumption of retroactivity does not operate neatly to supply an answer to the constructional choice (see **PJ [349] CAB 104**) it is certainly more consistent with the underlying common law value preserved by that principle — that Parliament is not taken lightly to have intended "what is unjust"[8] — to prefer a construction which does not hinge on the relevant unlawful removal occurring *prior* to the Act commencing (noting the unworkability introduced for purchasers set out in paragraph [24] below). That the effect of the law will be to interfere in the most extreme of ways with property rights — i.e., by forfeiture — is again a reason not to favour a broad, rather than narrower available construction.[9]

24. Fourth, it is important to note the immediate textual context for s 14(1)(a), being the offence provision in s 14(2)(a), noting that the language of s 14(1)(a) will be construed consistently with the same language in the immediately subsequent sub-section.[10] Being an offence provision, s 14(2) is subject to the presumption of interpretation that it should be construed in favour of the subject to the extent of any ambiguity, which here would

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8 *George Hudson Limited v Australian Timber Workers' Union* (1923) 32 CLR 413 at 434 (Isaacs J). See also *Maxwell v Murphy* (1957) 96 CLR 261 at 637–8 (Dixon CJ); *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 642-643 (Dawson J).

9 *Clissold v Perry* (1904) 1 CLR 363 at 373 (Griffith CJ, Barton and O'Connor JJ agreeing); *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 181 (Barwick CJ), 182 (Menzies J), 185 (Windeyer J), 204 (Owen J); *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677 at 682–683 (Mason J; Gibbs CJ, Murphy, Aickin and Brennan JJ agreeing); *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 at 199–200 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ); *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239 at 252 (Deane, Dawson, Toohey and Gaudron JJ).

10 *The Registrar of Titles of the State of Western Australia v Franzon* (1975) 132 CLR 611 at 618 (Mason J); *Regional Express Holdings Ltd v Australian Federation of Air Pilots* (2017) 262 CLR 456 at [21] (Kiefel CJ, Keane, Nettle, Gordon and Edelman JJ).

favour the narrower construction preferred by the primary judge.[11] The majority's construction has the result that, as Downes J explained (**FC [88] CAB 146**):

> … it would require a potential importer of an object – which may have been exported from a country of origin many decades or even centuries before the implementation of the Convention and the commencement of the Act – to identify not just when an export occurred (which could be any time in history), but also whether an export at that time (however historically distant) complied with the country of origin's laws relating to cultural property. They would also need to identify that the export in question was the most recent export of the object from its country of origin. Finding answers to these questions could prove very difficult, if not impossible. And expecting someone other than a legal scholar to be able to identify and then understand the applicable laws – particularly in countries where local legislation, such as in this case, may go back some 120 years or more, and where that legislation may not be available in English – is an inconvenient result in the context of a potential penal sanction, and an unreasonable and improbable outcome.

25. The primary judgment itself demonstrates the great difficulty that may arise in assessing the date of export of an unprovenanced object before the international attention brought to such matters by the Convention, and enactment of subsequent national legislation. In this case, to make findings as to the Artefact's origin, the primary judge was required to consider evidence from a geologist, a conservator, three archaeologists, and an anthropologist specialising in the Tiwanaku culture (**PJ [44]-[50], [55]-[73] CAB 21-29**). There was disagreement even amongst the respondent's experts as to when the object in question left Bolivia (albeit that disagreement was not determinative in the context of this case) (**PJ [221]-[222] CAB 69**). Similarly, information about laws operating in a foreign country at some historical (even ancient) point in time may be obscure or only available in a foreign language. Finally, any documented export authorisation granted for an object in the distant past may well have been lost (noting there was no obvious reason for a person to preserve such documentation once exportation was effected, at least until the enactment of the Convention and corresponding national legislation).

26. In the face of constructional choices, the choice that produces such unreasonable and unworkable outcomes — particularly in respect of a penal provision — should not be preferred. Rather, the new liabilities introduced by the Act in respect of imported objects should be construed as involving criteria that need only be assessed from circumstances as they stand on and after 1 July 1987. This is fortified by a consideration of the purpose

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[11] *R v A2* (2019) 269 CLR 507 at [52] (Kiefel CJ and Keane J); *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 at [45] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

of the Act, including having regard to the relevant extrinsic material, which is dealt with immediately below.

The purpose of the Act generally and s 14 specifically

27. The purpose of a law is "what the law can be seen to be designed to achieve in fact",[12] and is to be ascertained objectively from the "whole text and context"[13] of the Act. Identification of the purpose is akin to identification of the 'mischief' which the law is designed to address.[14] "The purpose can sometimes be found spelt out in the text of the law. More often than not, the purpose will emerge from an examination of its context."[15]

28. The majority identified the purpose of the Act "evident on the text" as the "protection of movable cultural objects", and the specific purpose of s 14(1)(a)-(b) as being to "limit the black-market trade of such objects". Neither statement of purpose finds support in the text or context of the Act.

29. As for the first stated purpose of the Act, it is plainly overbroad, simply restating part of the title of the Act without consideration of its precise content or the way in which it is narrowly tailored to achieve specific ends. The operative part of the Act is Part II, titled "Control of Exports and Imports". In relation to exports, the Act sets up a regime for the creation of the National Cultural Heritage Control List (s 8), the designation of categories of objects that constitute the movable cultural heritage of Australia (ss 7, 8(2)), and the granting of permits and certificates to permit their exportation, including subject to particular conditions (ss 10, 12).

30. In relation to imports, the Act similarly sets up a regime which prohibits imports in specified circumstances (s 14(1)-(2)), and provides for a regime whereby protected objects can be imported in accordance with agreements for the loan of the object (s 14(3)). Superimposed on the import regime is the requirement that a foreign country have requested the return of its protected foreign object, which is a precondition to both the

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12 *Spence v Queensland* (2019) 268 CLR 355 at [60] (Kiefel CJ, Bell, Gageler and Keane JJ).

13 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40 at [16] (Gageler CJ, Gorgon, Gleeson and Jagot JJ) quoting *Alexander v Minsiter for Home Affairs* (2022) 276 CLR 336 at [104] (Gageler J).

14 *McCloy v New South Wales* (2015) 257 CLR 178 at [132] (Gageler J) quoting *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [178] (Gummow J).

15 *Brown v Tasmania* (2017) 261 CLR 328 at [209] (Gageler J).

effecting of a forfeiture pursuant to s 14(1) and the commencement of proceedings for a contravention of s 14(2) (see s 41(1)-(2)).

31. The purpose of the legislation is therefore not so sweeping as "the protection of movable cultural objects", and there is no justification in the text for attributing a purpose of "limiting the black-market trade of such objects" *simpliciter*. It appears this "black-market" concept was drawn by the majority from the second-reading speech, but taken well out of context, as explained below at [39].

32. As will be seen, having regard to the carefully tailored nature of the statutory text and the extrinsic material, the purpose of Act as concerns the cultural heritage of *foreign* countries (that is, the import controls introduced by s 14) is best stated as being to establish a regime which inhibits the unlawful removal from foreign countries of movable cultural objects which represent an irreplaceable part of that country's cultural heritage. That purpose is necessarily forward-looking; being to prevent in the future the loss of cultural heritage which Parliament recognised had, at the time of the introduction of the Act, "reached crisis level in certain countries".[16]

The extrinsic material

33. The Explanatory Memorandum states Parliament's purpose in relation to the whole Act as being to "provide for the protection of Australia's heritage of important movable cultural objects by introducing export controls and to extend protection to the cultural heritage of other countries through import controls".[17] It goes on to state that "[i]mplementation of the Act will enable Australia to become a party to the 1970 [Convention]".[18] What is clear is that the Act is concerned with *export* and *import* of movable cultural heritage. The Second Reading Speech offers support for this construction, as the Minister states: "[l]et me deal first with the export and import controls", and confirms "I should say at the outset that the Government is not seeking to stop movement of all cultural material or even most of it".[19] It is abundantly clear from

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16 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 1985 at 3739 (Mr Cohen, Minister for Arts, Heritage and Environment).
17 Explanatory Memorandum, Protection of Movable Cultural Heritage Bill 1985 at 2.
18 Explanatory Memorandum, Protection of Movable Cultural Heritage Bill 1985 at 2.
19 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 1985 at 3740 (Mr Cohen, Minister for Arts, Heritage and Environment).

this material that the Parliament was not concerned with "black-market trade" *simpliciter* (cf **FC [29] CAB 132**).

34. In relation to import controls, the Explanatory Memorandum indicates that the purpose of the import controls is narrowly tailored to achieve the purpose of enabling foreign countries to restrict the movement of property *out* of that foreign country:[20]

> Imported objects forming part of the cultural heritage of a foreign country and so recognised under the law of that country will not be seized unless a formal request to return the object has been received from the government of that country.
>
> The Bill is thus designed to **recognise an individual's right to enjoyment of property** whilst establishing the nation's right to **restrict the movement of that property** where it represents an irreplaceable part of the cultural heritage.
>
> [Emphasis added]

35. Particularly when read in the context of the Minister's Second Reading Speech (as discussed immediately below), this provides strong support for the conclusion that sub-ss 14(1)(a) and 2(a) are directed to unlawful removals of cultural objects from foreign countries *after* commencement of the Act.

36. In the Second Reading Speech, the Minister makes clear that that the purpose of the Act in relation to import controls was to "extend certain forms of protection to the cultural heritage of other nations"[21] (that is, certain forms, not complete protection). The Minister went on to note that "[a]s a result of these steps, Australia will be able to accede to the 1970 [Convention]",[22] later noted "Australia's decision to accede to the 1970 Convention"[23] and stated that the "legislation before the House will put us in a position to do this",[24] and further made clear in relation to the *import* controls (that is, s 14(1)) that "these controls relate essentially to Australia's treaty obligations under the 1970 Convention".[25] Having regard to these statements, as well as the express statement to that

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20 Explanatory Memorandum, Protection of Movable Cultural Heritage Bill 1985 at 4.
21 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 1985 at 3740 (Mr Cohen, Minister for Arts, Heritage and Environment).
22 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 1985 at 3739 (Mr Cohen, Minister for Arts, Heritage and Environment).
23 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 1985 at 3739 (Mr Cohen, Minister for Arts, Heritage and Environment).
24 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 1985 at 3739 (Mr Cohen, Minister for Arts, Heritage and Environment).
25 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 1985 at 3740 (Mr Cohen, Minister for Arts, Heritage and Environment).

effect in the Explanatory Memorandum, the Convention is plainly relevant to interpretation (which is dealt with at paragraphs [41]-[47] below).

37. However, staying with the Second Reading Speech, it is important to note the critical passages in relation to the import controls introduced by the Act (s 14(1)-(2)) which the Minister emphasised were limited in scope, stating:[26]

> The import controls will apply only to important cultural material which has been imported into Australia without the requisite export authorisation from the country of origin. There will be no search of incoming luggage or freight. The import controls exist solely to enable Australia to respond if an official complaint is received from a foreign government that an illegally exported object has been brought to Australia. If a foreign government does not consider an object sufficiently important to lodge such a complaint, we do not consider ourselves as having an obligation to protect that country's cultural property on its behalf. Although these controls relate essentially to Australia's treaty obligations under the 1970 Convention, they will also make it possible for the Government to provide this form of protection to countries which may not yet be party to the Convention. An institution or individual buying an important cultural object from overseas will need to be satisfied that the requisite export authorisations have been issued in the country of origin. This is already the practice of all reputable collecting institutions and private collectors.

38. The Minister then went on to stress that neither the Convention nor the legislation was "concerned with restitution of cultural property … brought here in the past years from other countries without proper authority", and stated:[27]

> The restitution of cultural property is the subject of other United Nations Educational, Scientific and Cultural Organisation efforts, **but it is not the subject of the 1970 Convention or the purpose of this legislation**. Rather, the concern is to **draw a line across history** to ensure that **in future years transfers** of important and valuable cultural objects **from one country to another** take place in a legal and orderly fashion and that sanctions imposed will discourage illicit trafficking in cultural material.
>
> [Emphasis added]

39. To the extent it might be thought that this last sentence gives some credence to the majority's "black-market" purpose, that is not supported by the earlier statements in the Second Reading Speech, where the reference to the "black market" actually occurs. There, the Minister makes clear that the "trafficking" with which the Act is concerned is

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[26] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 1985 at 3740-41 (Mr Cohen, Minister for Arts, Heritage and Environment).

[27] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 1985 at 3741 (Mr Cohen, Minister for Arts, Heritage and Environment).

not simply all trade in movable cultural objects, but rather the "systematic looting of cultural treasures" which is "organised by black market operators".[28] Parliament was focused, it is clear, on ceasing the incentives the black market provided to engage in the removal of movable cultural heritage from the country of origin. So much is plain on the text of the Act in any event, because Parliament did not, for example, introduce any broader controls on trade in relation to movable cultural objects already in Australia, nor for the restitution of those cultural objects to their country of origin. That is simply not the concern of this Act. In those circumstances, the purpose of s 14(1) is, as noted above, best stated as being to inhibit the unlawful removal from foreign countries of movable cultural objects which represent an irreplaceable part of that country's cultural heritage.

40. Returning to the interpretation of s 14(1)(a), the construction which best achieves that purpose[29] is not the majority's "wide" construction, which would give the Act a broader operation than Parliament plainly intended. Indeed, that construction tends to cut entirely across the evident statutory intention, because it *does* give the Act a "restitutionary" operation: at any point movable cultural objects (whenever removed) end up imported into Australia, they are liable to forfeiture and return to their country of origin upon request by the foreign country. By contrast, the construction preferred by Downes J and contended for by the appellant is the one which in fact "draws a line across history" to ensure that "in future years" movable cultural objects are exported and imported only in accordance with authorisation from the foreign country.

The Convention

41. There is no difficulty as a matter of principle with consideration of the Convention, as relevant material extrinsic to the Act itself that assists in making the constructional choice. Both the Explanatory Memorandum and Second Reading Speech emphasise that the purpose of the Act was to enable Australia to accede to the Convention. The difficulty the primary judge and the majority perceived in using the Convention as an aide to construction was that the Act does not "pick up" the convention and its provisions "are broader" than the terms of the Convention (**PJ [375], CAB 111; FC [32] CAB 132**). Plainly Parliament did not transpose the text of the treaty into the Act so as to enact the treaty as part of domestic law. It is therefore correct to say there is no presumption that

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[28] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 1985 at 3739 (Mr Cohen, Minister for Arts, Heritage and Environment).

[29] Consistently with s 15AA of the *Acts Interpretation Act 1901* (Cth).

the text of the Act should be interpreted consistently with the manner in which the treaty has been interpreted.[30]

42. However — contrary to the approach of the majority — that does not deprive the Convention of any weight in the task of construction.[31] That is particularly so where Parliament's expressly stated intention in the Explanatory Memorandum was to "enable Australia to become a party to the 1970 [Convention]" (cf **FC [28] CAB 131,** where the majority found, contrary to this express statement, that Parliament was putting in place a regime "which was not connected to the operation of the Convention").

43. It is not irrelevant to the task of construction, in the context of ambiguity, to consider the international agreement which Parliament expressly stated it was legislating to give effect to. Where that international agreement — as here — provides support for one constructional choice over another, it is entirely orthodox to prefer a construction which is consistent with the Convention rather than one which would cut across it.[32] That is simply to adopt from a "range of potentially available constructions" one which "best allows the domestic statutory language to fulfil its statutory purpose".[33]

44. Article 7 of the Convention is the provision which imposes substantive obligations on state parties to prevent the importation of cultural property (Articles 7(a)-(b)(ii)) and, "at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property" (Article 7(b)(ii)). As the primary judge noted, there are significant differences between s 14(1) and Article 7, most notably that it is concerned with the position of "museums and similar institutions" (whereas s 14(1) applies to any importer) (**PJ [374] CAB 111**).

45. Critically, however, Article 7 undoubtedly has *only* non-retroactive operation.[34] That is plain on the text of Article 7, which refers to cultural property "which has been illegally

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30 Cf *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 230-231 (Brennan J); 239-240 (Dawson J), 251-2 (McHugh J), 272 (Gummow J), 292 (Kirby J).

31 Noting that s 15AB(1) provides that "any material" not forming part of the Act capable of assisting in the ascertainment of meaning may be considered, subject to s 15AB(3), and that s 15AB(2) contains an inclusive list.

32 *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at [34] (Gummow ACJ, Callinan, Heydon and Crennan JJ); *Minister for Immigration and Border Protection v WZAPN* (2015) 254 CLR 610 at [53] (French CJ, Kiefel, Bell and Keane JJ); *Macoun v Federal Commissioner of Taxation* (2015) 257 CLR 519 at [67] (French CJ, Bell, Gageler, Nettle and Gordon JJ).

33 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [44] (Gageler J, dissenting).

34 See Vrdoljak, Jakubowski and Chechi (eds), *The 1970 UNESCO and 1995 UNIDROIT Conventions on Stolen or Illegally Transferred Cultural Property: A Commentary* (Oxford Academic, 2024) at 223.

exported after entry into force of this Convention" (sub-paragraph (a)), the importation of cultural property stolen "after the entry into force of this Convention" (sub-paragraph (b)(i)), and the obligation to "recover and return any such cultural property imported after the entry into force of this Convention in both States concerned" (sub-paragraph (b)(ii)).

46. To the extent there would be any doubt, Article 28 of the *Vienna Convention on the Law of Treaties*[35] similarly confirms the non-retroactivity principle applies (subject to contrary intention, of which there is none in Article 7). Article 15 of the Convention notes that nothing in the Convention prevents State Parties from concluding special agreements "regarding the restitution of cultural property removed, whatever the reason, from its territory of origin, before the entry into force of this Convention for the States concerned", which provides further contextual support for the proposition that the operative provisions of the Convention did not operate retrospectively. And if there was any residual doubt, the *travaux préparatoires* similarly demonstrate an insistence during negotiation on the inclusion of express language in the operative provisions (including Article 7) to confirm the Convention did not have retroactive effect.[36]

47. Also relevant is Article 6, by which the State Parties undertook to introduce a certification regime to authorise the export of cultural property, and otherwise to prohibit exportation otherwise than in accordance with the certification regime, and Article 8, by which the State Parties undertook to impose penalties or administrative sanctions on the infringement of the prohibitions in Article 6(b) (the export of cultural property without certification) and Article 7(b) (the import of cultural property stolen from a museum, religious or secular public monument or similar institution). As Downes J observed, the Parties agreed by Article 6 to "introduce a regime which authorised the export of cultural property, and which included a process whereby a certificate would be issued where authorisation was granted" (**FC [73] CAB 142**). The "requisite export authorisation" to which reference was made in the Second Reading Speech, in respect of which the "import

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35 [1984] ATS 2.

36 See UNESCO, Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property: Replies to Draft Convention, UNESCO Docs. SHC/MD/5, Annex 1 22 (USA); UNESCO, Final Report for Special Committee of Governmental Experts to examine the Draft Convention on the means of Prohibiting and Preventing the Illicit Import, Expert and Transfer of Ownership of Cultural Property, UNESCO Doc.16C/17, 13 July 1970, Annex 2 at [18], [29]. See also Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (Cambridge University Press, 2006) at 207.

controls" would apply, was evidently looking forward to the regime which would be introduced by the Convention.

48. The Convention provides almost unequivocal support for construing s 14(1)(a) as applying to unlawful exports from the date of the Act, because from the range of constructional choices that is the one which allows the statutory language to fulfil the statutory purpose. That is consistent with what Parliament was told by the Minister: that the "import controls relate essentially to Australia's treaty obligations under the 1970 Convention".[37] In line with the forward-looking stance specifically adverted to by the Minister in the Second Reading Speech, s 14(1) takes an approach which is consistent with the Convention in enacting a liability to forfeiture in respect of objects unlawfully exported only *after* enactment of the liability.[38] That is the manner in which it should be construed.

The Full Court erred, the primary judge and Downes J were correct

49. Having regard to the text, context and purpose of the Act, the primary judge and Downes J were correct to construe s 14(1) as applying to a protected object only if the act of exportation referred to in s 14(1)(a) occurred on or after the date that the Act commenced operation, 1 July 1987. The majority erred in concluding otherwise, and the judgment of the Full Court should be set aside accordingly.

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37 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 1985 at 3740 (Mr Cohen, Minister for Arts, Heritage and Environment).

38 The Canadian courts have similarly taken this approach in construing s 31(2) of the *Cultural Property Export and Import Act 1975* (Can), which provided that "From and after the coming into force of a cultural property agreement in Canada and a reciprocating State, it is illegal to import into Canada any foreign cultural property that has been illegally exported from that reciprocating State". In *R v Heller, Zango and Kassam* (1983) 27 Alta LR (2d) 346, Stevenson Prov J relied on Article 7(a) of the Convention in interpretation and held that "the meaning to be attached to the words 'illegally exported' must be restricted to that time frame following the entry by Canada as a party to the international convention" (at 353-354) (not disturbed on appeal: see *R v Heller* (1984) 30 Alta LR (2d) 130). It may be accepted that there is no direct interpretative assistance to be derived from the Canadian decision given the difference in wording of s 14(1) as compared to the Canadian statute (**PJ [379] CAB 112**), but it lends some support to the proposition that the construction which best accords with Parliament's intention vis-à-vis the Convention is one which is essentially forward-looking, not some sweeping attempt to redress all instances of unlawful export no matter how far in the past that export occurred.

PART VII: ORDERS SOUGHT

50. The following orders are sought:

i. Appeal allowed.

ii. Orders 1 and 2 and declarations 1 and 2 made by the Full Court be set aside and in their place order that the appeal to the Full Court be dismissed with costs.

iii. The respondent pay the appellant's cost of the appeal and the application for special leave to appeal.

PART VIII: ESTIMATE OF HOURS

51. The appellant estimates that 1.5 hours is required for the presentation of oral argument.

10 **Dated: 9 January 2025**

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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	*Acts Interpretation Act 1901* (Cth)	Version 38 (11 December 2024 to present)	ss 15AA, 15AB	Act presently in force. Cited provisions have not changed in period relevant to these proceedings.	-
2	*Cultural Property Export and Import Act 1975* (Canada)	As passed.	s 31	Act as applied in decision in *R v Heller, Zango and Kassam* (1983) 27 Alta LR (2d) 346.	1 December 1981: date of alleged offence in *R v Heller, Zango and Kassam* (1983) 27 Alta LR (2d) 346
3	*Customs Act 1901* (Cth)	Version 184 (11 December 2024 to present)	-	Act presently in force. The *Customs Act 1901* is cited only in passing at AS [7] and is not otherwise relevant to the appellant's submissions.	-
4	*Protection of Movable Cultural Heritage Act 1986* (Cth)	Version 18 (21 October 2016 to 21 August 2023)	ss 3, 7, 8, 10, 12 14, 27, 34, 37	Act in force on the date of Artefact's seizure, and the date first instance proceedings commenced by appellant.	17 May 2021: Artefact taken to have been seized under the Act 16 June 2021: Proceedings commenced by appellant for return of the Artefact