HIGH COURT OF AUSTRALIA

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File Number:	S147/2024
File Title:	Palmanova Pty Ltd v. Commonwealth of Australia
Registry:	Sydney
Document filed:	Form 27E - Reply
Filing party:	Appellant
Date filed:	13 Feb 2025

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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 REPLY

PART I CERTIFICATION

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

PART II REPLY TO ARGUMENTS OF RESPONDENT

The "issues" issue

2. The criticisms in **RS [4]** about the appellant's statement of the issue presented by the appeal (at **AS [3]**) are immaterial and distracting. Each party accepts that s 14(1)(a) requires that an object be a "protected object of a foreign country" (*cf* the first alleged "inaccuracy" at **RS [4]**). Each party accepts that there must be an importation of that foreign object which occurs after the commencement of the Act (*cf* the second alleged "inaccuracy" at **RS [4]**).

The text

3. **RS [5], [14], [15], [18], [21]** and **[30(b)]** all proffer different variations of the same underlying explanation as to the use of the present perfect tense in s 14(1)(a): that it tells the reader the protected object must *still* have the legal characterisation of a "protected object of a foreign country" at the time of import for the purposes of s 14(1)(c). None of the iterations of that submission avoid the redundancy that this construction introduces: see **AS [21]**. It also approaches the task of construction by (incorrectly) taking s 14(1)(a) in isolation instead of reading s 14(1)(a), (b) and (c) as a congruent whole. Read as a whole, s 14(1)(c) already supplies the "focus" on the "object being a protected object of

a foreign country at the time of importation" that the respondent calls in aid at **RS [5]**. Section 14(1) simply has no scope of operation if the object does not have that character; and that is not the work which the present perfect tense in the expression of s 14(1)(a) is doing.

4. **RS [16]** submits that sub-paragraph (b) contains the "only limitation as to time" in s 14(1), which ought not be accepted. Each of the sub-paragraphs of s 14(1) contain both a temporal element and a descriptive element, that is, an element identifying and descriptive of the fact or characteristic to which the section applies. The descriptive element of sub-paragraph (b) is the prohibition on export by a law of the foreign country; its temporal element is that the law of the foreign country must have prohibited the export, at the time of export. The descriptive element of sub-paragraph (c) is that the object is "imported"; the temporal element is supplied by "is" — that is, the present tense — being the date the provision is sought to be applied to an object. The descriptive element of sub-paragraph (1) is that there is a "protected object of a foreign country … exported"; and the natural reading of "has been" is that it supplies the temporal element applicable to s 14(1)(a). There is no dispute between the parties that s 14(1) operates prospectively by reference to antecedent circumstances and characteristics (**RS [17]**), but that does not answer the constructional choice presented, which is what those circumstances and characteristics *are* in s 14(1)(a).

5. The respondent agrees that s 14(2)(a) and 14(1)(a) should be read consistently (**RS [19]**), but that is a matter which supports the narrower available construction, s 14(2)(a) being a penal provision: see **AS [16], [26]**. Each party also agrees that the presumption against retroactivity does not apply (**RS [24]**), but the respondent offers no real answer to what is submitted at **AS [23]**, relying on the common law value which underlies that principle clearly tending in favour of a narrower construction. The contention at **RS [27]** that this is all a "criticism of Parliament's policy choice" places the cart (the constructional outcome) before the horse (the task of construction). The choice which has been made by Parliament is to be discerned by the exercise of construction: "[i]n exercising their judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted".[1]

[1] *Al-Kateb v Godwin* (2004) 219 CLR 562 at [19] (Gleeson CJ).

6. The reliance on the respondent's burden of proof in civil proceedings pursuant to s 14(1), and its onus in a prosecution under s 14(2) at **RS [27]** does not grapple with the unworkability that Downes J actually identified (**FC [88] CAB 146**) and on which the appellant relies. That is because the respondent focuses on the burden of proof in *proceedings* and assumes an individual only becomes concerned about the matter once an object has been imported and seized and they are engaged in proceedings for its return, or trying to defend criminal proceedings for an offence. The respondent's focus fails to appreciate the unworkability actually produced, namely, for those persons acting conscientiously to try and ensure they do not breach the Act, including its criminal provisions, *before* importing any relevant goods into Australia.

Context and purpose

7. There is again no dispute between the parties that the task of construing s 14(1)(a) requires consideration of the whole of the section, within the broader scheme of the Act, and in light of its purpose and objects: see **RS [30].** The appellant relies on context and purpose, which support its construction: see **AS [27]-[48]**. The contribution to that task of consideration of the definition provision (**RS [26], [30(d)]**) is elusive; the fact that the objects are "of importance" to the foreign country is a policy concern that underlies the entire statutory regime, it says nothing about the constructional choice to be made one way or another.

8. At **RS [30(e)], [32]** the respondent slides into the error which waylaid the majority in the Full Court, that the purpose of the Act is to "protect movable cultural heritage" *simpliciter.* That is not the more carefully tailored object of the Act which emerges from the text and extrinsic material, which for the reasons set out at **AS [27]-[32]** 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. In resisting this statement of purpose, the respondent submits at **RS [35]** that it is "highly unlikely" that Parliament intended to create a situation where objects exported before the date of commencement could "find safe-haven in Australia". The premise of this submission is that the relevant object has already moved from its "home" country into a second country. But the contextual reality of the Act is that the Convention obligations applied only prospectively to the obligations of all the other State parties. In that otherwise regulated international environment for the movement of artefacts, the relevant object is equally "safe" in whichever jurisdiction it is located after

commencement, because the Convention (and the Act) are not concerned with restitution of cultural property which was removed in "past years": see **AS [38]**.

9. **RS [40]** submits that the Minister's reference to a "line across history" in the Second Reading Speech is implicitly referring to the fact that the import restrictions only operated on imports after the commencement of the Act. That disregards the Minister's immediately subsequent reference to "transfers … from one country to another", which instead suggests a focus on export, and the date of removal from the foreign country (see also **FC [91] CAB 147** (Downes J)).

The Convention

10. The respondent points to the absence of an authorisation regime within the Act and deploys this in criticism of the reliance by the appellant and Downes J on the Convention (**RS [44]**). That criticism is misplaced. It cannot sensibly be said that when the Minister was referring in the Second Reading Speech to the import controls in the Act applying only where "the requisite export authorisation from the country of origin"[2] had not been obtained, he was unaware that the Act he was introducing to Parliament did not actually contain any "export authorisations". And on no sensible understanding of the role of the Commonwealth Parliament in an international context would one expect the Act to contain the "export authorisations" contemplated by the Convention: those are matters for foreign governments. The Act does that which the Commonwealth Parliament can appropriately do in that international context, which is to introduce a prospective prohibition on importations of the protected objects of a foreign country contrary to the law of that foreign country. It does so in clear contemplation of the Convention regime, pursuant to which foreign governments were to introduce domestic laws providing for the prohibition on exportation of cultural property unless accompanied by an export authorisation.[3]

11. Finally, it is wrong to suggest that the appellant (or Downes J) "incorrectly subordinate the Act to the Convention" (**RS [44]**). Settled principle establishes that the Court is entitled to prefer a construction which is consistent with the Convention to one which is

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

3 Convention, Article 6.

not, and doing so does not "subordinate" the statute to anything; it construes it in its full context.

The respondent's statement of facts

12. It is not clear what the respondent seeks to make of the further facts set out at **RS [7]-[10]**, but there is no dispute that they accurately reflect the findings of the trial judge, which are not in issue on the appeal.

Dated: 13 February 2025

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