HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 30 Jan 2025 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S147/2024
File Title:	Palmanova Pty Ltd v. Commonwealth of Australia
Registry:	Sydney
Document filed:	Form 27D - Respondent's submissions
Filing party:	Respondent
Date filed:	30 Jan 2025

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S147/2024

BETWEEN:

PALMANOVA PTY LTD
Appellant

and

COMMONWEALTH OF AUSTRALIA
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Issue on the appeal

2. The present matter concerned whether an object, described by the primary Judge as "the Artefact" and photographed in the primary Judge's reasons [2] (CAB 8) and [95] (CAB 35), met the conditions for being liable to forfeiture under s 14(1) of the *Protection of Movable Cultural Heritage Act 1986* (Cth) (**Act**).

3. The single issue on the appeal is whether s 14(1) of the Act excludes from its reach any object that is exported from a foreign country before the commencement of the Act, notwithstanding that the object is a protected object of a foreign country, exported from that country in prohibition of a law of that country relating to cultural heritage, and the act of importing the object into Australia only occurs after the commencement of the Act. That reduces to whether it is a requirement of s 14(1) of the Act, for a protected object of a foreign country to be liable to forfeiture, that its export from the foreign country be after the commencement of the Act.

4. The Appellant's statement of the issue, at AS [3], is inaccurate in multiple ways. One is that s 14(1)(a) first requires that an object be "a protected object of a foreign country" to fall within s 14(1) and not only that it "has been exported from that country". *Secondly*, any protected object of a foreign country that was exported from that country in prohibition of a law of that country relating to cultural property (not only one that was exported from that country after the commencement of the Act on 1 July 1987) will be

liable to forfeiture if it is imported into Australia after the commencement of the Act, but the Respondent does not contend and the Full Court (Banks-Smith and Abraham JJ) did not find that s 14(1) "applies to objects unlawfully exported from the foreign country at any time at all". Both the Respondent and Banks-Smith and Abraham JJ pointed to s 14(1)(b), which is to be read cumulatively with s 14(1)(a) and (c), as dealing with when the export of a protected object of a foreign country had to have occurred for that object to be liable for forfeiture when, after the commencement of the Act, it is imported into Australia.

10 5. Also, in this case, the present relevance (at the time of post-commencement importation into Australia) of the completed export from Bolivia of the Artefact under consideration is supplied by the Artefact (still) being a protected object of Bolivia when imported into Australia, its export from Bolivia having been prohibited by a law of Bolivia relating to cultural property. It is at the time of importation into Australia, described by the primary Judge as "the legal present"[1] that s 14(1) falls to be applied. Further, the focus of s 14(1)(a) upon the object being a protected object of a foreign country at the time of importation itself explains the use of the present perfect as found by Banks-Smith and Abraham JJ at [14] (CAB 12) and [24] (CAB 16).

Part III: Whether notice should be given under section 78B of the *Judiciary Act 1901* (Cth)

20

6. The Respondent does not consider that a notice should be given under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Statement of Relevant Facts

7. The primary Judge found that the Artefact was manufactured by the Tiwanaku, not less than hundreds of years ago, in Tiwanaku.[2] The Tiwanaku culture rose to prominence in 600-1000AD, and was centred on the ancient city of Tiwanaku (located in present day Bolivia).[3] In relation to the features of the Artefact, his Honour found that its figures and motifs were incised with the percussive action of a sharpened tool (rather than engraved

[1] Primary Judge's reasons (**PJ**) at [345] (CAB 103).
[2] PJ at [53](c), [18], [196], [209]-[211], [343] (CAB 24, 14, 62, 66, 102).
[3] PJ [74], [80] (CAB 30, 31).

with a modern tool).[4] The Artefact served a religious or ritual purpose,[5] and it was a sculptural depiction of a Tiwanaku kero.[6] The style of kero depicted by the Artefact (putting aside its feline head) was typical of keros found at Tiwanaku.[7]

8. His Honour concluded that the Artefact was "an exceptional and unique piece of archaeological significance" and formed part of the movable cultural heritage of Bolivia.[8]

9. His Honour found that the Artefact was removed from the ruins of Tiwanaku either by Dr Casanova, in 1934, or by looters, in or around 1950.[9] Under Bolivian law, it was unlawful to remove objects from the ruins at Tiwanaku from Bolivia after 3 October 1906.[10] The Artefact surfaced in Buenos Aires, Argentina, during the 1950s[11] (and therefore was removed from Bolivia at some point between 1934 and the 1950s, at a time when it was unlawful to do so).

10. The Artefact was purchased by the Appellant from Artemis Gallery, Colorado, in June 2020,[12] and was shipped to Australia the same month.[13] Upon entry to Australia, the Artefact was intercepted and retained[14] and on 17 May 2021 the Artefact was taken to have been seized under the Act.[15] That seizure decision was not itself the subject of any judicial review proceeding.

Part V: Argument

11. Contrary to the Appellant's argument (including at AS [18], [20]-[26]), the text of s 14(1), its context and its purpose all support the proposition that s 14(1), on its proper construction, reaches pre-commencement (as well as post-commencement) exports from foreign countries where the relevant object is imported into Australia after the

[4] PJ [53](b), [191] (CAB 24, 61).
[5] PJ [90], [91] (CAB 34, 35).
[6] PJ [209] (CAB 66). A kero is a particular vessel shape common to the Andes typically consisting of a cylindrical cup without a handle and with a flaring upper edge: PJ [83] (CAB 31).
[7] PJ [209] (CAB 66).
[8] PJ [210], [211], [343] (CAB 66, 102).
[9] PJ [338], [341] (CAB 101).
[10] PJ [5] (CAB 10).
[11] PJ [53](g) (CAB 24).
[12] PJ [1] (CAB 8).
[13] PJ [1] (CAB 8).
[14] PJ [1] (CAB 8).
[15] PJ [3] (CAB 9).

commencement of the Act (meeting s 14(1)(c), "the object is imported") and that object is "a protected object of a foreign country" which "has been exported" from that country (s 14(1)(a)) at a time when "the export was prohibited by a law of that country relating to cultural property" (s 14(1)(b)). Text, context and purpose provide no support for the exclusion from the operation of s 14(1)(a) of all pre-commencement exports of a protected object of a foreign country in cases where "the export was prohibited by a law of that country relating to cultural property" (s 14(1)(b)). Read in context,[16] s 14(1) is not "ambiguous or obscure" as contended by the Appellant, and the text of the provision is not "manifestly absurd or unreasonable"[17] if read as the Respondent contends and as the Full Court found. Banks-Smith and Abraham JJ were correct to find (at [27] (CAB 131)) that, given that the construction of s 14(1) was clear, the extrinsic material is "unnecessary to consider", but "that said, the material does not assist [Palmanova] or tell against [their Honour's] construction…". Their Honours further explained these conclusions at [28]-[30] (CAB 131-132).

Text of s 14

12. Section 14(1)-(2) of the Act provides:

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

[16] See eg. *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39] (the Court); *R v A2* (2019) 269 CLR 507 at [32]-[33] (Kiefel CJ and Keane J).
[17] Cf. *Commissioner of Police (NSW) v Cottle* (2022) 276 CLR 62 at [33] (Kiefel CJ, Keane, Gordon and Steward JJ), citing *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1998) 83 FCR 511 at 519 (Black CJ and Sundberg J); *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 273 CLR 21 at [29] (the Court).

13. Contrary to AS [21]-[22], the text of s 14(1) and (2) does not support the Appellant's construction for a number of reasons.

14. *Firstly*, the opening words of s 14(1)(a) make clear that the paragraph is focused upon "a protected object of a foreign country" and that paragraph continues to identify a feature of that object, namely that it "has been exported" from that country. See the reasoning of Banks-Smith and Abraham JJ at [14] (CAB 127), particularly with respect to the circumstances specified in s 14(1)(a) and (2)(a), namely that the object is a protected object that has been exported, which, as their Honours there observe, "are current circumstances which exist at the time of import". Further, the focus in s 14(1)(a) upon the object being one that is a protected object of a foreign country at the time of importation is itself sufficient to explain the use of the present perfect tense in that paragraph.[18]

15. Also, the use of the present perfect tense through the words "has been", which was critical to and determinative of the conclusion reached by the primary Judge as to construction,[19] and upon which the Appellant's argument fundamentally rests, does not, in any event, exclude all completed acts. It is broad enough to capture any completed act at least if it has present relevance (as the primary Judge accepted[20]). The primary Judge considered that the use of the present perfect may extend to a completed export with present relevance.[21] Even upon that basis alone, the text of s 14(1)(a) does not exclude all pre-commencement exports. In this case, the present relevance of the completed export is that the object exported is "a protected object of a foreign country" (paragraph (a)), with the history that "the export was prohibited by a law of that country relating to cultural property" (paragraph (b)), and all of that remains so when (post-commencement of the Act) "the object is imported" (paragraph (c)) – importation being the time that the questions posed by section 14(1) come to be addressed.

16. *Secondly*, paragraphs (a) and (b) of s 14(1) are to be read in the context of each other, and the section as a whole.[22] Paragraph (a) cannot be read as though it were entirely

[18] Banks-Smith and Abraham JJ at [24] (CAB 130).
[19] PJ [347]-[348] (CAB 103-104).
[20] PJ [352] (CAB 105).
[21] PJ [352]-[353] (CAB 105).
[22] *R v A2* (2019) 269 CLR 507 at [33] (Kiefel CJ and Keane J).

divorced from, or unrelated to, paragraph (b). Paragraph (b) is the only limitation as to time of the completed export found in s 14(1). The effect of paragraph (b) is to capture any export that occurred when "the export was prohibited by a law of that country relating to cultural property". It does not otherwise limit time of export. If Parliament had intended to impose any other temporal limitation on export, it could easily have included that, but it did not (as Banks-Smith and Abraham JJ so observed).[23] Of course, paragraph (c) also must be met and, at the time of importation, when the sub-section comes to be applied, paragraph (a) requires that the object be a "protected object of a foreign country" to be liable for forfeiture.

17. *Thirdly*, it is common ground that s 14(1) comes to be applied at the time the object is imported into Australia: that is apparent from the use of the present tense ("is") in s 14(1)(c). It is also common ground that the importation into Australia, envisaged by s 14(1), is an act that occurs post-commencement of the provision. It is the time of importation that can be described in that sense as the legal present (as the primary Judge did).[24] That is not to say that exports of protected objects from a foreign country prior to the date of commencement must be ignored for the purposes of determining whether s 14(1), read as a whole, is satisfied. A history of export of the relevant object prior to the commencement of the Act from a foreign country, in prohibition of a law of that country relating to cultural property, is of relevance at the time of importation by reason of s 14(1)(a) and (b) being read in the context of each other and of the section as whole. As observed below, s 14(1) operates prospectively (i.e. attaching to any import that comes to occur after commencement), but by reference to antecedent circumstances and characteristics of the object. There is nothing unusual about such a provision.

18. It is no answer to these submissions as to the text of s 14(1) and the need to read that sub-section as a whole and in context simply to say, as does the Appellant, that "has been" in paragraph (a) is present perfect and "was", in paragraph (b), is past tense – especially where (as here) the export (of the protected object) was one meeting paragraph (b) and has present relevance at the time of importation (see paragraph [5] above).

[23] Banks-Smith and Abraham JJ at [17] (CAB 128).
[24] PJ [345] (CAB 103).

19. *Fourthly*, s 14(2) is also part of the context of s 14(1). Leaving aside the presence of the mental element in s 14(2) and its provision for a penalty, there is no difference in substance between paragraph 14(1)(a) and (2)(a). Both s 14(1)(a) and (2)(a) are talking about an object which, viewed at the time of importation (when the provisions come to be applied), "is a protected object of a foreign country [that] has been exported" and these are "current circumstances" which exist at the time of import (Banks-Smith and Abraham JJ at [14] (CAB 127), also there finding s 14(1)(b) and (2)(b) to be "circumstances which exist at the time of import"). Banks-Smith and Abraham JJ were correct in seeing s 14(2)(a) as supporting their view as to the construction of s 14(1)(a) and also in their observations regarding s 14(1)(b) and (2)(b).

20. See also, in this respect and more widely, the reasoning of Banks-Smith and Abraham JJ especially at [17] (CAB 128) and [19] (CAB 129) (absence of a time limit on when the imported object was exported); [18] (128) (questioning the importance afforded by the primary Judge to the use of the present perfect in s 14(1)(a)); [21] (CAB 129) (identifying that "the text read in context [of s 14(1)(a)] reflects that the focus of the subsection is that the object is a protected object"); [22] (CAB 129) (the significance of s 14(2) to the interpretation of s 14(1)(a)); [23] (CAB 130) (the basis for both s 14(1)(a) and (b) and why there is no "redundancy" in s 14(1)(a) if it reaches pre-commencement exports); [24] (CAB 130) (finding that "sections 14(1)(a) and 14(2)(a) are directed to the character of the object at the time of import" – it needing to be established that the object is a "protected object" at the time of import – and "the use of the present tense is explicable in that context"); and [25] (CAB 130) (stating their Honours' conclusion that the text of s 14(1), considered in context and given its purpose, provides no basis to limit its application to post-commencement exports).

21. *Fifthly*, contrary to the rationale of the primary Judge as to "redundancy" or "superfluity"[25] and to the Appellant's submissions, the above submissions cannot properly be met by observing that any object that is imported must previously have been exported. That is, with respect, too simplistic and ignores the inter-relationship between the various paragraphs of s 14(1) and how the paragraphs of s 14(1) inform each other. There is no "superfluity" or "redundancy" involved in the Respondent's approach, and

[25] PJ [351], [357]-[358], [360]-[361] (CAB 104, 106-107, 107).

those findings below were correctly rejected by Banks-Smith and Abraham JJ at [23] (CAB 130), for the reasons their Honours give from [20] (CAB 129). The words "has been exported" may, as submitted above, capture a pre-commencement export of present relevance without doing violence to tense. And, as also described above, the present relevance is supplied by the object, viewed at the time of importation, being or remaining a protected object of a foreign country, the actual export of which from the foreign country was prohibited by a law of the foreign country relating to cultural property. Also, as Banks-Smith and Abraham JJ found at [23] (CAB 130), the fact of importation does not establish that the item is a protected object. Downes J's agreement (at [81] (CAB 144)) with the primary judge that the Commonwealth's construction involved "superfluity" is answered in the same way.

22. *Sixthly*, whereas AS [22] also alleges "ambiguity", those submissions rest upon the proposition that the Respondent is not giving the past export present relevance, but that is answered above. There is no ambiguity. Also, Parliament left to paragraph (b) the task of limiting which completed exports from a foreign country would be liable to forfeiture, in a case where the object is a protected object of a foreign country (as found in this case) and is imported into Australia after the commencement date (as here was not in dispute). See also Banks-Smith and Abraham JJ (at [17], [19] (CAB 129)) as to the absence of a time limit. The text does not require the exclusion of any export on the basis that it is pre-commencement of the Act. See again Banks-Smith and Abraham JJ at [14] (CAB 127) and [16]-[25] (CAB 128-130).

23. *Seventhly*, although the approach of the Respondent and the findings of Banks-Smith and Abraham JJ are consistent with the tense of paragraph (1)(a), their Honours pointed also to other matters referred to above (including at paragraph [20]) which properly supported their conclusion that the text of s 14(1), considered in its context and given its purpose, "provides no basis to limit its application to exports from a foreign country after the enactment of the legislation".[26] Those are all relied upon. As recently observed by a Full Court of the Federal Court of Australia,[27] the task of statutory construction with reference

[26] Banks-Smith and Abraham JJ at [25] (CAB 120).
[27] *Qube Ports Pty Ltd v Construction, Forestry and Maritime Employees Union* [2024] FCAFC 132 at [72]-[76].

to text, context and purpose requires more than merely matching up the statutory text against pronouncements of grammar or usage.

24. *Eighthly*, and in answer to the Appellant's third argument (AS [23]), the Appellant does not assert that any presumption against "retroactivity" (or retrospectivity) operates against the construction argued by the Respondent and found by Banks-Smith and Abraham JJ. The primary Judge was correct to reject the argument put by the Appellant that the provision was, on the Respondent's construction, retrospective,[28] as were Banks-Smith and Abraham JJ,[29] relevantly agreeing with the primary Judge's reasons. Section 14(1) speaks as to the future only by attaching consequences to imports that occur after its commencement.[30] As the primary Judge held at [348] (CAB 104): "Section 14(1) only has effect when an object is imported. Neither before nor after that time does s 14(1)(a) confer rights or impose obligations". A law is not retrospective[31] because it attaches new consequences, in the future, by reference to past events, or where it takes account of antecedent facts and circumstances as a basis for what it prescribes in the future.[32] That is all that s 14(1) does.

25. *Ninthly*, in answer to the Appellant's fourth argument (AS [24]), seeking to draw support from the presence of s 14(2)(a) and from s 14(2) being a criminal provision, Banks-Smith and Abraham JJ considered s 14(2) as part of their examination of the context of s 14(1)(a) and, for the reasons given by their Honours at [21]-[25] (CAB 129-130), the presence of s 14(2) does not assist the Appellant, and instead aids the construction reached by their Honours.

26. *Tenthly*, the following important definitions in the Act support the proposition that the Act is unlikely to be excluding all pre-commencement exports from a foreign country in the way that the Appellant contends. The expression "protected object of a foreign country", which occurs in s 14(1)(a), is defined in s 3 of the Act to mean "an object

---

[28] PJ [348]-[350] (CAB 104).
[29] Banks-Smith and Abraham JJ at [33] (CAB 132).
[30] *Chang v Laidley Shire Council* (2007) 234 CLR 1 at [113] (Hayne, Heydon and Crennan JJ).
[31] In any of the senses that retrospectivity has been used: cf. *Stephens v The Queen* (2022) 273 CLR 635 at [29].
[32] See eg. *Robertson v City of Nunawading* [1973] VR 819 at 823; *R v Roussety* (2008) 24 VR 253 at [18]-[19] (Nettle JA; Vincent, Ashley, Redlich and Weinberg JJA agreeing); *Minogue v State of Victoria* (2018) 264 CLR 252 at [110]-[111] (Gordon J); *Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at [57] (McHugh and Gummow JJ); *Chang v Laidley Shire Council* (2007) 234 CLR 1 at [113].

forming part of the movable cultural heritage of a foreign country". Then, "movable cultural heritage of a foreign country" is defined in s 3(5) of the Act. It is clear from that latter definition that it may include objects that are of importance to that country, or a part of it, for (amongst other things) "ethnological", "archaeological" or "historical" reasons. Given the nature of movable cultural heritage of a foreign country, one would expect very clear words if the Act was excluding all pre-commencement exports (see Banks-Smith and Abraham JJ at [21] (CAB 129)).

27. *Eleventhly*, the following further submissions are made in answer to AS [23]-[26], where the Appellant submits that s 14 is, on the construction of the Respondent and Banks-Smith and Abraham JJ , "unjust", "unworkable", "unreasonable", or "inconvenient" – the Appellant placing particular reliance upon Downes J at [88] (CAB 146) as forensic difficulties that may be encountered by an importer in establishing whether a pre-1987 export from a foreign country is movable cultural heritage of that country exported at a time when its export was prohibited by a law relating to cultural property. This really comes down to a criticism of Parliament's policy choice, such choice being reflected in a contextual and correct reading of its language, which does not displace the matters in favour of Banks-Smith and Abraham JJ's' interpretation.[33] As submitted above, the terms of the provision are clear, and, properly construed as above, do not exclude pre-commencement exports from foreign countries. That is so regardless of whether the importer bears the onus of proof, but in fact it is the Commonwealth (and not the importer, such as, here, the Appellant) who carries that onus of establishing the elements in s 14(1) to sustain the case that the object is liable to forfeiture. That is because, once an object is seized,[34] the owner, or person who had possession, custody or control of the object immediately before seizure may bring proceedings for the recovery of the object.[35] In such a proceeding, the object must be returned to that person, unless the Court determines that all the elements of s 14(1) are made out.[36] Accordingly, it is ultimately the Commonwealth that must overcome any forensic difficulties presented by matters such as the age of the object or the circumstances of its export. It was common ground,

[33] *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1998) 83 FCR 511 at 519 (Black CJ and Sundberg J); *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 273 CLR 21 at [29] (the Court).
[34] Section 34 of the Act.
[35] Section 37(1) of the Act.
[36] Section 37(3)(b), (d), (e).

and accepted by the primary Judge, that the Commonwealth bore the onus in this way.[37] Likewise, in a prosecution under s 14(2), the Respondent would bear the onus of proving each element (as well as the requisite knowledge).

28. Also, the subject of investigating whether something falls within s 14 and the definition "movable cultural heritage of a foreign country" will typically involve investigative difficulty, even on the Appellant's construction, because of the need to show provenance and circumstances of past export in relation to very old objects which may necessarily involve delving back a very long time. Further and as found by Banks-Smith and Abraham J at [29] (CAB 131), rejecting the corresponding argument of the Appellant, "it would be expected that an importer of such an object would attempt to satisfy themselves as to its provenance to avoid any risk of forfeiture". Whatever difficulties an importer may face upon the Respondent's construction, they do not show unworkability or unreasonableness and certainly do not warrant a departure from the construction contended for by the Respondent in circumstances where the factors favouring that construction are so strong. Further, any inconvenience that might arise from the Act capturing pre-commencement exports is better viewed as a policy choice made by Parliament.[38]

29. Finally, it is noted that, for completeness, Banks-Smith and Abraham JJ addressed, correctly, the alternative construction postulated by the primary Judge, referred to by Banks-Smith and Abraham JJ at [7] (CAB 126) and [9] (CAB 127), for which neither party has contended. The primary Judge did not find it necessary to decide the correctness of the "alternative construction".[39]

Context of section 14(1)(a)

30. The need to consider in context s 14(1)(a), including the use of "has been", has already been discussed under the prior heading dealing with textual considerations. Text cannot

[37] PJ [5], [8] (CAB 10, 11).
[38] *Commissioner of Police (NSW) v Cottle* (2022) 276 CLR 62 at [33] (Kiefel CJ, Keane, Gordon and Steward JJ), citing *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1998) 83 FCR 511 at 519 (Black CJ and Sundberg J); *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 273 CLR 21 at [29] (the Court).
[39] PJ [378] (CAB 112).

be properly understood other than in context. In this case, aspects of context which are particularly relevant and which have been raised above are as follows:

a. The need to read s 14(1)(a) with the remainder of s 14(1) and to appreciate how paragraphs (a), (b) and (c) inform each other and operate together. Reaching the correct interpretation is not a simple matter of noting that the present perfect "has been" is used in paragraph (a), and that the past "was" is used in paragraph (b). The breadth of s 14(1)(b) as to time points strongly against the section being limited to post-commencement exports.

b. Insofar as the use of the present perfect tense in the expression "has been exported" may suggest that past exports are being referred to only if of present relevance, consideration of the paragraph, in the context of the sub-section as a whole, aids in identifying what present relevance is being looked for in this case. Thus, as submitted above, the completed export from Bolivia found by the primary Judge has present relevance because the object is a protected object of Bolivia, its export from Bolivia falls within paragraph 14(1)(b), and (as was common ground in the present case) the object is imported into Australia after the commencement of the Act.

c. Sub-section 14(2) is also part of the context of s 14(1)(a), and its presence supports the construction of s 14(1) that was found by Banks-Smith and Abraham JJ.[40] As held by their Honours,[41] the fact that s 14(1)(a) and (2)(a) are directed to the character of the object (a protected object of a foreign country) at the time of importation itself explains the use of the present perfect tense in s 14(1)(a).

d. The definitions (see s 3 of the Act) of "protected object", "protected object of a foreign country", and the definition in s 3(5) of "movable cultural heritage, in relation to a foreign country" are part of the context of s 14(1)(a) and help explain the unlikelihood of the Appellant's construction being correct, or intended by Parliament.

e. The title of the Act (as per s 1) is also an indicator that the Act's purpose is to protect movable cultural heritage, defined as just explained.

[40] Banks-Smith and Abraham JJ at [21]-[24] (CAB 129-130).
[41] Banks-Smith and Abraham JJ at [24] (CAB 130).

31. As already submitted, all of these aspects of context favour the Respondent's construction of the provision and support the correctness of the construction reached by Banks-Smith and Abraham JJ. Also, the absence from one part of the Act of provisions found in another part of the Act is itself part of context. See paragraph [33] below in this respect.

Purpose

32. Contrary to AS [28], Banks-Smith and Abraham JJ correctly identified the purpose of the Act, as regards movable cultural heritage of foreign countries (as submitted above). Textual support is provided by the presence of s 14 itself, read in context, as well as by the title of the Act and by the way in which s 3 defines "protected object of a foreign country" – a concept immediately reached in s 14(1) (as explained in paragraph [26] above).

33. AS [29] makes reference to provisions of the Act in relation to exports from Australia of movable cultural heritage of this country. Those are not helpful to the Appellant. The Act is structured and drawn to provide a separate and different regime, for the control of exports from Australia of Australian protected objects (Part II Division 1 (ss 7-13A)), and for the importation into Australia of protected objects of a foreign country (Part II Division 2 (which contains only s 14)). Because the provisions referred to by the Appellant (AS [29] – ss 7, 8, 10 and 12) all relate only to the exportation of Australian movable cultural heritage and are not repeated in s 14, they are not relevant to the interpretation of s 14 in the present case.

34. Contrary to AS [31], Banks-Smith and Abraham JJ of the Full Court were not seeing the Act as purposed to limit black-market trade of movable cultural heritage "simpliciter". Rather, they recognised (as explained above) that s 14 attaches the consequence of liability to forfeiture to the importation into Australia (post-commencement) of objects meeting s 14(1)(a) and (b). Their Honours (at [15] (CAB 128)) also noted the requirement in s 41.

35. Contrary to AS [32], the purpose of s 14 is not to "inhibit the unlawful removal from foreign countries of movable cultural objects…". The regulation of removal is a matter

for the foreign country and its own laws (as s 14(1)(b) recognises, by reference to the laws of that other country). Section 14 is regulating importation *into Australia* of movable cultural heritage of foreign countries in the way contended above. AS [32] also uses an expression "forward-looking", which is not taken from the statute. Of course, s 14 of the Act is only applying to protected objects of foreign countries *imported* into Australia after the commencement date, meeting its terms, but the use of the expression "forward looking" does nothing to aid the Appellant's argument that s 14 is not concerned at all with goods exported from a foreign country prior to the date of commencement of the Act. It is, in reality, a statement that assumes the correctness of the Appellant's own construction. Also, AS [32] contains a statement by the Appellant of what it contends to be the purpose of the provision, which it there describes as 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 levels in certain countries'". But an important element of what Minister Cohen was referring to, in the part of his speech[42] referred to by the Appellant, is the loss and removal of objects from foreign countries that has already occurred.[43] It would not aid or address any such "crisis" if any object illegally exported from the foreign country prior to the commencement of the Australian Act was entirely excluded from the reach of that Act. It is highly unlikely that the drafting choices made by Parliament were intended to create a situation whereby *any* object that is part of the movable cultural heritage of a foreign country and was illegally exported from that country before the date of commencement of the Act, could after commencement of the Act find safe-haven in Australia. That would not rest comfortably with any recognition that the unlawful export of such objects had *already* reached crisis levels by the time Parliament acted. Also, if that was the intention, it is surprising that it is not expressly stated. If relevant at all, the quoted words favour the Respondent, not the Appellant.

36. Any inconvenience does not, in any event, support the Appellant's interpretation, when text, context and purpose all point against it, and more so when the subject matter includes antiquities, and the alleged inconvenience is largely a product of the age of the

[42] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 1985 at 3739 (Barry Cohen, Minister for Arts, Heritage and Environment).
[43] Cf. eg. the reference to "in recent decades", "systematic looting…that is known to be organised", and "the loss of material has reached crisis levels".

object or the circumstances of its removal from the foreign country. The above submissions (at paragraphs [27]-[28]) under earlier headings on the subject of alleged inconvenience are repeated in relation to purpose. Again, any inconvenience that might arise from the Act capturing pre-commencement exports is better viewed as a policy choice made by Parliament.[44]

Explanatory Memorandum

37. The Appellant first refers to the explanatory memorandum at AS [33] and footnotes 17-18 and 20, noting that it refers to "export controls" and "import controls" and indicates that the "[i]mplementation of the Act will enable Australia to become a party to the 1970 [Convention]". As already demonstrated, the Act plainly makes separate and different provision in relation to "export controls" and "import controls". They are not to be equated. Also, both the primary Judge[45] and Downes J[46] found no assistance in the explanatory memorandum in resolving the question of construction in the present case. Their Honours were correct to take that view. Nothing is said in the explanatory memorandum in sufficient detail to aid upon the particular constructional issue before the Court, one way or the other. (Also, as will be specifically discussed under its own latter heading, the Convention is ultimately of no assistance for the reasons given by the primary Judge and by Banks-Smith and Abraham JJ.)

38. At AS [34], the Appellant quotes a passage from the explanatory memorandum (cited at footnote 20). The passage quoted does not suggest that the purpose of the legislation is "enabling foreign countries to restrict the movement of property out of that foreign country" (as the Appellant submits it to be). Rather, it simply indicates that "imported objects… forming part of the cultural heritage of the country will not be seized unless a formal request for return of the object has been received from the government of that country". That is not a statement that the Act cannot reach any pre-commencement export from a foreign country, nor is the following paragraph of the Appellant's quote (AS [34]). Instead, this issue came to be reflected in s 41(1) of the Act. The second

[44] *Commissioner of Police (NSW) v Cottle* (2022) 276 CLR 62 at [33] (Kiefel CJ, Keane, Gordon and Steward JJ), citing *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1998) 83 FCR 511 at 519 (Black CJ and Sundberg J); *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 273 CLR 21 at [29] (the Court).
[45] PJ [376] (CAB 111).
[46] PJ [70] (CAB 29).

paragraph of the quote should be understood in light of the fact that s 14(1) does not affect any person's right to enjoyment of property prior to importation into Australia, but if the object is imported into Australia after commencement, it will then be liable to forfeiture (if it is movable cultural heritage of a foreign country meeting paragraph (b) of s 14(1)). In any event, this paragraph of the explanatory memorandum simply does not say that pre-commencement exports from a foreign country are excluded from the operation of the Act.

Second Reading Speech

39. The Appellant then makes submissions in relation to the second reading speech at AS [33] and [35]-[39]. The Appellant submits (AS [33], [36]), that the second reading speech indicates the purpose of the Act in relation to import controls was "not complete protection" in relation to all exports from foreign countries. The Respondent does not contend that s 14 does protect *all* such exports: s 14(1) only renders liable to forfeiture goods with the characteristics in paragraphs (a) and (b), and which are imported into Australia post-commencement (paragraph (c)). Again, what is quoted by the Appellant does not say that the Act will not apply to all pre-commencement exports from foreign countries of movable cultural heritage of those countries.

40. The primary judge, unlike Banks-Smith and Abraham JJ, saw the second reading speech as slightly favouring the Appellant's interpretation.[47] This appears to be particularly based upon the "line across history" in the second reading speech (to which the Appellant refers at AS [38]). In relation to this, the primary Judge appears to have particularly erred by not recognising that the reference in the second reading speech to drawing a "line across history" (to the extent that they apply to objects imported into Australia) was referring to the fact that s 14 would only capture protected objects of foreign countries *imported into Australia* after the commencement of the Act. Those words do not exclude – and are not explained in the speech to have the purpose of excluding – all exports from foreign countries before the commencement of the Act. They relevantly sought to draw a line only where the transfer or importation into Australia would be after the commencement of the Act.

[47] PJ [365]-[372] (CAB 108-110).

41. AS [39]-[40] are answered similarly. The reference to systematic looting of cultural treasures or "black market" operations in the second reading speech also just do not say that past illegal exports from foreign countries will not be liable to forfeiture if imported after commencement with the history described in s 14(1)(a) and (b). Further, the Respondent's interpretation of s 14(1) does not give the Act a "restitutionary" operation (contra what AS [40] appears to suggest). Section 14 is not affecting at all objects imported into Australia pre-commencement, and it does not lead to any "restitution" of such items. It only captures imports prospectively occurring.

10 42. Banks-Smith and Abraham JJ correctly found that consideration of the extrinsic material was unnecessary because the construction of s 14(1) "is clear" (at [27] (CAB 131)) and that followed from their analysis of the text and statutory context of s 14 (and what that showed about purpose).[48] Nonetheless, Banks-Smith and Abraham JJ did examine the second reading speech and expressly found (at [27] (CAB 131)) that it did not in any event "tell against" their own construction of s 14. Their Honours gave, with respect correctly, a number of specific reasons why that was so:[49]

a. There is nothing in the parts of the second reading speech relied on by the primary Judge,[50] or p.3741 of the second reading speech, that is contrary to its own construction.

20 b. The Act is not about "restitution" because of the way in which its "import control" is directed to import into Australia after the Act was enacted.

c. The absence of any suggestion in the second reading speech, properly read, including the reference to "transfers", that the provisions are designed to be limited to exports after the commencement date.

d. Such a limitation would "significantly confine the operation and effectiveness of the Act". The Act applies to imports from a second foreign country after export from the foreign country of origin (as well as direct exports) and has the purpose, evident in its text, of the protection of movable cultural heritage by limiting trade in such items.

---

[48] Cf. *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [70] (Crennan and Bell JJ); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [31]-[34] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Kline v Official Secretary to the Governor-General* (2013) 249 CLR 645 at [32] (French CJ, Crennan, Kiefel and Bell JJ).
[49] Banks-Smith and Abraham JJ at [29] (CAB 131).
[50] PJ [365] and [372] (CAB 108 and 110).

This paragraph, and the last three, also answer Downes J at [91] (CAB 147).

The Convention

43. The primary judge correctly found[51] the Convention to provide no assistance to the task of statutory interpretation in this case. This was a practical assessment of the usefulness of the Convention in determining the issue before the Court, based upon a comparison of the particular statutory provisions in Australia at issue here and the terms of the Convention. His Honour found that Convention was of no assistance, essentially because the differences between s 14 of the Act and the Convention are "too large to make comparison useful" and "the Parliament was seeking to put in place a regime dealing with the export and import of cultural heritage which was not connected to the operation of the Convention".[52] His Honour added[53] that he accepted that there were parts in the second reading speech indicating an intention that Australia would be complying with its obligations under the Convention if Australia acceded to the Convention, but those could only be useful if one party's construction would be inconsistent with the Convention and neither party submitted that the other's interpretation would be in breach of the Convention. Banks-Smith and Abraham JJ agreed[54] with the primary judge that the Convention did not assist, finding that the Convention was ultimately of no assistance because:

    a. "The Act does not refer to or adopt the Convention and s 14 is not linked to Australia's accession to the Convention".
    b. "Australia did not accede to the Convention until 1990, three years after it was enacted".[55]
    c. There is nothing in the Act confining its application to signatory countries (whereas the Convention is, in terms, limited only to signatories).
    d. Section 14(1) "is in wider terms and has an obviously broader application…" than the Convention – e.g. the Act is not confined to the position of museums (cf Art 7) and the power of inspectors to relevantly seize a protected object of a

[51] PJ [373], [375] (CAB 110, 111).
[52] PJ [375] (CAB 111).
[53] PJ [375] (CAB 111).
[54] Banks-Smith and Abraham JJ at [32] (CAB 132).
[55] That was well after the dates there noted by their Honours when the Convention was opened for signature (14 November 1970) and entered into force (24 April 1972).

> foreign country is not linked to the absence of an appropriate export certificate (as referred to in Art 6 of the Convention), but rather a belief that the Commonwealth has received a request for return from a foreign country.[56]

44. The Appellant accepts (AS [41]) that the Convention was not enacted as part of Australian law and that "there is no presumption that the text of the Act should be interpreted consistently with the manner in which the Convention has been interpreted", but the Appellant's submissions do attempt to incorrectly subordinate the Act to the Convention, as does the dissenting judgment of Downes J (including at [76]-[78] (CAB 143-144)). Downes J's disagreement (at [78] (CAB 144)) with the primary judge's finding that the Convention was of no assistance was based upon the "apparent link between the authorisation scheme required to be introduced by the Convention and the references to export authorisation in the second reading speech", but her Honour's reasons do not grapple with the absence from s 14 (or the rest of the Act) of a regime based on authorisations of foreign countries for export, or upon any statutory obligation upon importers to obtain such authorisations. Similarly, her Honour's treatment of the second reading speech (at [75]-[76] (CAB 143)) is to use that speech to discern an intention to prevent importation into Australia of a protected object which did not have authorisation issued by the foreign country, or "to impose an obligation upon importers to ensure the requisite export authorisations had been issued by the foreign country", when that is plainly not part of the enactment.

45. Contrary to AS [42] and following, Banks-Smith and Abraham JJ were not saying that the Convention could never assist the task of construction where there is ambiguity, or anything contrary to what is referred to by the Appellant in those paragraphs. Rather, here, the Act operated in a manner that was so different to the Convention in the ways explained by the primary Judge and Banks-Smith and Abraham JJ, that it simply did not, as a practical matter, assist upon the specific construction issue before the Court.

46. Further, with respect to the specific indications of "non-retroactive operation" in the Convention, to which the Appellant refers at AS [45]-[46], those do not have any equivalent in the text of s 14 of the Act and do not assist – as the primary Judge correctly

[56] As noted above, s 41 refers to such requests.

found.[57] Further, to the extent the Appellant suggests that the Respondent's construction would involve retrospectivity or retroactivity, that is also not correct, as explained above at [24]. With respect to the Appellant's reliance (AS [47]) upon the Convention's regime of export authorisation, that also is not to be found in the Act as regards imports of foreign cultural heritage. Contrary to AS [48], it follows from the above submissions that neither the Second Reading Speech nor the Convention assists the Appellant. Finally, with respect to the Canadian case referred to by the Applicant at AS [48] and its footnote 38, that is of no utility for the reasons given by the primary Judge[58] and by Banks-Smith and Abraham JJ.[59]

10

Part VI: Cross-appeal or Notice of Contention

47. There is no notice of cross-appeal or notice of contention.

Part VII: Estimate of time for oral presentation of Respondent's argument

48. The Respondent estimates that 60 to 90 minutes is required for presentation of its argument.

Dated 30 January 2025

20

…….. ……..
Geoffrey Johnson SC Nicholas Swan
11th Floor St James Hall 11th Floor St James Hall
(02) 8226 2344 (02) 8226 2391

[57] PJ [374]-[375] (CAB 111).
[58] PJ [379] (CAB 112).
[59] Banks-Smith and Abraham JJ at [35] (CAB 133).

ANNEXURE TO RESPONDENT'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	*Protection of Movable Cultural Heritage Act 1986* (Cth)	Version 18 (21 October 2016 to 21 August 2023)	ss 1, 3, 14, 34, 37, 41	Act in force on the date of the Artefact's seizure, and the date first instance proceedings were commenced by the Appellant.	17 May 2021: Artefact taken to have been seized under the Act. 16 June 2021: Judicial review proceedings commenced by the Appellant in the Federal Court of Australia.