HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY
BETWEEN: **OLEG VLADIMIROVICH DERIPASKA**
Appellant

and

MINISTER FOR FOREIGN AFFAIRS
Respondent

APPELLANT'S SUBMISSIONS

PART I CERTIFICATION

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

PART II ISSUES

2. The sole issue is whether regs 14 and 15 of the *Autonomous Sanctions Regulations 2011* (Cth) (**ASR**) may be "read down" as they were by the court below: FC[84]. Specifically, can those provisions be construed so that they do not apply to conduct that is undertaken "for the purpose, in an objective sense, of challenging the validity of decisions or actions" under the *Autonomous Sanctions Act 2011* (Cth) (**ASA**) pursuant to s 75(v) of the Constitution or s 39B(1) of the ***Judiciary Act** 1903* (Cth) (collectively, the **Challenge Purpose**)? That raises two subsidiary questions: (1) is such a "reading down" a permissible exercise in statutory construction, and (2) if it were permissible, would it, in any event, save the regulations from invalidity?[1]

PART III SECTION 78B NOTICES

3. Notices under s 78B of the *Judiciary Act* have been filed and served (CAB 128).

PART IV CITATION OF DECISIONS BELOW

4. The decision of the primary judge is *Deripaska v Minister for Foreign Affairs* [2024] FCA 62 (**PJ**) (CAB 4-61). The decision of the Full Court of the Federal Court is *Deripaska v Minister for Foreign Affairs* [2025] FCAFC 36 (**FC**) (CAB 69-112).

PART V BACKGROUND

5. **Overview.** In March 2022, the respondent (**Minister**) "designated" and "declared" the appellant (**Deripaska**) under ASR reg 6: FC[25]-[26]; AFM 25-28. Relevantly,

[1] This proceeding concerns the extent to which the ASA authorised the making of regs 14 and 15. These submissions address this by asking a "composite hypothetical question" — namely, "[i]f the subordinate legislation in issue had been enacted as legislation, would that legislation have been compliant with the constitutional guarantee in issue?": *Palmer v WA* (2021) 272 CLR 505, [124] (Gageler J).

"designation" makes Deripaska's "access to legal representation a matter for executive discretion": PJ[42]. In summary, that is because without a permit from the Minister, it "will very likely be impossible for a lawyer effectively to advise or represent" Deripaska without committing a criminal offence: PJ[41]. That is the practical consequence of ASR regs 14 and 15. The Minister concedes that regs 14 and 15 would be invalid, if they meant what they said: PJ[51]. But the FC held that those provisions can be "read down", pursuant to s 15A of the *Acts Interpretation Act 1901* (Cth) (**AIA**), so as not to apply to conduct that is undertaken for the Challenge Purpose (the **Partial Disapplication**): FC[84]; see above at [2] for the full expression of the Partial Disapplication.

6. **Legislative regime.** The ASR were made pursuant to ASA ss 10 and 28. Subsection 10(1)(a) provides that the regulations "may make provision relating to … *proscription* of persons". "Proscribe" means "put outside the protection of the law": PJ[115]. Section 12 of the ASA provides that the regulations "have effect despite" any Act that was enacted before the ASA commenced in 2011. Notably, therefore, the ASR "have effect despite" s 39B(1) of the *Judiciary Act*.

7. Regulation 6 of the ASR empowers the Minister to "designate" and "declare" persons. The Minister may also revoke such a decision, including upon an application being made by the person who is the subject of the decision: ASR regs 10, 11. A person's status as a "designated" person (**DP**) brings regs 14 and 15 into operation. Regulation 14 (entitled "Prohibition of *dealing with* designated persons") prohibits anyone (including a lawyer) from "directly *or indirectly*" making any "asset available to, *or for the benefit of*," a DP. Regulation 15 prohibits a DP and any other person (including a lawyer) from "using" or "dealing with" a DP's "assets", and from "allowing" or "facilitating" such use or dealing. For the purposes of both provisions, "asset" means "an asset of any kind or property of any kind", as well as any "legal document or instrument in any form (*including electronic or digital*) evidencing title to, or interest in," another asset or property: ASA s 4.

8. The prohibitions in regs 14 and 15 are criminal offences. That is because they are specified as "sanction laws" pursuant to ASA s 6: FC[17]. This makes their contravention by a DP or his lawyer an offence punishable by up to 10 years' imprisonment: ASA s 16. Pursuant to ASA s 11, the offences have extraterritorial effect: ASR regs 14(2), 15(2). The scope of that extraterritorial effect is defined by s 15.1 of the *Criminal Code* (Cth)

(**Code**).[2] With one exception, the fault element in relation to the conduct that constitutes the offences in regs 14 and 15 is "intention": Code s 5.6(1). The exception is that strict liability applies to the circumstance that the relevant conduct is not in accordance with a ministerial permit: regs 14(1A), 15(1A).

9. The Minister may grant such a permit, allowing a person to engage in conduct that would otherwise be prohibited by regs 14 or 15: reg 18(1)(e), (f). But she may do so only if satisfied that this "would be in the national interest": ASR reg 18(3)(a). That imports a broad "discretionary value judgment": *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379, [42]. The present litigation was able to be commenced — and any advice in relation to that commencement was able to be given — only by virtue of a permit from the respondent to that very litigation (i.e. the Minister). Such a permit may be revoked at any time: AIA s 33(3). Notably, a DP specifically requires a permit for "basic expense dealings": reg 20(2)(a). Such "dealings" include payments for legal expenses and professional fees: regs 20(3)(b)(vii) and (viii).

10. Separately, the effect of the Minister's "declaration" of Deripaska (as opposed to "designation") is that a Commonwealth official "either would or could refuse [Deripaska] a visa to enter Australia" (FC[34]) by reason of the operation of the *Migration Regulations 1994* (Cth): PJ[13].

11. **Practical effects of regs 14 and 15 on legal advice and representation.** As mentioned above at [5], regs 14 and 15 prevent a DP from receiving advice or representation from a lawyer in Australia. In summary, this consequence arises because: (1) a DP "is prevented from remunerating an Australian lawyer" (PJ[41]); and (2) even if a lawyer were prepared to work for free, the lawyer-client relationship would nevertheless entail the DP and lawyer engaging in the forms of conduct that are prohibited by regs 14 and 15. It is convenient to begin with the impact of reg 15. In order for a lawyer to advise or represent a DP, it is inevitable that documents (or other property) owned by the DP must be "used" or "dealt with" by that lawyer (within the meaning of reg 15). A reason for this is that documents brought into existence or received by a solicitor when acting as the client's

[2] Relevantly, an offence is committed where: (1) the conduct constituting the offence occurs wholly "*or partly*" in Australia (Code s 15.1(1)(a)(i)); (2) where that conduct occurs wholly outside Australia but with a result that occurs at least "partly" in Australia (Code s 15.1(1)(b)(i)); or (3) where the offence is an "ancillary offence" (such as "attempt" or "incitement") that occurs wholly outside Australia, but where the conduct constituting the "primary offence", or a result of that conduct, occurs (or is intended to occur) wholly or partly in Australia (Code s 15.1(1)(d)). "Ancillary offence" is defined in the Dictionary to the Code.

agent are the property of the client (and hence are the client's "assets" for the purposes of reg 15): ***Wentworth*** *v De Montfort* (1988) 15 NSWLR 348, 353F. The same is true of other documents that a solicitor brings into existence for the benefit of the client: see, e.g., *Wenworth*, 359D. For example, reg 15 prohibits a DP's lawyer from using or dealing with proofs of evidence, documents involving counsel (such as a written opinion or brief), or correspondence with officers of the court; all of these are property of the DP: *Wentworth*, 359A, 360G, 361B. Plainly, also, reg 15 prohibits a solicitor from using or dealing with funds held on trust for the DP (including funds necessary for the payment of court fees or other disbursements). Moreover, under the ASR, the position is even more stringent than at general law, because a DP's assets include certain documents — such as contracts — in digital form: see above at [7]. Regulation 15 prohibits a lawyer from using or dealing with such documents, or "facilitating" such use or dealing. Regulation 15 also prohibits the DP from "facilitating" the solicitor's "use" or "dealing".

12. Separately, reg 14 prevents a lawyer from directly *or indirectly* making any kind of property (including intellectual property) — whether owned by the lawyer or someone else — "available to, or for the benefit of," a DP client. For instance, the lawyer cannot make his or her own notes or memoranda, or other documents in which the lawyer retains ownership, "available to, or for the benefit of," a DP client. At trial, Deripaska adduced affidavit evidence of his solicitors' dealings with "assets", which would contravene regs 14 or 15 in the absence of a ministerial permit: AFM 7-8 [6]-[13].

PART VI ARGUMENT

A. PROBLEMATIC FEATURES OF THE PARTIAL DISAPPLICATION

13. Deripaska submits that the Partial Disapplication is "a complete and impermissible reformulation" of regs 14 and 15: ***Chu Kheng Lim*** *v Minister* (1992) 176 CLR 1, 37. It impermissibly involves "re-drafting of a provision" and "the making of policy choices": ***YBFZ*** *v Minister* (2024) 99 ALJR 1, [75]. At the outset, it is important to note ten problematic features of the Partial Disapplication that mark it as an unworkable and impermissible attempt at statutory construction. *First*, it is impossible to apply the concept of a single "objective purpose" to the conduct of a lawyer on behalf of a client. That conduct occurs on a temporal continuum, where multiple different purposes will, by turns, arise and fall away. For much of the time, the sole discernible purpose of the lawyer's conduct will merely be to make inquiries in relation to his or her client's rights or duties. A lawyer might initially inquire into the possibility of seeking relief under

s 75(v) of the Constitution, only to conclude that such a case was not reasonably arguable. Conversely, a lawyer may initially do nothing at all in relation to s 75(v), and only much later direct attention to that jurisdiction. If such a lawyer first drafts originating process seeking nothing other than relief under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), does that conduct have the Challenge Purpose? Does the answer depend on something that the lawyer cannot know or predict at that point — namely, an amendment that occurs only later?

14. *Second*, the Partial Disapplication turns, absurdly, upon an "objective purpose" to seek only particular forms of relief — namely, those identified in s 75(v). The solicitor who drafts an originating process seeking only a declaration (such as the declaration of invalidity sought in this very proceeding) needs a permit, but the solicitor who includes a prayer for an injunction against a Commonwealth officer apparently may not need a permit.

15. *Third*, it is sophistry to suggest that conduct of a DP, who is ignorant of the laws of Australia, has an "objective purpose" of seeking s 75(v) relief, at least until the DP is specifically advised about that option. For example, it is unreal to suggest that if a DP transfers money into a solicitor's trust fund, pursuant to a retainer to advise the DP on his duties under Australian law, then that transfer somehow has the Challenge Purpose.

16. *Fourth*, the concept of an "objective purpose" for conduct is nowhere to be found in regs 14 or 15, nor s 75 of the Constitution, nor s 39B(1) of the *Judiciary Act*. *Fifth*, worse still, regs 14 and 15 are criminal offences that operate by reference to *subjective* intention: see above at [8]. The FC did not explain how the judicially-invented defence of the Challenge Purpose can be reconciled with the *subjective* focus of the relevant criminal offences. *Sixth*, because the Partial Disapplication is the brainchild of the judiciary, rather than of the other branches of government, it is not clear how "objective purpose" is to be discerned or proved. That is especially significant where the stakes are not only criminal liability but also a loss of legal professional privilege if the relevant conduct may lack the Challenge Purpose: *R v Cox* (1884) 14 QBD 153, 167.

17. *Seventh*, the Partial Disapplication cuts against the grain of a statutory regime that is "designedly draconian": PJ[110]. *Eighth*, the Partial Disapplication is inconsistent with the express, unqualified requirement that a DP obtain a permit to pay legal expenses and professional fees: see above at [9]. *Ninth*, the FC's carving-out of rights derived from

s 39B(1) of the *Judiciary Act* is contrary to the statute's express provision that the ASR override that statute: see above at [6].

18. *Tenth*, despite the FC purporting to disapply regs 14 and 15 by reference to a supposed criterion of "objective purpose", the FC (FC[86]) explained its conception of "objective purpose" by using the language that the majority in ***Automotive Invest*** *Pty Ltd v FCT* (2024) 98 ALJR 1245, [110] used to describe *subjective* purpose. There, the majority said, "[a] person's purpose is usually the ultimate end, object or goal that the person seeks to achieve" (language adopted at FC[86]). But the majority's account of *objective purpose* came later in the reasons in *Automotive Invest*, where "objective purpose" was described as the object which conduct "is apt to achieve", determined from the position of "what a reasonable person engaging in the act would expect to achieve": *Automotive Invest*, [116]-[117]. The fact that the FC's mischaracterisation of this distinction needs to be corrected at all — in a context where neither the ASR nor s 75 of the Constitution refers to any standard, criterion or test of "purpose" — is emblematic of the reality that the Partial Disapplication is insupportable. Notably, *Automotive Invest* concerned legislation that actually referred to "purpose", rather than a judicially-invented proviso to legislation in which that concept is nowhere to be found.

B. THE PARTIAL DISAPPLICATION IS IMPERMISSIBLE

19. **Overview.** The Partial Disapplication is not constitutionally permissible because in reality, it is an *ad hoc*, judicially-invented defence to the criminal offences in regs 14 and 15. It is judicial redrafting. And the redrafting is unworkable, in any event. Such redrafting is not what AIA s 15A permits, because it is not what Ch III of the Constitution permits. Such a purported application of s 15A is not "strictly within the limits of judicial power": ***Spence*** *v Queensland* (2019) 268 CLR 355 at [87] (Kiefel CJ, Bell, Gageler and Keane JJ). At once compounding and illustrating its error, the FC explicated its "construction" of regs 14 and 15 by drawing upon this Court's description of *subjective* purpose in *Automotive Invest*, even though the FC was purporting to tell the public what it meant by its own *objective* test: see above at [18]. Beyond the unworkability explained above at [13]-[18], the Partial Disapplication is infected by four specific vices, as follows.

20. **First FC error: failure to safeguard the very jurisdiction that the Partial Disapplication was designed to protect.** In ***Plaintiff S157****/2002 v Cth* (2003) 211 CLR 476, [104], the plurality stated that s 75 "limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review". The limit bites where a law operates to

so curtail or limit the right or ability of applicants to seek relief under s 75(v) as to be inconsistent with the place of that provision in the constitutional structure: ***Bodruddaza*** *v Minister* (2007) 228 CLR 651, [53].

21. Here, the premise of the Partial Disapplication is that s 75(v) protects from legislative interference only such conduct as is undertaken "for the purpose, in an objective sense" of invoking s 75(v) jurisdiction: FC[84]. The FC understood the "objective sense" of purpose to be "the ultimate end, object or goal the person seeks to achieve" (as to which, see above at [18]): FC[86]. This Court has never held that the limitation on legislative power derived from s 75(v) is expressed in this way, nor that it extends only this far.

22. Deripaska's submission is that the Partial Disapplication is self-defeating, because its practical result is that a DP's ability to seek relief under s 75(v) continues to be curtailed to an extent that is constitutionally impermissible.[3] That is because even with the Partial Disapplication, regs 14 and 15 continue to prohibit conduct that is a necessary precursor to a client knowing "their rights and obligations", and thereby having "the capacity to invoke judicial power" (including in s 75(v) jurisdiction): ***APLA*** *Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, [30] (Gleeson CJ, Heydon J); see also [84], [87] (McHugh J), [393]-[394], [396] (Hayne J).

23. One example is conduct of the DP and solicitor at an initial conferral, when the DP gives the solicitor some written contracts to which the DP is party and asks, "what are my rights and duties under Australian law?" For the reasons summarised above at [11]-[12], this initial conferral is almost certain to entail breach of regs 14 or 15. The Partial Disapplication does not ride to the rescue. That is because there can be no Challenge Purpose at this point. That in turn is because at this early point, neither the client nor the solicitor even knows what the issues are — let alone whether there might be any desire or scope to "challenge" the "validity" of any governmental decision, whether it would be advisable to do so, whether a means to do so would be to seek relief under s 75(v), or whether that is what the client in fact wishes to do. Yet if the client *is* ever to pursue s 75(v) relief, then this initial conferral is a necessary precursor to that pursuit. That is because in order to seek s 75(v) relief, the client must first know that the relief is available. And that in turn depends upon the client being able to be advised about it by a lawyer.

[3] Such practical consequences being relevant to the validity of a law that affects the exercise of s 75(v) jurisdiction: *Bodruddaza*, [54].

Yet the Partial Disapplication prevents that from happening, because it applies only where the Challenge Purpose has already arisen.

24. Again, even if the DP and solicitor managed to conduct the initial conferral without breaching regs 14 or 15, the immediate next steps (such as receipt of money into a trust account, or generation of documents that are owned by, or made available for the benefit of, the DP) will inevitably entail such a breach: see above at [11]-[12]. As explained above, the Partial Disapplication does not assist. It would be fanciful to suggest that at this early point, the Challenge Purpose could be discerned in any conduct of the solicitor or DP. For example, how could the DP's transfer of funds into the solicitor's trust account (immediately after an initial conferral) have the Challenge Purpose, when the DP probably does not even know that Australia is a country in which official decision-making can be "challenged" in a court *at all*, let alone "challenged" by seeking the particular kinds of relief that are available under s 75(v)?

25. For these reasons, even with the Partial Disapplication, the effect of regs 14 and 15 remains to nip in the bud any potential invocation of s 75(v) jurisdiction. It is this practical impact that Deripaska says is constitutionally impermissible. In other words, the Partial Disapplication fails to recognise that "the effective exercise of judicial power", including under s 75(v), "depend[s] upon the providing of professional legal services" that enable clients to "know their rights and obligations" in the first place: *APLA*, [30].

26. **Second FC error: failure to discern a limitation in the text or subject-matter of the ASR.** The Partial Disapplication is also impermissible because it cannot be derived from the text or subject-matter of the ASA or ASR. The FC purported to read down "general words or expressions": *Victoria v Commonwealth* (1996) 187 CLR 416 (***IR Act Case***), 502. Chief Justice Latham's reasons in ***Pidoto*** *v Victoria* (1943) 68 CLR 87 are the *locus classicus* of principle on this topic, having been cited numerous times in this Court: e.g., *Spence*, [86]; *IR Act Case*, 502. In *Pidoto*, Latham CJ held that, in the case of general words or expressions, the "standard or test to be applied for the purpose of reading down" is to "be discovered from the terms of the law itself or from the nature of the subject matter with which the law deals" (the **Construction Rule**): at 110-111. Similarly, in ***Re Nolan*** (1991) 172 CLR 460, Brennan and Toohey JJ held that, if AIA s 15A is to authorise partial disapplication, then "there must be discovered in the [relevant Act] or in its subject matter a standard, criterion or test on which the limit can be based": at 487. To the same effect, see ***Clubb*** *v Edwards* (2019) 267 CLR 171, [340] (Gordon J).

Section 15A "does not authorize the Court, by adopting a standard criterion or test merely selected by itself, to redraft a statute or regulation so as to bring it within power and so preserve its validity": *Pidoto*, 111.

27. Five justices of this Court applied the Construction Rule in the *IR Act Case*, where it was held that "[t]he nature and subject matter of the [relevant statute] suggest the limitation by which [the impugned provision] may be read down": at 503. That was because the relevant legislation concerned "terms and conditions with respect to employment", and this was "an area where Parliament's legislative power is subject to a clear limitation" — specifically, "the legislative power of the Parliament is limited in the manner explained in" ***Re AEU*** (1995) 184 CLR 188, 231: *ibid*. This was akin to the example that Latham CJ gave in *Pidoto*, concerning the reading down of laws "clearly made with the intention of exercising the power to make laws with respect to trade and commerce": at 109-110. His Honour reasoned that "it is not difficult to read [such a law] down so as to limit its application to inter-State and foreign trade and commerce": at 109. Thus, a law that applies to all ships can be read so as not to apply to ships engaged in intra-state trade: *Newcastle and Hunter River Steamship Co Ltd v A-G (Cth)* (1921) 29 CLR 357, 369-370. A more recent application of the Construction Rule was ***Graham*** *v Minister* (2017) 263 CLR 1, [66], where the impugned provision concerned evidence that could be provided to a "court". Thus, the text or at least subject matter of the law concerned the exercise of courts' jurisdiction. The word "court" was therefore able to be read down by reference to the particular jurisdiction being exercised by a "court" at a given time.

28. In the present matter, however, the FC did not derive the Challenge Purpose limitation from the text or subject matter of the ASA or ASR. To the contrary, the FC held that "reading down is **not** limited to cases where the limitation by which a provision is to be read down may be found in the terms of the law itself or its subject matter, as was mentioned in *Pidoto*": FC[81] (emphasis added). In other words, the FC understood the law to have moved on from *Pidoto* (and *Re Nolan*), so that a court is now empowered to engraft upon any law a "limitation" that may be found *neither* in "the terms of the law" *nor* in "its subject matter". In other words, contrary to *Pidoto*, 111, the FC appears to have thought a court *can* adopt "a standard, criterion or test merely selected by itself".

29. The FC cited two authorities for its approach. The first was the *IR Act Case*, 502-503. But that decision does not support the FC's approach. That is for two reasons. *First*, as mentioned above at [27], five justices in the *IR Act Case* held that "[t]he *nature and*

subject matter of the Act suggest the limitation by which [the impugned provision] may be read down". It is clear that their Honours regarded this as necessary for the reading down to occur, consistently with *Re Nolan* and *Pidoto* (and in stark contrast with the FC in the present case). Their Honours did not read down by reference to a limitation that was alien to the statute, nor did they suggest that it was permissible to do so. *Second*, the FC ignored the fact that the approach adopted in the *IR Act Case* is available only "where a law is *intended to operate in an area* where Parliament's legislative power is subject to a clear limitation": at 502-503. The FC never identified the "area" in which the ASR are "intended to operate", such as to enliven this principle. Nor could it have done so. This is not a case like the one postulated by Latham CJ in *Pidoto*, concerning a law that is intended to engage a head of power like the trade and commerce power (which is subject to a clear limitation as to the kind of trade or commerce that may be regulated): see above at [27]. Nor is this a case like the *IR Act Case*; that proceeding concerned a law governing "terms and conditions with respect to employment", which was an "area" in which Commonwealth legislative power was subject to clear limitations — *viz*., the second two limitations identified in the middle paragraph of p498 of that case, derived from *Re AEU*.[4] Nor is this a case where Parliament has regulated communication, so that the regulation may be disapplied from political communication.

30. The FC appears to have understood the *IR Act Case* — wrongly — as establishing a licence to engage in partial disapplication whenever a law otherwise infringes any constitutional restriction on legislative power, regardless of whether the particular reading down may be derived from the law's terms or subject matter. For the reasons explained above, that is not what the *IR Act Case* establishes. Nor is that surprising; if the Court were free to abandon the Construction Rule — and hence to disregard the question whether a partial disapplication may be derived from the terms or subject-matter of the relevant law — then the Court would no longer be "constru[ing] he statute in the light of s 15A" but instead would "assume the role of legislator … to re-enact a law within power": ***Ravbar*** *v Commonwealth* (2025) 99 ALJR 1000, [181] (Edelman J).

31. The *second* authority that the FC cited for its approach was ***Tajjour*** *v NSW* (2014) 254 CLR 508, [171] (Gageler J, dissenting). There, his Honour reasoned that AIA s 15A could be applied to "read down a provision expressed in general words so as to have *no*

[4] The plurality in the *IR Act Case* picks up the language of these two limitations, verbatim, in articulating the partial disapplication of s 6 of the relevant statute: at 503.

application within an area in which legislative power is subject to a clear constitutional limitation" (emphasis added). For that proposition, his Honour cited the *IR Act Case*, 502-503. For the reasons explained above, the *IR Act Case* does not stand for the proposition that if a law merely happens to infringe a constitutional restriction on legislative power, then the Court is necessarily authorised to engraft a limitation upon it. Rather, what the plurality in the *IR Act Case* held was that a court may read a law "as subject to" a constitutional limitation if the "law is *intended to operate in an area*" (such as "terms and conditions with respect to employment") that is subject to that limitation. Accordingly, the reasons of Gageler J in *Tajjour* are best understood as an orthodox application of the Construction Rule in relation to a law that was intended to regulate communication: see *Tajjour*, [22]. That law was able to be read down by reference to the implied freedom of political communication. Read in context, the reasons of Gageler J in *Tajjour* do not support the FC's approach in the present matter, which was to engraft upon the ASR a limitation without regard to the text or subject-matter of the law. The FC's approach — unmoored from legislative text and subject-matter — is not permissible.

32. **Third FC error: drafting the Partial Disapplication as a matter of "judgment and degree".** It is well established that AIA s 15A does not authorise a court to make a legislative choice between several possible readings down: *Pidoto*, 111; *IR Act Case*, 502. In a revealing sentence, the FC stated, "[t]he precise reading down, so as not to be inconsistent with the constitutional limitation, *is a question of judgment and degree*": FC[84] (emphasis added). But a "question of judgment and degree" is precisely what the judicial selection of a reading down *cannot* be. Such questions are constitutionally reserved to legislators. The FC conflated two distinct questions. The *first* question is whether a particular law operates to so curtail or limit the right or ability of applicants to seek relief under s 75(v) as to be inconsistent with the place of that provision in the constitutional structure: *Bodruddaza*, [53]. That first question *is* "one of substance, and therefore of degree": *Graham*, [48]. The *second* question, which is separate, is how the particular law is to be partially disapplied (if at all) within the limits of what AIA s 15A authorises. That second question *cannot*, constitutionally, be a "question of judgment and degree", because if it *is* such a question, then that means the court is exercising a legislative choice.

33. Here, regs 14 and 15 might have been partially disapplied in a variety of different ways. For example, the FC could have chosen to disapply regs 14 and 15 from conduct that '*might*' ultimately result in a s 75(v) challenge. Instead of the word 'might', other tests could be chosen, such as 'is likely to', or 'is reasonably necessary for', etc. Each of these has practical consequences different to the present Partial Disapplication, which depends upon the presence of the Challenge Purpose. As explained above at [21], the Challenge Purpose may arise only late in a client's engagement of a lawyer. Another possible partial disapplication would be by reference to *subjective* purpose (which, on one reading, is in fact what the FC did in any event: see above at [17]). After all, the notion of "objective purpose" is especially jarring in this criminal context: see above at [8]. Again, a partial disapplication by reference to subjective purpose would have different practical consequences to the Partial Disapplication chosen by the FC. The examples could be multiplied. It is clear that the FC exercised a "judgment" in choosing the Challenge Purpose as the appropriate criterion of limitation — the FC said as much: FC[84]. That was not permissible.

34. The FC appears to have drawn support for its approach from a statement of Gageler J that "reading down can occur even if the constitutional limitation is incapable of precise definition, and even if an inquiry of fact is required to determine whether the constitutional limitation would or would not be engaged in so far as the law would apply to particular persons in particular circumstances": *Tajjour*, [171]; FC[80], [83]. Deripaska submits that Gageler J is not properly understood to have held that if the relevant "constitutional limitation is incapable of precise definition", then the reading down itself is appropriately a "question of judgment and degree" with which a court is permitted to grapple. It is one thing to say that reading down is permissible even if the relevant constitutional limitation is "incapable of precise definition"; it is quite another thing to say that an imprecise constitutional limitation licenses the Court to design its own partial disapplication as a matter of "judgment and degree".

35. Again, the correct approach is illustrated by the *IR Act Case*. There, the plurality was relevantly concerned with the constitutional "prohibition against laws of general application which operate to destroy or curtail the continued existence of the State or their capacity to function as governments": at 498. Relevantly, that prohibition had been held (in *Re AEU*) to entail two specific restrictions on Commonwealth legislative power. *First*, the Commonwealth could not "prevent a State from … determin[ing] the number and

identity of the persons whom it wishes to employ, the term of appointment of such persons and, as well, the number and identity of the persons whom it wishes to dismiss ... on redundancy grounds": *ibid*. *Second*, the Commonwealth could not "prevent the State from determining 'the terms and conditions on which' individuals 'employed at the higher levels of government … shall be engaged'": *ibid*. It was then a simple matter for the plurality to use the language of those limitations to partially disapply s 6 of the relevant Act (a provision which otherwise provided that the Act bound the Crown in right of the States): at 503. Unlike the present case, the limitations involved no questions of "judgment and degree". Unlike the present case, the reading down in the *IR Act Case* involved no choice between different formulations with different practical consequences. Again, the Partial Disapplication is not permissible.

36. **Fourth FC error: infringing this Court's other strictures on partial disapplication.** Even if it is now the case that a law may be read down by reference to a limitation that is alien to that law, and even if judicial selection of a partial disapplication is now a freestanding "question of judgment and degree", Deripaska maintains that the Partial Disapplication remains impermissible, because it otherwise offends against this Court's strictures on reading down. Those strictures mark the boundary between the judicial task of *construing*, and the Parliamentary or Executive task of *legislating*: *Pidoto*, 110; *Spence*, [87]. The Partial Disapplication offends against five strictures.

37. *First*, in *YBFZ*, [75], it was held that AIA s 15A does not permit "the confining of the field of operation of a statutory provision in circumstances where that more confined field is incapable of specification with any certainty". Here, the ambit of the Partial Disapplication is radically uncertain. If a DP wants to pay an Australian lawyer to give general advice about his rights or duties under Australian law, is that prohibited by reg 15? If Deripaska loses the present appeal, does he need a ministerial permit to pay his Australian lawyers for written advice about what this Court's judgment means for him? Is the Challenge Purpose 'spent' by that point? Again, if a barrister provides a written opinion that a DP could seek s 75(v) relief, but that the prospects are poor, does the instructing solicitor breach reg 14 by making the written opinion available to the DP? Does the answer depend upon whether the DP ultimately decides to seek s 75(v) relief? Is a solicitor's conduct at risk of being retrospectively characterised as criminal, depending on whether a DP ultimately gives instructions to pursue s 75(v) relief? Is a lawyer faced with a choice between, on the one hand, breaching his or her duty not to

prosecute an unarguable case and, on the other hand, criminal liability in the event that s 75(v) relief is not ultimately pursued? What if the solicitor draws originating process that seeks relief only in the nature of *certiorari* or a declaration, but later amends it to add an injunction? The FC appears to have assumed that lawyers and clients can somehow divine the ultimate relief that might be sought in a court, before even knowing what the problem is or whether *any* kind of judicial relief should be sought *at all*. The concept of objective purpose runs into problems as soon as it encounters the real world where regs 14 and 15 actually operate. This uncertainty is particularly problematic in the reading down of a criminal provision, which should be "certain and its reach ascertainable by those who are subject to it": *Qantas Airways Ltd v TWU* (2023) 278 CLR 571, [40].

38. *Second*, the Partial Disapplication infringes the rule that "partial disapplication cannot be used if it would alter a statute's general policy or scheme or the specific policy or purpose of the relevant provision. To do so would cross the line between adjudication and legislation": *Clubb*, [431] (Edelman J); see also *Pidoto*, 111; *Spence*, [87]. Here, it is "tolerably clear" (PJ[115]) that the ASR are "designedly draconian": PJ[110]. An indication of this is Parliament's empowerment of the Executive to make regulations providing for "*proscription* of persons": ASA s 10(1)(a). "Proscribe" means "to put outside the protection of the law": PJ[115]. The explanatory statement to the ASR confirms that the policy of reg 15 is to "freeze" a DP's assets: AFM 44. A DP must apply for a permit to pay for any professional fees and legal services (without exception). And the restrictions in regs 14 and 15 were fully intended to override any pre-existing statutory rights, including under s 39B(1) of the *Judiciary Act*. The legislation's general policy, and the specific purpose of regs 14, 15, 18 and 20, is that the effects of these "designedly draconian" prohibitions are moderated, if at all, only by ministerial permit. Such a permit cannot be granted unless it is "in the national interest" to do so: ASR reg 18(3)(a). The Partial Disapplication alters the general policy and specific purpose. The effect of the Partial Disapplication is that, as it turns out: (1) rights derived from s 39B(1) of the *Judiciary Act* are not overridden after all; (2) DPs are not quite "proscribed" after all; (3) DPs' assets are not quite "frozen" after all; (4) DPs do not always need a permit to pay for professional and legal services after all; and (5) the Minister is not, after all, the sole moderator of the "designedly draconian" effects of regs 14 and 15.

39. *Third*, similarly, the Partial Disapplication falls foul of the rule that AIA s 15A must yield to a "contrary intention": AIA s 2(2). Such a "contrary intention" arises where there is a

"positive indication that the legislature did not intend" the relevant provision to have the "distributive application" upon which the partial disapplication depends: *Tajjour*, [169] (Gageler J). For example, if a partial disapplication would make enforcement of a law impracticable, then a "contrary intention" is manifest: *Clubb*, [235]-[236] (Nettle J). In addition to the matters mentioned above at [38], there is a further indicator of a "contrary intention" — namely, that regs 14 and 15 are criminal provisions, liability for which depends upon proof of a *subjective* fault element. From this, it is clear that the provisions are not intended to be given a distributive operation by reference to "*objective* purposes". Quite apart from anything else, it is very difficult to see how those charged with enforcing regs 14 and 15 are supposed to inquire into "objective purposes" of conduct (to say nothing of the people who must work out how to comply with regs 14 and 15).

40. The *fourth* rule that is broken by the Partial Disapplication is the rule against partially disapplying unless the impugned provision "is capable of operating in a distributive manner in respect of each and every part of the subject matter": *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 (***Bank of NSW***), 252; see also ***Re F****; Ex parte F* (1986) 161 CLR 376, 385 (Gibbs CJ). Here, conduct that falls within the Partial Disapplication cannot be separated from conduct that falls outside it. Precisely the same conduct might either constitute the *actus reus* of a criminal offence or it might not constitute a contravention of regs 14 or 15 at all. Take a scenario where a DP deposits $100,000 (of his own money) into the Australian trust account of a solicitor whom the DP retains to advise him on the consequences of his "designation". The solicitor then draws fees from that money. Without the Partial Disapplication, the conduct of both DP and solicitor necessarily contravenes reg 15. Both the DP and the solicitor require a permit under reg 18. But the Partial Disapplication changes this. The effect of the Partial Disapplication is that the conduct of the DP and solicitor may or may not contravene reg 15. The answer seems to depend upon what "objective purpose" is ascribed to their respective "uses" or "dealings" with the DP's $100,000. Permits may or may not be needed. That is a fundamental alteration to the way that the scheme operates. The result is that the scheme does not "operate upon the persons and things affected by it in the same way as it would have operated if it had been entirely valid": *Re F*, 385.

41. *Fifth*, the Challenge Purpose is not an "expression of the constitutional limitation" that is "anchor[ed] … in factual reality": *NZYQ v Minister* (2023) 280 CLR 137, [57]. As a matter of ordinary experience, the purposes of any particular conduct are manifold —

there is rarely a single purpose. Real humans' conduct is not something that is construed objectively from moment to moment. In *Automotive Invest*, in the passage in which the majority in fact explains "objective purpose" (as opposed to the passage to which the FC referred: see above at [18]), their Honours refer to objective purpose as "a construct", which "can only be established by inference from the circumstances as to the purpose that … a reasonable person in the relevant position would have had": at [115]. The problem with attempting to apply this "construct" to regs 14 and 15 is that those regulations contain criminal prohibitions that target the conduct of real humans rather than of "a construct".

C. REGULATIONS 14 AND 15 WOULD REMAIN INVALID, EVEN IF THE PARTIAL DISAPPLICATION WERE PERMISSIBLE

42. Deripaska's submission is that even if the Partial Disapplication were otherwise permissible, regs 14 and 15 would remain invalid. That is for two reasons, as follows.

43. **Prohibition on legal representation in Ch III courts.** As has been explained, the practical effect of regs 14 and 15 is that it "will very likely be impossible for a lawyer effectively to … represent" Deripaska in a Ch III court (absent a ministerial permit that may itself be revoked at any time): PJ[41]. The Partial Disapplication alleviates that problem only to the extent that any conduct undertaken in the course of legal representation is for the Challenge Purpose. In all other circumstances, Deripaska's ability to be legally represented in a Ch III court is at the Minister's mercy. For example, if Deripaska loses the present appeal and then wants to seek a declaration as to the impact of the ASR upon him[5], he cannot be legally represented in his attempt to do so, unless the Minister grants permission. Equally, if Deripaska were himself sued, then his ability to defend himself through a lawyer in a Ch III court is at the Minister's mercy. In this very matter, if Deripaska had not sought the relief mentioned in order 2(b) in the Notice of Appeal (relief that might be thought surplusage) (CAB 125), then his lawyers' prosecution of the proceeding (including in this Court) would have been at the Minister's political discretion.

44. This Court has never had to decide whether Parliament may pass a law that operates to prevent a person from being legally represented in a Ch III court. The FC did not deny that regs 14 and 15 have that effect, but instead appears to have decided that Parliament

[5] For an example of the kind of declaration that might be sought in relation to the operation of the ASR, see *Tigers Realm Coal Ltd v Commonwealth* [2024] FCA 340, [6].

may indeed prohibit legal representation in a Ch III court, simply because no court has held to the contrary: FC[101]-[104]. That is not a recognised mode of judicial reasoning. It is not the case that Parliament may do whatever it pleases unless there is pre-existing judicial authority to the contrary.

45. Deripaska's submission is that Ch III of the Constitution is based "on the assumption of traditional judicial procedures, remedies and methodology": *Polyukhovich v Cth* (1991) 172 CLR 501, 607 (Deane J). "Traditional judicial procedures" require that litigants be permitted to be legally represented if they have the means and desire for that to be so. Thus, it has been said that a "principle inherent in Ch III" is that "persons who have rights under federal law may enforce them in federal jurisdiction with the advice and assistance of qualified legal practitioners in accordance with the traditional judicial process": *APLA*, [87] (McHugh J). Without this, "proceedings in federal jurisdiction would become a mockery of the judicial system contemplated by Ch III": *APLA*, [84] (McHugh J). Put another way, the "effective exercise of judicial power … depend[s] upon the providing of professional legal services": *APLA*, [30] (Gleeson CJ and Heydon J). Doubtless this is why Gummow J in *APLA*, [245], was prepared to concede, without needing to decide, that "a law denying or forbidding" legal representation before a court exercising federal judicial power would be "obnoxious to the exercise of the judicial power of the Commonwealth". This also explains why, in *WA v **Ward*** (1997) 76 FCR 492, 497F, Hill and Sundberg JJ opined, "[w]ere Parliament to pass a law outlawing legal representation before a Ch III court, it may well be that such a law would be held to be invalid as inconsistent with the exercise by Ch III courts of judicial power". To be clear: Deripaska does not assert, and never has asserted, any positive right to legal representation (especially not at public expense). Rather, he submits that the Parliament cannot pass a law that places a person's ability to be legally represented in a Ch III court at the discretion of the Executive. The FC's reference to *Dietrich v R* (1992) 177 CLR 292 is thus beside the point: FC[103].

46. The Partial Disapplication does not address the submissions made immediately above. Proceedings in which s 75(v) relief is sought — and hence where the Challenge Purpose might be present — are only a small subset of proceedings in Ch III courts. The Partial Disapplication therefore does not save regs 14 and 15 from invalidity. To use Gummow J's language in *APLA*, [245], those regulations remain "obnoxious" to Ch III.

47. **Prohibition on invocation of s 75(iii) jurisdiction.** In any event, Deripaska submits that the Parliament cannot place a person's ability to invoke the jurisdiction in s 75(iii) at the discretion of Commonwealth officials. Deripaska's submission is that while Parliament may abolish a particular cause of action that might be brought against the Commonwealth in s 75(iii) jurisdiction[6] (subject to enduring the political consequences of doing so, and subject to the requirements of s 51(xxxi) of the Constitution), it cannot shut a litigant out of that jurisdiction altogether.

48. Regulations 14 and 15 are comparable in effect, though not in form, to provisions that were held to contravene s 75(iii) in *Bank of NSW*. Those provisions were invalid because they purported to prevent certain claims against the Commonwealth from being brought in this Court: *Bank of NSW*, 276 (Rich and Williams JJ), 323 (Starke J), 368 (Dixon J). Justice Starke observed that the jurisdiction conferred by s 75(iii) "cannot be taken away or withdrawn by the Parliament": at 321. In the present matter, while there is no provision that purports expressly to prohibit a DP from invoking the jurisdiction in s 75(iii), that is the *practical effect* of regs 14 and 15. Deripaska submits that "what the legislature cannot do directly, it cannot do indirectly": ***Mutual Pools*** *and Staff Pty Ltd v Cth* (1994) 179 CLR 155, 214 (McHugh J).

49. Deripaska's submissions are supported by various statements of members of this Court. In *Plaintiff M68/2015 v Minister* (2016) 257 CLR 42, [161], Gageler J opined that the "Executive Government and any officer or agent of the Executive Government acting in the ostensible exercise of his or her de facto authority is *always amenable* to habeas corpus under s 75(iii) of the Constitution" (emphasis added). It is difficult to see why a Commonwealth official should be "always amenable" to habeas corpus but not to, say, *certiorari* or a declaration that a law under which they purported to act was invalid.

50. In *Mutual Pools*, 216, McHugh J opined, "it might be thought that the jurisdiction conferred by s 75(iii) was similar to that conferred by s 75(v), which this Court has said cannot be taken away by Parliament, notwithstanding that s 75(iii) is expressed in terms of parties while s 75(v) is expressed in terms of remedies". In *Davis v Minister* (2023) 279 CLR 1, [85], Gordon J stated that "the Executive and the officers of the Commonwealth are always subject to the entrenched jurisdiction of this Court under ss 75(iii) and 75(v) of the Constitution". In *Cth v NSW* (1923) 32 CLR 200, 216 (a case

[6] *Werrin v Cth* (1938) 59 CLR 150, 168 (Dixon J).

that concerned s 75(iii)), Isaacs, Rich and Starke JJ held, "[t]he jurisdiction conferred by s 75 is beyond the power of Parliament to affect. It can aid it and direct the method of its exercise; but it cannot diminish it". And in *Chu Kheng Lim*, 36, Brennan, Deane and Dawson JJ held that Parliament's powers in s 51 of the Constitution are "subject to" the vesting of jurisdiction by s 75(iii). Similarly, at 20, their Honours opined, "[i]f an officer of the Commonwealth is acting in the ostensible exercise of his or her authority as such, the detained alien can invoke the original jurisdiction of this Court under s 75(iii) of the Constitution." See also *R v Davey; Ex parte Freer* (1936) 56 CLR 381 at 384-385 (Evatt J).

10 51. The FC avoided this issue by invoking this Court's statement in ***Knight*** *v Victoria* (2017) 261 CLR 306, [33] that "it is ordinarily inappropriate for the Court to be drawn into a consideration of whether a legislative provision would have an invalid operation in circumstances which have not arisen and which may never arise if the provision, if invalid in that operation, would be severable and otherwise valid": FC[97]-[98]. The FC committed two errors. The *first* is that the FC failed to ask itself whether the operation of regs 14 and 15 to bar Deripaska from s 75(iii) jurisdiction "would be severable" if invalid. It is not apparent why the FC ignored this aspect of what the Court said in *Knight*. The FC's *second* error was as follows. In *Knight*, the plaintiff argued that a provision permitting judges to be members of a parole board was invalid because it (potentially)
20 enlisted those judges in an impermissible function: at [5]. But the relevant board had "not in fact been constituted, and [did] not need to be constituted, to include a judicial officer": at [6]. The circumstances alleged to give rise to invalidity had therefore not arisen (and might never arise). Here, by contrast, the circumstance that gives rise to invalidity — namely, that Deripaska is locked out of s 75(iii) jurisdiction unless given a ministerial permit — *has already arisen*. It is already a fact that Deripaska's practical ability to take any step to invoke s 75(iii) jurisdiction is dependent on the Minister's permission. Deripaska's case is that this is an unconstitutional state of affairs, and he wants to rid himself of it. In that context, it is difficult to understand the significance of the FC's observation that Deripaska "does not seek to invoke s 75(iii) alone, or at all" in the present
30 proceeding: FC[97]. In any event, by seeking a declaration against the Minister, Deripaska *has* invoked s 75(iii) jurisdiction.

52. The proposition that apparently underpins the FC's reasoning is that Deripaska is shut out of making his s 75(iii) argument because in the present proceeding he happens to have

sought, in addition to a declaration, an order in the nature of an injunction. The corollary appears to be that in order to have a court rule upon whether regs 14 and 15 are invalid because of s 75(iii), Deripaska must lose the present appeal, then obtain a permit to sue the Commonwealth again, but this time confine his prayer for relief to a declaration (or some other relief that is not mentioned in s 75(v)). That proposition should be rejected.

D. THE CONSEQUENCE OF THE INVALIDITY OF REGS 14 AND 15

53. If regs 14 and 15 are invalid (as Deripaska contends that they are), then it would follow that when deciding to "designate" and "declare" Deripaska, the Minister proceeded upon an "error … as to an important attribute of the decision to be made": *Graham*, [68]. Specifically, the Minister proceeded upon the erroneous basis that her decision would result in the various restrictions in regs 14 and 15 being enlivened with respect to Deripaska. In those circumstances, the decision should be quashed (or a declaration made to the effect that the decision is void): *Graham*, [69].

PART VII ORDERS SOUGHT

54. Deripaska seeks the orders set out in the notice of appeal (CAB 125).

PART VIII TIME REQUIRED FOR PRESENTATION OF ARGUMENT

55. It is estimated that up to 2.5 hours will be needed for oral submissions (including reply).

Dated: 11 September 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)	Compilation No. 38 (11 December 2024)	ss 2(2), 15A, 33(3)	Illustrative	Current
2	*Autonomous Sanctions Act 2011* (Cth)	Compilation No. 3 (8 December 2021 to 8 April 2024)	ss 4, 6, 10(1)(a), 11, 12, 16, 28	Act in force at the time that Deripaska was designated and declared	17 March 2022
3	*Autonomous Sanctions Regulations 2011* (Cth)	Compilation No. 14 (5 March 2022 to 27 March 2022)	regs 6, 14, 15, 18, 18(3)(a), 20(3)(b)(vii), 20(3)(b)(viii)	Regulations in force at the time that Deripaska was designated and declared	17 March 2022
4	*Commonwealth Constitution*	Compilation No. 6 (29 July 1977)	ss 51(xxxi), 75(iii), 75(v)	Illustrative	Current
5	*Criminal Code Act 1995* (Cth)	Compilation No. 167 (8 February 2025)	Code ss 5.6, 15.1	Illustrative	Current
6	*Judiciary Act 1903* (Cth)	Compilation No. 51 (11 December 2024)	s 39B(1)	Illustrative	Current