



HIGH COURT OF AUSTRALIA

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Form 27E – Appellant’s reply

Note: see rule 44.05.5.

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN:

OLEG VLADIMIROVICH DERIPASKA

Appellant

and

MINISTER FOR FOREIGN AFFAIRS

Respondent

APPELLANT’S REPLY

Part I: These submissions are in a form suitable for publication on the internet.

Part II: Reply

1. **Statutory construction without a statutory foothold.** Deripaska’s case is that regs 14 and 15 cannot be construed as operating differently upon conduct with different “objective purposes”. The Attorney-General (AG) responds that merely because regs 14 and 15 happen, in practice, to trench upon “a single constitutional limitation” (derived from s 75(v)), the Court can construe them by reference to a criterion (“objective purpose”) that need have no “foothold” in the legislation (nor in s 75(v)): RS[40], [46]. Whenever a law breaches such a “limitation”, the Court may select an extra-statutory criterion (e.g. “objective purpose”) by which to construe the statute so as to confine its operation: RS[40].
2. Once the AG enters a zone where statutory construction need have no statutory “foothold”, surprising results flow. The AG takes Deripaska’s arguments that the FC’s construction of regs 14 and 15 was wrong, and mischaracterises them as arguments about the “articulation of the way in which a constitutional limitation is expressed”: RS[21], [23]. The AG does this by morphing the Court’s task of construing regs 14 and 15 into a task of constitutional “exegesis”: RS[22]. Asked whether the FC’s construction was correct, the AG answers, “[m]aybe” (RS[22]), as if the difference between subjective and objective purpose (for example) were purely semantic. The AG forgets that those who are governed by regs 14 and 15 are “entitled” to know what is prohibited, and what is not: *International Finance Trust Company v NSWCC* (2009) 240 CLR 319, [42] (French CJ). Different “expressions” of the provisions’ construction draw that line in different places: see AS[33].
3. In truth, this appeal concerns not the “exegesis” of a “constitutional limitation”, but whether it is correct to construe regs 14 and 15 as operating by reference to “objective purposes”. To defend that construction, the AG untethers statutory construction from the statute, by misreading authorities like *Graham*: RS[30]-[31]. There, as here, a law was invalid because it curtailed courts’ capacity to exercise s 75(v) jurisdiction: at [64]. Unlike the present case, however, the law in *Graham* regulated courts’ exercise of jurisdiction: *ibid*. Thus, the law was “intended to operate in an area [i.e. courts’ jurisdiction] where Parliament’s legislative power is subject to a clear limitation”: *IR Act Case*, 502-503. The law was therefore construed as not applying to courts exercising s 75(v) jurisdiction: *Graham*, [66].
4. Can regs 14 and 15 similarly be construed as not applying to exercises of s 75(v) jurisdiction? That would be a *non sequitur*, because regs 14 and 15 are not regulations of courts’ jurisdiction. They are not “intended to operate in” that “area”. Accordingly, in order to connect regs 14 and 15 to s 75(v) by process of ‘construction’, the FC needed to

inject a criterion that has no “foothold” in the legislation — namely, “objective purpose”. For that to work, the text and subject-matter of the law needed to be disregarded: FC[81].

5. Contrary to RS[30], [33], this Court has never embraced such an approach. A law that regulates communications might be disapplied from political communications: *Clubb*, [341] (Gordon J), [438]-[439] (Edelman J). And federal laws that regulate State public sector employment conditions, or courts’ jurisdiction, do not apply to those things in ways that infringe the relevant constitutional principle: *IR Act Case*; *Graham*. But in those cases, the “elements of divisibility or distributiveness lay within the framework of the enactments”: *Strickland v Rocla Concrete Pipes* (1971) 124 CLR 468, 517 (Walsh J). None of the cases required resort to an *ad hoc*, extra-statutory criterion like “objective purpose”. Accordingly, statutory construction in each case remained just that — construction. But the AG now invites the Court to ‘construe’ legislation by reference to “elements of divisibility or distributiveness” that do *not* lie within the legislation’s “framework”, and thereby to cross “the Rubicon between adjudicating and legislating”: *Ravbar*, [180] (Edelman J).

6. Notably, the AG’s reliance on pre-*Cole v Whitfield* s 92 jurisprudence for an argument about the effect of constitutional “limitations” (RS[30], [33]) is misplaced. Before *Cole*, s 92 was regarded not as a “limitation” of the kind to which the AG refers, but rather as guaranteeing an individual right: *Cole* (1988) 165 CLR 360, 401; *Palmer v WA* (2021) 272 CLR 505, [28], [41]; *Betfair v Racing NSW* (2012) 249 CLR 217, [42]. In any event, the cases cited by the AG involved no injection of an extra-statutory criterion like “objective purpose”.

7. **Failure to confine regs 14 and 15 to valid operations.** Deripaska submitted that on the FC’s construction of regs 14 and 15, his ability to seek relief under s 75(v) remains impermissibly curtailed, because conduct that is a necessary precursor to the invocation of s 75(v) need not have the relevant “objective purpose”: AS[20]-[25]. The AG answers this by referring only to one class of conduct — *viz.*, conduct by “a designated person who approaches a lawyer to determine whether it is possible to challenge their designation”: RS[47]. The AG submits that it is “artificial” to deny that this conduct falls within the FC’s limitation: *ibid*. But that submission ignores other conduct to which regs 14 and 15 apply, which is a necessary precursor to invocation of s 75(v) — e.g. conduct by a lawyer who uses a DP’s assets merely to inquire into that DP’s rights or duties under Australian law. On the FC’s construction of regs 14 and 15, a permit is still needed for such conduct. That is not something that Ch III of the Constitution permits: AS[22].

8. **Distinction between powers and limitations.** Deripaska submitted that the FC’s failure to derive the “objective purpose” criterion from the legislation’s text or subject-matter was

fatal to its construction: AS[26]-[31]. In addition to the submissions above at [1]-[2], the AG responds by setting up a distinction between cases where there is a choice between “different heads of power” and, on the other hand, cases where invalidity arises from a single “constitutional limitation”: RS[23], [40]. Only in the former is it necessary for the “standard, criterion or test” to be “discovered from the terms of the law itself”: *ibid*.

9. Problems with these submissions are addressed above at [1]-[6]. Additionally, this Court’s jurisprudence contradicts the notion that in a “limitation” case (as opposed to a “choice of power” case) the Court need not derive the relevant criterion from the text or subject-matter of the law. In the *IR Act Case* (concerning the *Melbourne Corporation* limitation), the plurality found it necessary to hold that “[t]he nature and subject matter of the Act suggest the limitation by which s 6 may be read down”: at 503; cf RS[28]. In *Re Nolan* (where *only* the defence power was in issue), Brennan and Toohey JJ held that “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. This prerequisite has often been applied in implied freedom and Ch III cases: e.g., *Farm Transparency International Ltd v NSW* (2022) 277 CLR 537, [101] (Gageler J); *Tajjour*, [52] (French CJ) (cf RS[32]); *APLA*, [94]-[95] (McHugh J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 80-81 (Deane and Toohey JJ); *Monis v R* (2013) 249 CLR 92, [76] (French CJ).

10. **The FC’s legislative choice.** Deripaska submitted that in selecting the “objective purpose” criterion, the FC exercised an impermissible legislative “judgment” (by discarding other possible criteria like subjective purpose, reasonable necessity, etc): FC[84]; AS[32]-[35]. The AG’s response is that the only “choice” exercised by the FC was a “choice as to how a single constitutional limitation should be *expressed*”: RS[46]. There are three replies. *First*, as explained above at [3], Deripaska’s complaint is not that limitations derived from s 75(v) might be variously expressed, but rather that the FC might have construed regs 14 and 15 by reference to a range of different *ad hoc* criteria, from which it made a legislative choice. *Second*, the authorities cited above at [9] contradict the AG’s submission that if invalidity arises from “a single constitutional limitation” (RS[46]), then *ex hypothesi* there is no legislative choice to be made. *Third*, in any event, Deripaska submits that the invalidity of regs 14 and 15 arises from more than one “constitutional limitation”: AS[42]-[52]. The AG’s answer is that “the entrenched jurisdiction under s 75(v)” is “sufficient to dispose of the matter”: RS[58]. In other words, the AG defends the FC’s construction on the premise that invalidity arises only from a single constitutional limitation (which means “there is no question of the Court” exercising a legislative choice: RS[27]). But the AG also says that

the Court should not inquire into whether that premise is true, because s 75(v) is “sufficient to dispose of the matter”. The AG cannot have it both ways.

11. **Contravention of other strictures.** Deripaska submitted that the “objective purpose” construction is unworkable, in part because it does not specify the ambit of regs 14 and 15 with any certainty: AS[51]. The AG’s response is that partial disapplication (as opposed to reading down “in its strict sense”) can occur even though there is “some indeterminacy in the articulation of the relevant constitutional principle”: RS[51]. The AG goes so far as to say that the offences in regs 14 and 15 may be committed “irrespective of” whether the offender is even aware that this is happening: RS[39]. Deripaska’s replies are twofold.

10 *First*, indeterminacy of a constitutional principle cannot mean that indeterminacy is permitted *in a statutory construction itself*. *Second*, there is no basis to permit vagueness in *any* form of statutory construction (whether reading down “in its strict sense” or otherwise). The AG again forgets that the Court is not tasked with abstract expression of constitutional principle, but with construing regs 14 and 15. That construction must be “workable”: *Re Nolan*, 486 (Brennan and Toohey JJ).

12. Deripaska submitted that the FC’s construction alters the policy of the scheme, including because ASA s 12 provides that the regulations override *Judiciary Act* s 39B, whereas the FC’s construction provides for the converse: AS[38]. One response by the AG is that “the extrinsic material” contemplates that “judicial review would be available”: RS[52]. But

20 this “extrinsic material” postdates, by over a decade, the legislation’s enactment: RS[49], [52]. It cannot be used to interpret that legislation: *AEU v Dept of Education* (2012) 248 CLR 1, [33]. Another response by the AG is that ASA s 12 must itself be read down: RS[45]. But the AG cites no authority for the proposition that primary legislation may be read down so as to enable subordinate legislation to be partially disappplied in a particular way. That is a case of the stream rising above its source.

13. Deripaska submitted that the FC’s application of AIA s 15A was impermissible because regs 14 and 15 — liability for which turns upon subjective fault elements — are not intended to operate distributively by reference to “objective purposes”: AS[39]-[40]. The AG’s response, in summary, is that there is “nothing to indicate that the Regulations were

30 intended to operate in an all-or-nothing fashion”: RS[34]. The problem with that submission is again its underlying premise that once a law infringes a “single constitutional limitation”, statutory construction is unshackled from the law’s text and subject-matter, so that a court may select a criterion for “distribution” (e.g. “objective purpose”), irrespective of whether that criterion accords with the statutory scheme: see above at [1]-[6].

14. **An unsuitable vehicle?** Deripaska submitted that as a result of regs 14 and 15, he needs a permit from the Commonwealth to sue the Commonwealth, or otherwise to be represented in Ch III courts; the provisions are therefore invalid: AS[43]-[52]. The AG does not dispute that these are “real facts” (cf RS[19]); the regulations *do* currently have these effects on Deripaska (as opposed to “other people”: cf RS[19]). But the AG labels Deripaska’s complaints “artificial” or “hypothetical”: RS[19], [59]. The AG submits that this case is “not a suitable vehicle” for the Court to deal with them (RS[59]), “in light of the successive permits issued under reg 18” (RS[35]). Apparently, in order to have a court rule upon his complaints, Deripaska must wait for the Minister to revoke his permit. But by then it will be too late, because any litigation at that point will *prima facie* entail the commission of multiple criminal offences by Deripaska and his lawyers.

15. Even apart from this absurdity, the problems with the AG’s submissions are fivefold. *First*, “the Court must consider the law according to its own terms, and the fact that the actual administration of the law may not be inconsistent with [Ch III] is immaterial”: *Ackroyd v McKechnie* (1986) 161 CLR 60, 70 (Gibbs CJ). *Second*, the AG’s apparent suggestion that Deripaska needs a finding of fact about an intention to sue the Commonwealth (again) is contrary to authority; the invalidation of legislation on s 75(iii) grounds in the *Bank Nationalisation Case* did not depend on any such finding. *Third*, any permit to Deripaska may at any point “be amended or revoked at the discretion of the Minister” (ABFM, 15); in those circumstances, the Court should address all of Deripaska’s constitutional complaints about the need for such a permit in the first place: *Wragg v NSW* (1953) 88 CLR 353, 370-371, 392; *Plaintiff M68/2015 v MIBP* (2016) 257 CLR 42, [23], [64], [235]. *Fourth*, if the AG means to submit that the Court should not address constitutional arguments about the need for a permit in circumstances where the litigant has in fact obtained such a permit, then that is wrong: *Australian National Airways v Commonwealth* (1945) 71 CLR 29. *Fifth*, the AG’s own submissions depend upon there being only one constitutional “limitation” by reference to which regs 14 and 15 are to be read down; that means analysis of Deripaska’s s 75(v) arguments is not “sufficient to dispose of the matter” (RS[58]): see above at [10].

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