



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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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 OUTLINE OF ORAL SUBMISSIONS

PART 1 This outline is in a form suitable for publication on the internet.

PART 2 OUTLINE OF ORAL SUBMISSIONS

1. **I. Operation of the legislation: AS[6]-[12], [38].** Particularly in light of the definition of ‘asset’ in s 4 of the *Autonomous Sanctions Act 2011* (Cth) (**ASA**) (V1 T5 p183), regs 14 and 15 of the *Autonomous Sanctions Regulations 2011* (Cth) (**ASR**) (V1 T6 p241) are sweeping prohibitions that operate on the moment-to-moment minutiae of human conduct. They prevent Australian lawyers and their administrative staff from doing routine tasks that are necessary to provide legal services (and ancillary administrative services) to a designated person (**DP**). They also prevent a DP from doing things that would need to be done to obtain those services. The regulations thus prevent a DP from obtaining legal advice about the effects of government decisions or actions (let alone advice about whether and how to have them reviewed in some way). Regulations 14 and 15 are invalid, unless construed in a way that avoids these practical consequences.
2. **II. The Full Court’s ‘construction’ and what it entails: AS[11]-[12].** The court below (**FC**) construed regs 14 and 15 as not applying “to actions taken for the purpose, in an objective sense, of challenging the validity of decisions or actions under the [ASA] pursuant to s 75(v) of the *Constitution* or s 39B(1) of the *Judiciary Act*”: FC[84] (CAB 95-96). The FC’s ‘construction’ requires an inquiry into the “objective purpose” (whatever that actually means in this context; see below at [4]) of the day-to-day minutiae of conduct by lawyers and their administrative staff. This is not an inquiry into a discrete transaction of a kind that might be susceptible to an analysis of its “objective purpose”.
3. **III. The FC’s ‘construction’ fails as an exercise in statutory construction.** On any view of the authorities, the construction of regs 14 and 15 must do two things: (1) produce a clear, coherent inquiry of fact that can be conducted to determine whether the provisions apply in a given set of circumstances (even if that inquiry may occasionally be difficult); and (2) confine the operation of the provisions to valid applications. The FC’s construction of regs 14 and 15 achieves neither of these things.
4. **IIIA. Failure to produce a clear, coherent inquiry of fact: AS[13]-[16], [18], [37], [41]; Rep[2], [11].** The FC avoided a construction that turned on *actual* purposes, because it recognised that such a construction would produce unacceptable results. Instead, the FC opted for “objective purposes”. But it is meaningless to speak of an “objective purpose” of conduct, unless one postulates a “construct” of some kind, into

whose purposes one may inquire: *Automotive Invest Pty Ltd v FCT* (2024) 98 ALJR 1245, [115] (V12 T63 p4399). The FC never explained the attributes of any “construct” that it may have had in mind: FC[86] (CAB 96). The conceivable constructs either do not cure the constitutional problems with the legislation or are arbitrary legislative choices by the court. An inquiry into the purpose of a reasonable person in the position of the relevant DP is unenlightening, and does not solve the s 75(v) problems with regs 14 and 15. Even an inquiry into the purpose of a skilled Australian lawyer (who knows all the facts) would still have this problem, as well as constituting: (a) a transformation of a factual question into a legal one; and (b) an arbitrary exercise of a legislative choice by the federal judiciary.

5. **IIIB. Failure to confine regs 14 and 15 to valid applications: AS[20]-[25]; Rep[7].**

For two reasons, the FC’s construction of regs 14 and 15 fails to confine them to valid applications. **First**, on the FC’s construction, people’s subjective intentions are irrelevant: RS[39]. Whether a person falls within the FC’s carve-out is thus a matter of happenstance. Accordingly, in practice, everybody still needs a permit for the full range of conduct prohibited by the text of regs 14 and 15. **Second**, no conception of “objective purpose” would allow the relevant purpose to be imputed to: (a) a DP who wants advice about the effects of government action, or (b) a lawyer who answers that inquiry. The same is true if a DP specifically asks whether a government decision can be reviewed in some way, and if so, how. The ability of courts to supervise government action pursuant to s 75(v) therefore remains at the Minister’s mercy (even on the FC’s construction), because the DP and his or her lawyers (and their administrative staff) need a permit to provide the services that are a necessary precursor to judicial review under s 75(v).

6. **IV. The legal principles are clear, and do not support the FC’s ‘construction’:**

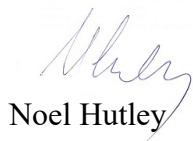
AS[26]-[35]; Rep[5], [9]-[10]. The **first** principle is that s 15A of the *Acts Interpretation Act 1901* (Cth) (V1 T4 p109) does not authorise the Court to decide controversies over legislative invalidity by saying, in effect, “we hold that this legislation applies in all circumstances where it operates validly, but it does not apply where its operation would be invalid, which we’ll decide on a piecemeal, case-by-case basis”: *Pidoto v Victoria* (1943) 68 CLR 87, 108-109 (V8 T50 pp3183-4); *Farm Transparency International Ltd v NSW* (2022) 96 ALJR 655, [98]-[102] (V6 T39 pp2410-2411). The **second** principle is that the standard, criterion or test for reading down general words must appear from the text or subject-matter of the legislation: *Pidoto*, 111; *Re Nolan*; *ex parte Young* (1991)

172 CLR 460, 485-7 (V9 T54 p3635-7). A **third** principle is that some types of legislation are recognised as instances where the relevant standard, criterion or test appears from the legislative text or subject-matter. One example is a law by which Parliament intends to enter a particular legislative field in which its power is confined in some way: *Victoria v Cth* (1996) 187 CLR 416 (**IR Act Case**), 502-3 (V10 T59 p4120). The ASR are not in that category. A **fourth** principle is that the Court is not permitted to exercise a legislative choice in selecting a criterion or test for reading down: *Pidoto*, 111; *Clubb v Edwards* (2019) 267 CLR 171, [431] (V6 T35 p2167). Here, the FC’s construction of regs 14 and 15 entails such choices, including as to the attributes of any “construct” that might be postulated, and as to “purpose” being the relevant criterion at all.

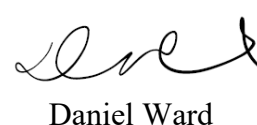
7. **V. *Tajjour* and *Graham* contain orthodox applications of the *IR Act Case*: AS[31], [34]-[35]; Rep[3]-[5].** Contrary to apparent suggestions by the Commonwealth (RS[31]), the reasons of Gageler J in *Tajjour v NSW* (2014) 254 CLR 508, [171] (V10 T57 p3972) are an orthodox example of construing a law by which Parliament intends to enter a particular field that is subject to a clear constitutional limitation (there, the law was intended to regulate communication). The same is true of *Graham v MIBP* (2017) 263 CLR 1, [66] (V7 T40 p2487), where the law regulated the exercise of courts’ jurisdiction.

8. **VI. Regs 14 and 15 are invalid for reasons beyond their inconsistency with s 75(v): AS[42]-[52]; Rep[14]-[15].** The appellant is subject to disabilities that apply to no other subjects of Commonwealth laws (except other DPs). He is disabled from being represented in Chapter III courts and from litigating in s 75(iii) jurisdiction, unless he obtains a ministerial permit. The appellant’s current permit may be revoked at any time (ABFM 15), at the minister’s broad discretion. In that event, the appellant and his lawyers will *prima facie* commit multiple criminal offences by dealing with each other. These bases for the appellant’s challenge to regs 14 and 15 are therefore not hypothetical: cf RS[57]-[61]. Even if the regulations can be construed to cure their s 75(v) problems, the same is not true in relation to the provisions’ broader Ch III problems, because any such construction would entail a complete and impermissible transformation of the legislative scheme.

Dated: 12 November 2025


Noel Hutley


Christian Porter


Daniel Ward