



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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Form 27F – Outline of oral submissions

Note: see rule 44.08.2.

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN:

OLEG VLADIMIROVICH DERIPASKA

Appellant

and

MINISTER FOR FOREIGN AFFAIRS

Respondent

**RESPONDENT AND THE ATTORNEY-GENERAL OF
THE COMMONWEALTH OF AUSTRALIA (INTERVENING)**

JOINT OUTLINE OF ORAL SUBMISSIONS

PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

2. Regulations 14 and 15 of the *Autonomous Sanctions Regulations 2011* (Cth) are generally expressed provisions that for the most part restrict the use of certain assets in circumstances unrelated to judicial review proceedings. However, the general words of those restrictions include the use of assets to obtain legal advice or representation. To that extent, regs 14 and 15 purport to operate in an area where the Commonwealth's legislative power is subject to the clear constitutional limitation.
3. That limitation can be expressed as being that a law cannot, whether in form or substance, prevent "actions taken for the purpose, in an objective sense, of challenging the validity of decisions or actions under the Act pursuant to s 75(v) of the Constitution" (FC [84], CAB 95-96). An alternative way of expressing the same limitation is that a law cannot prevent actions that are reasonably necessary to invoke the Court's jurisdiction under s 75(v).
4. The "sole issue" in this appeal is whether regs 14 and 15 can be partially disapplied pursuant to s 15A of the *Acts Interpretation Act 1901* (Cth) (AIA) (Vol 1, Tab 4) to the extent necessary to prevent them from infringing that constitutional limitation.

Factual context (CS [19]-[24])

5. Since November 2022 the Appellant has had the benefit of permits issued under reg 18 that have authorized him (along with any other designated person or entity) to use or deal with assets to the extent required to receive legal advice, legal representation and Ancillary Services in relation to matters arising under or related to Australian law: ABFM 13; FC [31], CAB 82. For that reason, regs 14 and 15 have not impeded the Appellant's ability to seek advice or to bring this proceeding.
6. Most of the Appellant's arguments are not directed to the threshold question of whether regs 14 and 15 can be partially disapplied to the extent necessary to prevent infringement of the above constitutional limitation. Instead, they concern whether circumstances that have not arisen, and that may never arise, would infringe that limitation. The effect of the permits is that there is no state of facts which makes it necessary to decide such questions: *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at [56]-[59] (Kiefel CJ, Gageler, Keane, Gordon, Steward and

Gleeson JJ) (**Vol 7, Tab 43**). Only the threshold question of whether the regulations could, if necessary, be partially disapplied need be determined.

Principles regarding partial disapplication (CS [25]-[33])

7. Section 15A of the AIA creates a “[c]onstructional imperative” that, where partial disapplication can occur, it must occur: *Tajjour v New South Wales* (2014) 254 CLR 508 at [171] (Gageler J) (**Vol 10, Tab 57**).
8. The Appellant’s case reflects an erroneous understanding of what was decided in *Pidoto v Victoria* (1943) 68 CLR 87 (**Vol 8, Tab 50**) and *Victoria v Commonwealth* (1996) 187 CLR 416 (**Vol 10, Tab 59**) (the *Industrial Relations Act Case*).
9. *Pidoto* establishes that “if a law can be reduced to validity by adopting any one or more of a number of several possible limitations, and no reason based upon the law itself can be stated for selecting one limitation rather than another, the law should be held to be invalid” (at 111). That situation principally arises where a law could be reduced to validity in different ways by reference to different heads of power: *Pidoto* (1943) 68 CLR 87 at 108-111 (**Vol 8, Tab 50**); *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 497-498 (Barwick CJ) (**Vol 10, Tab 56**).
10. By contrast, where general words are partially disapplied by reference to a constitutional limitation, the Constitution itself provides the requisite standard or test. The judicial expression of the content of that standard will determine the scope of the disapplication that is required. But the existence of judicial choice as to how a constitutional limitation should be articulated or expressed does not involve the judiciary making an impermissible legislative choice. That is so even if the content of the constitutional limitation is incapable of precise definition, or if its expression has changed over time: *Industrial Relations Act Case* (1996) 187 CLR 416 at 498, 501-503 (**Vol 10, Tab 59**); *Austin v Commonwealth* (2003) 215 CLR 185 at [124]-[125] (Gaudron, Gummow and Hayne JJ) (**Vol 3, Tab 23**).
11. Numerous decisions recognise that s 15A supports the partial disapplication of generally expressed provisions to the extent necessary to comply with constitutional limitations including the implied freedom of political communication, Chapter III and s 92. Those cases include examples of the area of partial disapplication being identified by reference to the purpose of regulated actions: *Tajjour* (2014) 254 CLR 508 at [20], [169]-[172], [178] (Gageler J) (**Vol 10, Tab 57**); *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at [14], [66] (**Vol 7, Tab 40**).

Application of principles to the Regulations and the relevant Ch III limit (CS [34])

12. The Federal Court correctly held that s 15A of the AIA requires regs 14 and 15 to be disapplied to the extent necessary so they do not apply to actions taken for the objective purpose of invoking the jurisdiction conferred by s 75(v) (**FC [64]-[65], CAB 90 and FC [81], [84], CAB 94-96**). That is not the “injection of an extra-statutory criterion”: cf Reply [1], [6]. It is a description – similar to that adopted in *Graham* – of the circumstances in which regs 14 and 15 cannot validly apply.
13. No contrary intention sufficient to exclude s 15A can be discerned (cf AS [39]). The Appellant is unable to point to any “positive indication” that Parliament intended regs 14 and 15 to be wholly invalid (including in relation to dealings with assets in contexts unrelated to judicial proceedings) unless they could prohibit the provision or use of assets to seek s 75(v) review. Reg 18, in authorising permits to permit actions otherwise prevented by regs 14 and 15, points against any intent that the prohibitions in those regulations operate completely or not at all.
14. Nor is a contrary intention found in regs 14 and 15 being “offence” or “criminal” provisions (cf AS [16], [39]): eg *Tajjour* (2014) 254 CLR 508 (**Vol 10, Tab 57**); *Clubb v Edwards* (2019) 267 CLR 171 at [145]-[151] (Gageler J), [346]-[348] (Gordon J), [442] (Edelman J) (**Vol 6, Tab 35**).

The Appellant’s other arguments from Chapter III (CS [57]-[62])

15. The Full Court was correct to conclude (**FC [96], CAB 98**) that it was “unnecessary and inappropriate” to decide constitutional issues about the entrenchment of s 75(iii).
16. Even if there were two relevant constitutional limitations, the same analysis would apply (cf Reply [10], [15]). The question would be whether the provision can be read down in a way that would avoid application in *both* areas of limitation. That would cause no difficulty with respect to ss 75(iii) and 75(v) of the Constitution, because any constitutional limitation arising from s 75(v) would be a subset of that derived from s 75(iii): *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 179, 204, 221 and 231.

Dated: 12 November 2025


Stephen Donaghue

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Brendan Lim

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Emma Dunlop