HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

OLEG VLADIMIROVICH DERIPASKA APPELLANT

AND

MINISTER FOR FOREIGN AFFAIRS RESPONDENT

Deripaska v Minister for Foreign Affairs
[2026] HCA 14
Date of Hearing: 12 November 2025
Date of Judgment: 13 May 2026
P34/2025

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

N C Hutley SC with C C Porter and D A Ward for the appellant (instructed by Pragma Lawyers)

S P Donaghue KC, Solicitor-General of the Commonwealth, with B K Lim SC and E C Dunlop for the respondent and for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

S J Keating SC with M R Salinger for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor)

CATCHWORDS

Deripaska v Minister for Foreign Affairs

Constitutional law (Cth) – Judicial power of Commonwealth – Where *Autonomous Sanctions Act 2011* (Cth) authorises making of regulations which impose sanctions – Where reg 6(a) of *Autonomous Sanctions Regulations 2011* (Cth) empowers Minister to "designate" a person – Where designation triggers operation of regs 14 and 15 – Where contravention of reg 14 or 15 constitutes an offence – Where person contravenes reg 14 if person "directly or indirectly makes an asset available to, or for the benefit of, a designated person or entity" – Where person contravenes reg 15 if person "holds a controlled asset" and "uses or deals with the asset" or "allows the asset to be used or dealt with" or "facilitates the use of the asset or dealing with the asset" – Where reg 18 empowers Minister to grant permit authorising conduct that would otherwise contravene reg 14 or 15 – Where appellant was designated under reg 6(a) by legislative instrument – Where Minister granted permit under reg 18 authorising use of assets associated with provision of legal services – Where practical operation of regs 14 and 15 denied designated person access to legal representation absent permit – Where Minister accepted that practical operation impermissibly impaired ability of designated person to invoke jurisdiction of High Court under s 75(v) of *Constitution* or Federal Court under s 39B of *Judiciary Act 1903* (Cth) to enforce limits of decision-making power conferred by or under Act – Whether regs 14 and 15 could be "read and construed" in accordance with s 15A of *Acts Interpretation Act 1901* (Cth) and s 13 of *Legislation Act 2003* (Cth) to exclude constitutionally impermissible operation – Whether regulation-making power in Act could be read down to ensure constitutional validity.

Words and phrases – "access to legal advice", "access to legal representation", "application of meaning", "artificial construction", "ascertainment of meaning", "autonomous sanctions", "Ch III court", "chilling effect", "clear constitutional limitation", "composite hypothetical question", "conforming interpretation", "constructional imperative", "contingent operation", "contrary intention", "declared person", "designated person or entity", "disapplication", "distributive application", "entrenched jurisdiction", "institutional integrity", "interpersonal justice", "invalid application", "judicial power", "judicial restraint", "legislative act", "liberty to obtain legal services", "manifest injustice", "meaning and application", "ministerial permit", "partial disapplication", "practical operation", "prudential approach", "read and construed", "read down", "regulation-making power", "rights and freedoms", "rule of law", "severable", "severance clause", "standard, criterion or test", "statutory construction", "substantial curtailment", "targeted financial sanctions".

Constitution, ss 75(iii), 75(v), 77, Ch III.
Constitution Act 1867 (Can), s 96.
Acts Interpretation Act 1901 (Cth), ss 2, 15A, 15AA, 33.
Autonomous Sanctions Act 2011 (Cth), ss 3, 4, 6, 10, 14, 16, 28.
Autonomous Sanctions Regulations 2011 (Cth), regs 3, 6, 14, 15, 18.
Judiciary Act 1903 (Cth), s 39B.
Legislation Act 2003 (Cth), s 13.

1 GAGELER CJ, GLEESON AND JAGOT JJ. The appellant is a Russian national whom the Minister for Foreign Affairs has designated for targeted financial sanctions and declared for travel bans by legislative instrument[1] made under the *Autonomous Sanctions Regulations 2011* (Cth) ("the Regulations"), which were in turn made under the *Autonomous Sanctions Act 2011* (Cth) ("the Act").

2 By a proceeding commenced in the Federal Court of Australia under s 39B of the *Judiciary Act 1903* (Cth), the appellant challenged the making of the legislative instrument. The proceeding was dismissed at first instance by the primary judge (Kennett J),[2] whose decision was upheld on appeal to the Full Court of the Federal Court of Australia (Wigney, Stewart and Neskovcin JJ).[3]

3 One of the grounds on which the appellant was unsuccessful in challenging the making of the legislative instrument in the Federal Court was that the Regulations are invalid in their entirety. The ground was founded on the proposition that the practical operation of certain provisions of the Regulations is to deny a designated person access to legal representation unless the Minister grants that person a permit and that the provisions thereby impermissibly impair the ability of a designated person to invoke the jurisdiction of this Court under s 75(v) of the *Constitution* (in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth) or the Federal Court under s 39B of the *Judiciary Act* (vesting original jurisdiction in that Court in respect of, relevantly, any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth) to enforce the limits of decision-making power conferred by or under the Act. The foundational proposition was uncontested by the Minister and was accepted by the primary judge and the Full Court.

4 The primary judge and the Full Court nevertheless rejected the conclusion that the Regulations are invalid in their entirety, holding instead that the provisions of the Regulations having that practical operation can and must be "read and construed" in accordance with s 15A of the *Acts Interpretation Act 1901* (Cth) and s 13 of the *Legislation Act 2003* (Cth) to exclude the constitutionally impermissible operation which those provisions would have otherwise. Once so read and construed, the practical operation of those provisions does not require a designated

---

1 *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Russia and Ukraine) Amendment (No 7) Instrument 2022* (Cth).

2 *Deripaska v Minister for Foreign Affairs* [2024] FCA 62.

3 *Deripaska v Minister for Foreign Affairs* (2025) 308 FCR 175.

person to obtain a permit granted by the Minister in order to obtain legal representation.

5 The issue in this appeal, by special leave from the decision of the Full Court, is whether that holding is correct. For reasons to be explained, it is.

The Act and the Regulations

6 The Act is described in its long title as "[a]n Act to make provision relating to sanctions to facilitate the conduct of Australia's external affairs, and for related purposes". It identifies its main objects as including to "provide for autonomous sanctions" and to "provide for [the] enforcement of autonomous sanctions (whether applied under [the] Act or another law of the Commonwealth)".[4]

7 An "autonomous sanction" within the meaning of the Act is a sanction that "is intended to influence" a "foreign government entity", a "member of a foreign government entity", or "another person or entity outside Australia" "in accordance with Australian Government policy", or that "involves the prohibition of conduct in or connected with Australia that facilitates ... the engagement by" such a person or entity "in action outside Australia that is contrary to Australian Government policy".[5] A "foreign government entity" within the meaning of the Act is "the government of a foreign country or of part of a foreign country" or an "authority" of such a government.[6]

8 The Act provides for the application of autonomous sanctions by empowering the Governor-General to make regulations in respect of permitted matters,[7] specified to include "proscription of persons or entities (for specified purposes or more generally)"[8] and "restriction or prevention of uses of, dealings with, and making available of, assets",[9] if the Minister is satisfied that those regulations "will facilitate the conduct of Australia's relations with other countries or with entities or persons outside Australia" or "will otherwise deal with matters,

---

4 Section 3(1)(a) and (b) of the Act.

5 Section 4 (definition of "autonomous sanction") of the Act.

6 Section 4 (definition of "foreign government entity") of the Act.

7 Section 28(a) of the Act.

8 Section 10(1)(a) of the Act.

9 Section 10(1)(b) of the Act.

things or relationships outside Australia".[10] An "asset" within the meaning of the Act, and therefore within the meaning of a regulation made under the Act,[11] encompasses "an asset of any kind or property of any kind, whether tangible or intangible, movable or immovable, however acquired" and "a legal document or instrument in any form (including electronic or digital) evidencing title to, or interest in, such an asset or such property".[12] Examples of such documents and instruments are "bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, debt instruments, drafts and letters of credit".[13]

9 The Act provides for enforcement of autonomous sanctions in two distinct ways. The first is by empowering the grant by the Federal Court of Australia or the Supreme Court of a State or Territory, on the application of the Attorney-General of the Commonwealth, of an injunction restraining a person from engaging in conduct in contravention of regulations made under the Act.[14] The second is by empowering the Minister, for the purpose of furthering the main objects of the Act, by legislative instrument, to specify a regulation made under the Act or another law of the Commonwealth to be a "sanction law".[15] One of the effects of specification as a sanction law is to make conduct in contravention of that law an offence under the Act if engaged in by an individual or a body corporate.[16]

10 The autonomous sanctions capable of being applied under the Regulations include country-specific designations of persons or entities and declarations of persons, for which provision is made in reg 6. Under reg 6(a), the Minister can by legislative instrument designate a person or entity mentioned in an item of the table within reg 6 as a "designated person or entity" for the country mentioned in the item. Under reg 6(b), the Minister can by legislative instrument declare a person mentioned in an item of the table "for the purpose of preventing the person from travelling to, entering or remaining in Australia". As inserted by the *Autonomous Sanctions Amendment (Russia) Regulations 2022* (Cth), item 6A of the table mentions "Russia" and mentions for that country "[a] person or entity that the

---

10 Section 10(2) of the Act.

11 Section 13(1)(b) of the *Legislation Act 2003* (Cth).

12 Section 4 (definition of "asset") of the Act.

13 Section 4 (note to definition of "asset") of the Act.

14 Section 14 of the Act.

15 Section 6(1) of the Act.

16 Section 16 of the Act.

Minister is satisfied is, or has been, engaging in an activity or performing a function that is of economic or strategic significance to Russia", "[a] current or former Minister or senior official of the Russian Government" and "[a]n immediate family member" of such a person.

11 Declaration of a person under reg 6(b) constitutes a ground for refusal of a visa or for cancellation of an existing visa.[17]

12 Designation of a person or entity under reg 6(a) triggers the operation of regs 14 and 15, each of which has been specified to be a sanction law so as to result in its contravention by an individual or a body corporate constituting an offence under the Act.[18] A person contravenes reg 14 if the person "directly or indirectly makes an asset available to, or for the benefit of, a designated person or entity" and the making available of the asset is not authorised by a permit granted under reg 18.[19] A person contravenes reg 15 if the person "holds" a "controlled asset" (being "an asset owned or controlled by a designated person or entity"[20]) and "uses or deals with the asset" or "allows the asset to be used or dealt with" or "facilitates the use of the asset or dealing with the asset" and the use or dealing is not authorised by a permit granted under reg 18.[21]

13 Regulation 18 empowers the Minister to grant a permit authorising, amongst other things, "the making available of an asset to a person or entity that would otherwise contravene regulation 14" or "a use of, or a dealing with, a controlled asset".[22] The Minister may grant such a permit on application by a person or on the Minister's initiative,[23] but only if satisfied that it would be in the national interest to do so.[24] The power so conferred by reg 18 includes a power,

---

17 Regulation 2.43(1)(aa)(i) of, and public interest criterion 4003 in Sch 4 to, the *Migration Regulations 1994* (Cth).

18 Section 3 of, and item 1 in Sch 1 to, the *Autonomous Sanctions (Sanction Law) Declaration 2012* (Cth).

19 Regulation 14(1) of the Regulations.

20 Regulation 3 (definition of "controlled asset") of the Regulations.

21 Regulation 15(1) of the Regulations.

22 Regulation 18(1)(e) and (f) of the Regulations.

23 Regulation 18(2) of the Regulations.

24 Regulation 18(3)(a) of the Regulations.

exercisable in the like manner and subject to the like condition, to revoke a permit that has been granted.[25]

The practical operation of regs 14 and 15

14 Following the designation and declaration of the appellant under regs 6(a) and 6(b) by legislative instrument on 17 March 2022 (on the basis of the Minister then having been satisfied that the appellant was, or had been, engaging in an activity or performing a function that was of economic or strategic significance to Russia), and before the commencement of the proceeding in the Federal Court challenging the making of that legislative instrument on 19 January 2023, the Minister on 7 November 2022 granted a permit under reg 18 of the Regulations. The permit authorised both the making available of an asset to, or for the benefit of, a designated person or entity and the use of, or dealing with, a controlled asset where doing so was associated with the provision of legal and ancillary services to a designated person. The permit then granted has since been revoked and replaced by a further permit.

15 Before this Court, as before the Federal Court, it has remained common ground between the parties that, absent such a permit under reg 18, regs 14 and 15 would have the practical operation of denying a designated person access to legal representation unless regs 14 and 15 can and must be read and construed in accordance with s 15A of the *Acts Interpretation Act* and s 13 of the *Legislation Act* to have a narrower practical operation. The primary judge distilled the essential difficulties:[26]

> "First, a designated person or entity is prevented from remunerating an Australian lawyer who works for them. Secondly, it will very likely be impossible for a lawyer effectively to advise or represent a designated person or entity without dealing with 'controlled assets' (which include legal documents or instruments belonging to the person or entity, including documents brought into existence by the lawyer on the client's instructions). Thirdly, any 'asset' in the lawyer's possession, including intellectual property (and likely including the lawyer's own notes) would not be able to be made available 'to, or for the benefit of' a designated person or entity who was the lawyer's client."

---

25 Section 33(3) of the *Acts Interpretation Act 1901* (Cth) read with s 13(1)(a) of the *Legislation Act 2003* (Cth).

26 *Deripaska v Minister for Foreign Affairs* [2024] FCA 62 at [41].

The constitutional limitation and its statutory consequences

16 Before this Court, as before the Federal Court, it has also remained common ground between the parties that, leaving aside s 15A of the *Acts Interpretation Act* and s 13 of the *Legislation Act*, the practical operation of regs 14 and 15 to deny a designated person access to legal representation absent a permit under reg 18 would infringe the constitutional limitation identified in *Graham v Minister for Immigration and Border Protection*[27] to the extent that such practical operation would deny a designated person access to legal representation for the purpose of invoking the jurisdiction of this Court under s 75(v) of the *Constitution* or the Federal Court under s 39B of the *Judiciary Act* to enforce the limits of decision-making power conferred by or under the Act.

17 The applicable constitutional limitation was identified in *Graham* as an incapacity on the part of the Commonwealth Parliament to "enact a law which denies to this Court when exercising jurisdiction under s 75(v), or to another court when exercising jurisdiction within the limits conferred on or invested in it under s 77(i) or (iii) by reference to s 75(v), the ability to enforce the legislated limits of an officer's power".[28] The question whether or not a law transgresses that constitutional limitation was explained to be "one of substance, and therefore of degree", the answer to which "requires an examination not only of the legal operation of the law but also of the practical impact of the law on the ability of a court, through the application of judicial process, to discern and declare whether or not the conditions of and constraints on the lawful exercise of the power conferred on an officer have been observed in a particular case".[29]

18 Noting that the legal operation of regs 14 and 15 is to prohibit the taking of specified actions, variously denoted by the expressions "deal with", "make available" and "use",[30] the primary judge and the Full Court considered that the practical operation of those regulations transgressing the applicable constitutional limitation could and should be avoided by construing those regulations in accordance with s 15A of the *Acts Interpretation Act* and s 13 of the *Legislation Act* to have a distributive application to some such actions but not others. The construction of regs 14 and 15 adopted was that those regulations must be read

---

27 (2017) 263 CLR 1 at 27 [48].

28 (2017) 263 CLR 1 at 27 [48].

29 (2017) 263 CLR 1 at 27 [48].

30 *Deripaska v Minister for Foreign Affairs* (2025) 308 FCR 175 at 186 [48]; *Deripaska v Minister for Foreign Affairs* [2024] FCA 62 at [68].

down to have no application to actions taken for the objective purpose of challenging the validity of decisions or actions under the Act pursuant to s 75(v) of the *Constitution* or s 39B of the *Judiciary Act*.[31]

19 The appellant challenges the availability of that construction of regs 14 and 15 in accordance with s 15A of the *Acts Interpretation Act*. He also challenges the efficacy of that construction to prevent the practical operation of those regulations transgressing the applicable constitutional limitation.

The constructional imperative

20 Section 15A of the *Acts Interpretation Act* provides that "[e]very Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power". Section 13(1)(a) of the *Legislation Act* applies s 15A of the *Acts Interpretation Act* to a legislative instrument, including a regulation, "as if each provision of the instrument were a section of an Act".

21 Section 13(1)(c) of the *Legislation Act* provides in addition that a legislative instrument "is to be read and construed subject to the enabling legislation as in force from time to time, and so as not to exceed the power ... to make the instrument". The power to make the instrument under the enabling legislation, of course, cannot exceed the legislative power of the Commonwealth. Issues can therefore sometimes arise as to the appropriate mode and sequence of analysis.[32] Issues of that nature do not arise in the present case.

22 The relevant operation of s 13(1)(c) of the *Legislation Act* can be taken for present purposes to coincide with that of s 13(1)(a). Both require, in the language of s 15A of the *Acts Interpretation Act*, that regs 14 and 15 of the Regulations "shall be read and construed ... so as not to exceed the legislative power of the Commonwealth".

23 Section 13(2) of the *Legislation Act* emulates the concluding words of s 15A of the *Acts Interpretation Act* in providing that a legislative instrument

---

31 *Deripaska v Minister for Foreign Affairs* (2025) 308 FCR 175 at 193 [84]; *Deripaska v Minister for Foreign Affairs* [2024] FCA 62 at [51], [73]-[74].

32 *Palmer v Western Australia* (2021) 272 CLR 505 at 546 [119]-[120]; *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 12 [19]; 419 ALR 457 at 468.

which would otherwise be construed to exceed the power to make it "is to be taken to be a valid instrument to the extent to which it is not in excess of that power". For present purposes, s 13(2) adds nothing to s 13(1)(a) and (c) and can for that reason be put to one side.

24 Three features of s 15A of the *Acts Interpretation Act*, both in its primary application and in its derivative application to regulations through s 13(1)(a) and (c) of the *Legislation Act*, are apparent on its face and have been emphasised in cases that have considered its application.

25 The first is that the section enacts a principle of statutory construction.[33] That is to say, it is concerned with "the process of attributing meaning to statutory text".[34] It explains in terms how legislation is to be "read and construed".

26 The second is that the principle of statutory construction the section enacts is "contingent"[35] or "secondary".[36] Incorporating but going beyond the primary principle of statutory construction which requires choice of a construction in conformity with the *Constitution* if that construction is "reasonably open",[37] s 15A applies where legislation "would, but for this section, have been construed as being in excess of that power". In the event of that contingency, s 15A requires what might otherwise be "an entirely artificial construction" to be placed on the legislation "in order to save so much of it as might have been validly enacted".[38]

---

33 *Pidoto v Victoria* (1943) 68 CLR 87 at 110; *Tajjour v New South Wales* (2014) 254 CLR 508 at 586 [170].

34 *Palmanova Pty Ltd v The Commonwealth* (2025) 99 ALJR 1362 at 1364 [4]; 424 ALR 768 at 769.

35 *Clubb v Edwards* (2019) 267 CLR 171 at 218 [140].

36 *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 657; *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 22 [75]; 419 ALR 457 at 481.

37 *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 644 [28]. Eg *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 469.

38 *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 652. See also *Clubb v Edwards* (2019) 267 CLR 171 at 218 [141].

27 The third is that the principle of statutory construction enacted by the section, where applicable and capable of application, is imperative.[39] The section states how legislation "shall be" read and construed. Like any principle of statutory construction, the contingent principle yields to a contrary intention and is specifically subject to s 2(2) of the *Acts Interpretation Act*, which provides that "the application of this Act or a provision of this Act to an Act or a provision of an Act is subject to a contrary intention". The nature of the contingency means, however, that a contrary intention is not to be found in a "legislative aspiration" that the legislation which has been construed as being in excess of power "is to operate fully in the terms in which it is expressed".[40] A contrary intention is rather to be found, if at all, in "a positive indication" that "the legislature intended [the legislation] to have either a full and complete operation or none at all".[41]

28 That the principle enacted by s 15A of the *Acts Interpretation Act* is one of statutory construction is not contradicted by, but rather reflected in, the observation first made in *Victoria v The Commonwealth (Industrial Relations Act Case)*[42] and applied in *Graham*[43] that "where a law is intended to operate in an area where Parliament's legislative power is subject to a clear limitation, it can be read as subject to that limitation". The observation does not suggest that a provision which operates in an area where the power of the Parliament is subject to a "clear constitutional limitation"[44] can have a piecemeal application so as to be applied in those circumstances where the operation of the provision does not breach the limitation and not applied in those circumstances where the operation of the provision does breach the limitation.[45] Nor is such a suggestion supported by references to the principle enacted by the section, or its State and Territory

---

39 *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 493; *Tajjour v New South Wales* (2014) 254 CLR 508 at 586 [171].

40 *Tajjour v New South Wales* (2014) 254 CLR 508 at 585 [169].

41 *Cam & Sons Pty Ltd v The Chief Secretary of New South Wales* (1951) 84 CLR 442 at 454. See also *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 502; *Knight v Victoria* (2017) 261 CLR 306 at 325 [35].

42 (1996) 187 CLR 416 at 502-503.

43 (2017) 263 CLR 1 at 32-33 [66].

44 *Tajjour v New South Wales* (2014) 254 CLR 508 at 586 [171]; *Ravbar v The Commonwealth* (2025) 99 ALJR 1000 at 1023 [63]; 423 ALR 241 at 263.

45 *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at 573 [102].

cognates, involving "disapplication".[46] Like references to the principle involving "severance",[47] references to s 15A "disapplying" a provision are properly understood as highlighting the contingent operation of s 15A.

29 The true position is that, consistently with the explanation given by Latham CJ in *Pidoto v Victoria*[48] and repeated in the *Industrial Relations Act Case*,[49] the contingent and imperative principle of statutory construction enacted by s 15A is required to be applied wherever it is capable of being applied to attribute meaning to the legislated text. For the principle to be capable of being so applied, what must be capable of being discerned as an exercise in statutory construction is some "standard" or "criterion" by which, having regard to the terms of the legislation and the subject-matter with which it deals, the text can be construed in light of the constitutional limitation so as to give that text a valid but partial operation. There is no distinction in this respect between a constitutional limitation and a limit of legislative power.

30 The application of s 15A of the *Acts Interpretation Act* in each of the *Industrial Relations Act Case* and *Graham* serves to illustrate the true position. In the *Industrial Relations Act Case*,[50] the "nature and subject matter" of the legislation in question were explained to "suggest the limitation" by which a provision expressing that the legislation "binds ... the States" was to be "read down" to avoid contravention of the constitutional limitation identified in *Melbourne Corporation v The Commonwealth*.[51] In *Graham*,[52] the "invalid application" of the legislation in question was explained to be "severable" by means of the statutory reference to a "court" being "read down" in light of the

---

46 cf *Clubb v Edwards* (2019) 267 CLR 171 at 313-318 [415]-[425]; *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 35 [89]; *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at 625-626.

47 eg *Tajjour v New South Wales* (2014) 254 CLR 508 at 585-589 [168]-[178]; *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 32-33 [66].

48 (1943) 68 CLR 87 at 108-111. See also *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 485-487; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 61, 80.

49 (1996) 187 CLR 416 at 502.

50 (1996) 187 CLR 416 at 503. See also at 574-575.

51 (1947) 74 CLR 31, as explained in *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188.

52 (2017) 263 CLR 1 at 32-33 [66].

constitutional limitation in question to exclude this Court when exercising jurisdiction under s 75(v) of the *Constitution* or the Federal Court when exercising broadly equivalent jurisdiction conferred on it under s 77(i) of the *Constitution* by a provision of the *Migration Act 1958* (Cth).

31 Those and other cases illustrate two other presently important propositions concerning the application of s 15A of the *Acts Interpretation Act*. The first is that, as an exercise in statutory construction, the discernment of the "standard" or "criterion" by which legislated text is to be "read and construed" so as to give it a valid but partial operation is not incompatible with the existence of "constructional choice".[53] To accept, in the language of Latham CJ in *Pidoto*,[54] that s 15A is incapable of application where legislated text "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" is not to suggest that the application of s 15A cannot involve the making of a choice between alternative constructions. It is significant in that respect that s 15A now sits alongside s 15AA, which provides that "[i]n interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation".

32 The remaining proposition is that it is no impediment to construing legislated text expressed in general words so as to exclude its application within an area in which legislative power is subject to a constitutional limitation either that: (1) "the constitutional limitation is incapable of precise definition";[55] or (2) "an inquiry of fact is required to determine whether the constitutional limitation

---

53 *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 274 CLR 565 at 594-595 [88]-[89]; *Farmer v Minister for Home Affairs* (2025) 99 ALJR 1408 at 1418 [25]; 425 ALR 116 at 124-125.

54 (1943) 68 CLR 87 at 111. See also *Spence v Queensland* (2019) 268 CLR 355 at 414-415 [87].

55 *Tajjour v New South Wales* (2014) 254 CLR 508 at 586 [171], citing *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 503 and *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272 at 307 [66], 317-318.

would or would not be engaged in so far as the law would apply to particular persons in particular circumstances".[56]

The impugned construction

33 The construction of regs 14 and 15 of the Regulations adopted by the primary judge and the Full Court was an orthodox application of the constructional imperative s 15A imposes. The construction involved nothing more or less than discernment and application of a standard or criterion by which the generally expressed references in those regulations – "deal with", "make available" and "use" – were to be read and construed so as to exclude actions the prohibition of which would contravene the constitutional limitation identified in *Graham*.

34 The appellant does not suggest that some other constitutionally permissible construction is preferable. His argument that no constitutionally permissible construction is available under s 15A must be rejected.

35 To construe regs 14 and 15 of the Regulations to have no application to actions taken for the objective purpose of challenging the validity of decisions or actions under the Act pursuant to s 75(v) of the *Constitution* or s 39B of the *Judiciary Act* is to construe those regulations in a manner that is not only faithful to the constructional imperative of s 15A of the *Acts Interpretation Act* but also consistent with the context and purpose of those regulations. The resultant criterion for the application of regs 14 and 15, expressed by reference to the objective purpose of the action which would otherwise contravene those regulations, is both legislatively coherent and judicially workable.

36 To the extent that the appellant challenges the efficacy of the resultant criterion for the application of regs 14 and 15 of the Regulations to prevent their practical operation transgressing the constitutional limitation identified in *Graham*, two responses are appropriate. One is that the criterion itself must be purposively construed to exclude actions the prohibition of which would contravene the constitutional limitation identified in *Graham*. There is no reason to treat the criterion as incapable of excluding action (such as the seeking of initial legal advice) that is objectively characterisable as preliminary or ancillary to potentially challenging the validity of decisions or actions under the Act pursuant to s 75(v) of the *Constitution* or s 39B of the *Judiciary Act* whether or not the designated person or other person knows of those provisions or their scope and

---

56 *Tajjour v New South Wales* (2014) 254 CLR 508 at 586 [171], citing *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 291-292 and *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 487-488. See also *R v Hughes* (2000) 202 CLR 535 at 556-557 [43].

whether or not any such challenge is available or taken. No such circumstance would alter the character of the action as being other than for the objective purpose of challenging the validity of decisions or actions under the Act pursuant to s 75(v) of the *Constitution* or s 39B of the *Judiciary Act*. The other is that the appellant's criticisms of the criterion pertain to the contestable penumbra of the constitutional guarantee. They do not pertain to its constitutional core.

37 The construction of regs 14 and 15 of the Regulations adopted by the primary judge and the Full Court was correct. That is sufficient to dismiss the appellant's challenge in its entirety in circumstances where those regulations do not constrain the appellant given the successive issuing of permits under reg 18.

Another constitutional limitation?

38 Before the primary judge and the Full Court, the appellant advanced an argument that regs 14 and 15 of the Regulations encountered another constitutional limitation asserted to be derived from Ch III of the *Constitution* beyond that recognised in *Graham*. Before this Court, the appellant refined the asserted further constitutional limitation as an incapacity on the part of the Commonwealth Parliament to disable a person from being represented in a Ch III court or from litigating in the jurisdiction conferred on this Court by s 75(iii) of the *Constitution* (in all matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party).

39 In *Knight v Victoria*,[57] and again in *Mineralogy Pty Ltd v Western Australia*[58] and *Zhang v Commissioner of the Australian Federal Police*,[59] it was said to be "ordinarily inappropriate" for this 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". Nothing about the present case warrants departure from that prudential norm.

40 Appropriating the language of *Knight*,[60] as did the Full Court,[61] it is both "unnecessary" and "inappropriate" to engage with the appellant's further arguments

---

57 (2017) 261 CLR 306 at 324 [33].

58 (2021) 274 CLR 219 at 248-249 [59].

59 (2021) 273 CLR 216 at 230 [21].

60 (2017) 261 CLR 306 at 326 [37].

61 *Deripaska v Minister for Foreign Affairs* (2025) 308 FCR 175 at 195 [96].

in circumstances in which: (1) there is nothing to indicate that the appellant has in fact been disabled by regs 14 and 15 of the Regulations from being represented in a Ch III court or from litigating in the jurisdiction conferred on this Court by s 75(iii) of the *Constitution*; and (2) the appellant advances no reason to consider that s 15A of the *Acts Interpretation Act* would not apply through s 13(1)(a) and (c) of the *Legislation Act* to require regs 14 and 15 of the Regulations to be read and construed so as to avoid such constitutional limitation as might ultimately be derived from Ch III of the *Constitution* beyond that recognised in *Graham*.

Disposition

41 The appeal should be dismissed with costs.

42 GORDON AND STEWARD JJ. The Minister for Foreign Affairs designated Oleg Deripaska, a Russian national, for targeted financial sanctions and declared him for travel bans under the *Autonomous Sanctions Act 2011* (Cth) ("the AS Act") and the *Autonomous Sanctions Regulations 2011* (Cth) ("the Regulations"). Mr Deripaska challenged that decision by way of an application for judicial review.

43 The practical effect of regs 14 and 15 of the Regulations is that a designated person would be unlikely to be able to retain an Australian lawyer to advise or represent them unless the Minister granted a permit under reg 18. The effect of two successive permits is that Mr Deripaska has not been prevented from bringing this proceeding. However, it is common ground that the Parliament cannot make Mr Deripaska's access to the entrenched jurisdiction under s 75(v) of the *Constitution* a matter for the discretion of the Executive.

44 The determinative question is whether the Governor-General's regulation-making power can be read down so as not to authorise regs 14 and 15 to preclude Mr Deripaska, in the absence of a permit, from challenging the validity of the decision to designate and declare him under the AS Act pursuant to s 75(v) of the *Constitution* or s 39B(1) of the *Judiciary Act 1903* (Cth). Since the validity of the Regulations may be tested by asking whether, if they were enacted as primary legislation, they would comply with the constitutional limitation, the determinative question may be reframed as a "composite hypothetical question":[62] can regs 14 and 15 be read down so as to give them a "partial but constitutionally valid operation"?[63]

45 For the following reasons, the answer is "yes". Regulations 14 and 15 should be read down so as not to apply to the extent that they would, directly or as a matter of practical effect, curtail or limit the right or ability of a person to seek relief under s 75(v) of the *Constitution* or s 39B(1) of the *Judiciary Act*. Read down in that manner, regs 14 and 15 do not relevantly constrain Mr Deripaska from bringing this proceeding without a ministerial permit. Whether regs 14 and 15 are invalid for infringing the other constitutional limitations for which Mr Deripaska contends should be left to a case in which they arise.

46 These reasons will address: first, the statutory framework and factual background; second, the decisions of the Courts below and the appeal to this Court;

---

62 *Palmer v Western Australia* (2021) 272 CLR 505 at 547 [124], citing *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 373 [104], in turn citing *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565 at 594.

63 *Clubb v Edwards* (2019) 267 CLR 171 at 288 [334]; *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at 578 [122].

third, the constitutional framework and the entrenched jurisdiction conferred by s 75(v) of the *Constitution*; fourth, the constructional imperative to read down the challenged regulations to accommodate that constitutional limitation; fifth, the limits on reading down to comply with that constitutional limitation; sixth, whether regs 14 and 15 can be read down conformably with those limits; and finally, whether, once they are read down, they infringe the other constitutional limitations for which Mr Deripaska contends.

Statutory framework and factual background

47 The AS Act provides for "sanctions to facilitate the conduct of Australia's external affairs, and for related purposes".[64] It provides for the imposition of "autonomous sanctions", defined broadly to mean sanctions that are intended to influence foreign government entities,[65] members of such entities, or persons or entities outside Australia, in accordance with Australian Government policy or that involve the prohibition of conduct in or connected with Australia that facilitates the engagement by such a person or entity in action outside Australia that is contrary to Australian Government policy.[66]

48 The AS Act operates principally by authorising the making of regulations which impose sanctions,[67] including, relevantly, authorising regulations that make provision for the "proscription of persons or entities (for specified purposes or more generally)" and the "restriction or prevention of uses of, dealings with, and making available of, assets".[68] Part 2 of the Regulations, headed "Autonomous sanctions", provides for the imposition of sanctions by reference to various criteria. Relevantly, reg 6(a) provides that, for the purposes of s 10(1)(a) of the AS Act, the Minister may by legislative instrument designate a person or entity mentioned in an item of the table as a "designated person or entity" for the country mentioned in the item of the table. A designation under reg 6(a) is effective for three years.[69]

---

64 AS Act, long title.

65 A foreign government entity is "the government of a foreign country or of part of a foreign country" or an "authority" of such a government: AS Act, s 4.

66 AS Act, s 4 definition of "autonomous sanction".

67 AS Act, s 10.

68 AS Act, s 10(1)(a) and (b). See also s 28.

69 Regulations, reg 9(1).

49 In June 2014, the Minister, acting under reg 6, made the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) List 2014* (Cth) ("the 2014 Instrument"). In February 2022, item 6A was inserted into the table in reg 6 and relevantly authorised the designation and declaration of "[a] person … that the Minister is satisfied is, or has been, engaging in an activity or performing a function that is of economic or strategic significance to Russia".[70] The 2014 Instrument was then amended in three relevant respects. First, its title was amended to refer to Russia as well as Ukraine.[71] Second, s 3A[72] was inserted to provide that, for the purposes of reg 6(a), each person or entity mentioned in an item of a table in Sch 2 is designated as a "designated person or entity" for Russia; and, for the purposes of reg 6(b), each person mentioned in an item of the table in Pt 1 of Sch 2 is declared for the purpose of preventing the person from travelling to, entering or remaining in Australia. Third, Sch 2 was inserted[73] to include persons from Russia in the list of designated and declared persons under reg 6(a) and (b).

50 On 17 March 2022, the Minister amended Pt 1 of Sch 2 to the 2014 Instrument to include Mr Deripaska's name in the list of designated and declared persons with respect to Russia.[74] That was done on the basis that Mr Deripaska met the listing criteria in item 6A ("Russia") of the table in reg 6.

51 Where a person or an entity is designated under reg 6(a), other regulations prohibit certain conduct to ensure that the autonomous sanctions are effective. In the present case, reg 14 prohibits dealings with the designated person or entity. It provides:

---

70 *Autonomous Sanctions Amendment (Russia) Regulations 2022* (Cth), s 4 and Sch 1, item 1.

71 *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment (No 4) Instrument 2022* (Cth), s 4 and Sch 1, item 1.

72 *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment (No 4) Instrument 2022* (Cth), s 4 and Sch 1, item 10.

73 *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment (No 4) Instrument 2022* (Cth), s 4 and Sch 1, item 13.

74 *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Russia and Ukraine) Amendment (No 7) Instrument 2022* (Cth), s 4 and Sch 1, item 1.

"(1) A person contravenes this regulation if:

(a) the person directly or indirectly makes an asset available to, or for the benefit of, a designated person or entity; and

(b) the making available of the asset is not authorised by a permit granted under regulation 18.

(1A) Strict liability applies to the circumstance that the making available of the asset is not in accordance with a permit under regulation 18.

Note 1: For strict liability, see section 6.1 of the *Criminal Code*.

Note 2: Strict liability is not imposed on an individual for any other element of an offence under section 16 of the Act that relates to a contravention of this regulation.

(2) Section 15.1 of the *Criminal Code* applies to an offence under section 16 of the Act that relates to a contravention of this regulation.

Note 1: This has the effect that the offence has extraterritorial operation.

Note 2: This regulation may be specified as a sanction law by the Minister under section 6 of the Act."

52 Regulation 15 prohibits using or dealing with controlled assets.[75] It provides:

"(1) A person contravenes this regulation if:

(a) the person holds a controlled asset; and

(b) the person:

(i) uses or deals with the asset; or

---

75 "Controlled asset" is defined in reg 3 to mean "an asset owned or controlled by a designated person or entity". "Asset" is defined in s 4 of the AS Act to mean "(a) an asset of any kind or property of any kind, whether tangible or intangible, movable or immovable, however acquired; and (b) a legal document or instrument in any form (including electronic or digital) evidencing title to, or interest in, such an asset or such property".

(ii) allows the asset to be used or dealt with; or

(iii) facilitates the use of the asset or dealing with the asset; and

(c) the use or dealing is not authorised by a permit granted under regulation 18.

(1A) Strict liability applies to the circumstance that the use or dealing with the asset is not in accordance with a permit under regulation 18.

Note 1: For strict liability, see section 6.1 of the *Criminal Code*.

Note 2: Strict liability is not imposed on an individual for any other element of an offence under section 16 of the Act that relates to a contravention of this regulation.

(2) Section 15.1 of the *Criminal Code* applies to an offence under section 16 of the Act that relates to a contravention of this regulation.

Note 1: This has the effect that the offence has extraterritorial operation.

Note 2: This regulation may be specified as a sanction law by the Minister under section 6 of the Act."

53 For the purpose of furthering the main objects of the AS Act,[76] the Minister may by legislative instrument specify a provision of a law of the Commonwealth as a "sanction law".[77] Regulations 14 and 15 are declared to be "sanction laws" under s 6 of the AS Act.[78] Section 16 of the AS Act then makes it an offence for individuals or bodies corporate to engage in conduct that contravenes a sanction law.

54 Regulation 18 provides that the Minister may grant a permit to a person authorising, among other things, "the making available of an asset to a person or entity that would otherwise contravene regulation 14" or "a use of, or a dealing

---

76 AS Act, s 3.

77 AS Act, s 6(1).

78 *Autonomous Sanctions (Sanction Law) Declaration 2012* (Cth), s 3 and Sch 1, item 1.

with, a controlled asset".[79] Such a permit may be granted on application by a person or on the Minister's own initiative.[80] The power to grant a permit conferred by reg 18 includes an equivalent power, exercisable in the like manner and subject to the like conditions, to revoke a permit that has been granted.[81]

55 The designation and declaration of Mr Deripaska enlivened regs 14 and 15, which prohibit a person from dealing with Mr Deripaska or his controlled assets, and meant that it was an offence under s 16 of the AS Act for Mr Deripaska or his bodies corporate to engage in conduct that contravenes regs 14 and 15.[82] Relevantly, "designation" makes Mr Deripaska's access to legal representation a matter for executive discretion. That is because, as the primary judge explained, without a permit from the Minister, it "will very likely be impossible for a lawyer effectively to advise or represent" Mr Deripaska without committing a criminal offence. For example, a designated person requires a permit for "basic expense dealing[s]".[83] Such dealings include payments for legal expenses and professional fees.[84]

56 Mr Deripaska has had the benefit of two successive permits issued under reg 18. A permit issued on 7 November 2022 applied to any "designated person or entity" as described in reg 3 and allowed dealings with assets that would otherwise be prohibited by the Regulations for the purpose of providing legal advice, legal representation and ancillary services to designated persons or entities in relation to matters arising under or related to Australian law. Then, on 30 October 2024, the Minister revoked that permit and issued a new permit which authorised making assets available to persons or entities designated under the Regulations, and the use of, or dealing with, controlled assets, in connection with legal services, settlement of legal proceedings and payment of legal costs.

Courts below

57 Mr Deripaska challenged the Minister's decision to designate him for targeted financial sanctions and declare him for travel bans by way of

---

79 Regulations, reg 18(1)(e) and (f).

80 Regulations, reg 18(2).

81 Section 33(3) of the *Acts Interpretation Act 1901* (Cth) read with s 13(1)(a) of the *Legislation Act 2003* (Cth).

82 An injunction would also be available to restrain such conduct: AS Act, s 14.

83 Regulations, reg 20(2)(a).

84 Regulations, reg 20(3)(b)(vii) and (viii).

an application for judicial review filed in the Federal Court of Australia. The primary judge dismissed Mr Deripaska's application, rejecting grounds challenging the validity of the Regulations and the Minister's making of the instrument giving effect to his designation and declaration. The primary judge recorded that the Minister accepted that regs 14 and 15 could not apply according to their terms to actions taken for the purpose of challenging the validity of decisions or actions under the AS Act pursuant to s 75(v) of the *Constitution* or s 39B(1) of the *Judiciary Act*. The Minister submitted that the relevant expressions in regs 14 and 15 ("deal with", "make available" and "use") could, and therefore should, be read as excluding actions taken for the purpose of challenging the validity of decisions or actions under the AS Act pursuant to s 75(v) of the *Constitution* or s 39B(1) of the *Judiciary Act*.

58 The primary judge relevantly held that regs 14 and 15 do not prevent a person or entity who is the subject of a designation under reg 6 from being represented (including paying for relevant professional services) in order to challenge that designation, or other things purportedly done under the AS Act, in proceedings commenced under s 75(v) of the *Constitution* or s 39B(1) of the *Judiciary Act*. So construed, the Regulations did not subvert the exercise of jurisdiction under s 75(v) of the *Constitution* or s 39B(1) of the *Judiciary Act*.

59 In reaching that conclusion, the primary judge stated that that "carve-out" of the Regulations would not cause the Regulations to have any materially different operation from that which the provisions would have if given their ordinary meaning and would not involve any change to the operation of the prohibitions in circumstances to which they did apply. There being no evident intention that the Regulations are to apply fully or not at all, the policy of the scheme would not be compromised. Moreover, the Regulations expressly contemplate that regs 14 and 15 would not apply in all cases by providing for the issue of permits to create exemptions from their effect. In the case of a generally expressed provision, the constitutional limitation itself can supply the standard by which reading down is to be effected and that method does not involve choosing between equally effective modes of limitation. In such a case, some indeterminacy in the articulation of the relevant constitutional principle is not a barrier to reading down.

60 The primary judge rejected an argument that the Regulations are invalid in their application to the acquisition of legal services for the purpose of conducting litigation in federal jurisdiction and therefore offend the separation of powers in Ch III. In any event, the primary judge stated that the Regulations could be read down to accommodate such a constitutional limitation, although articulating the relevant limitation was unnecessary because Mr Deripaska did not claim that the operation of the relevant regulations in relation to him breached any such limitation.

61 The Full Court of the Federal Court of Australia considered the primary judge's reasoning to the conclusion on reading down regs 14 and 15 to be "unimpeachable". The Full Federal Court considered that the practical effect of designation would be that a designated person or entity would be unlikely to be able to retain an Australian lawyer to advise or represent them unless the Minister granted a permit under reg 18. Relevantly, the Full Federal Court held that the primary judge was correct to find that reading down is not limited to cases where the limitation may be found in the terms of the law itself or its subject matter, where the law operates in an area that is subject to a clear constitutional limitation. The limitation by which the Regulations were to be read down was clear and did not involve a choice. The relevant limitation or carve out was that regs 14 and 15 do not apply to actions taken for the purpose, in an objective sense, of challenging the validity of decisions or actions under the AS Act pursuant to s 75(v) of the *Constitution* or s 39B(1) of the *Judiciary Act*.

62 The Full Federal Court considered it unnecessary to decide whether the jurisdiction under s 75(iii) of the *Constitution* was similarly entrenched because Mr Deripaska did not seek to invoke s 75(iii) jurisdiction except in relation to hypothetical litigation. The Full Federal Court agreed with the primary judge that there was no authority for the proposition that Ch III gives constitutional force to any general concept of the rule of law, nor for the proposition that a law which compromises the exercise of federal jurisdiction is unconstitutional because it impairs the procurement of legal advice and representation by a party or a potential party.

Appeal to this Court

63 By a grant of special leave to appeal, Mr Deripaska appealed to this Court to contend that regs 14 and 15 are invalid because they prevent a person who is "designated" and "declared" under the Regulations from obtaining legal representation unless the Minister grants a permit. Mr Deripaska contends: first, that regs 14 and 15 cannot be read down as they were by the Full Federal Court; and second, that regs 14 and 15 would remain invalid even if they were read down because they would infringe two other constitutional limitations for which he contends.

Constitutional framework and the entrenched jurisdiction conferred by s 75(v) of the *Constitution*

64 Section 75(v) of the *Constitution* confers original jurisdiction on this Court in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. Paragraphs (i) and (iii) of s 77 relevantly empower the Commonwealth Parliament to confer or invest equivalent statutory jurisdiction on or in other courts. The Parliament can delimit the statutory jurisdiction that it chooses to confer under s 77(i) or invest under s 77(iii)

to something less than the full scope of jurisdiction under s 75(v).[85] It may also, under s 51(xxxix), regulate the procedure to be followed in the exercise of jurisdiction under s 75(v) or under s 77(i) or (iii).[86]

65 However, the Parliament cannot "enact a law which denies to this Court when exercising jurisdiction under s 75(v), or to another court when exercising jurisdiction within the limits conferred on or invested in it under s 77(i) or (iii) by reference to s 75(v), the ability to enforce the legislated limits of an officer's power".[87] That limitation is "an entrenched minimum provision of judicial review".[88]

66 The question whether a law transgresses that constitutional limitation is one of substance and degree.[89] It requires "an examination not only of the legal operation of the law but also of the practical impact of the law on the ability of a court, through the application of judicial process, to discern and declare whether or not the conditions of and constraints on the lawful exercise of the power conferred on an officer have been observed in a particular case".[90]

67 As a majority of this Court explained in *Bodruddaza v Minister for Immigration and Multicultural Affairs*, "a law with respect to the commencement of proceedings under s 75(v) will be valid if, *whether directly or as a matter of practical effect*, it does not 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".[91]

---

85 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 26 [47], citing *Abebe v The Commonwealth* (1999) 197 CLR 510.

86 *Graham* (2017) 263 CLR 1 at 26-27 [47].

87 *Graham* (2017) 263 CLR 1 at 27 [48]. See also *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 482-483 [5], 513-514 [103]-[104]; *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 668-669 [46].

88 *Plaintiff S157/2002* (2003) 211 CLR 476 at 513 [103].

89 *Graham* (2017) 263 CLR 1 at 27 [48].

90 *Graham* (2017) 263 CLR 1 at 27 [48].

91 (2007) 228 CLR 651 at 671 [53] (emphasis added).

Constructional imperative

68 The regulation-making power in s 10 of the AS Act is subject to s 15A of the *Acts Interpretation Act 1901* (Cth) ("the AI Act"), which requires that it be interpreted and applied as subject to the *Constitution* and that, to the extent that it is construed as being in excess of the legislative power of the Commonwealth, it is to apply validly to the extent that it is not in excess of that power. Section 15A of the AI Act provides a prima facie presumption that "the enactment should be divisible and that any parts found constitutionally unobjectionable should be carried into effect independently of those which fail".[92] As will be explained, that presumption is subject to any "positive indication" that the law was intended to operate either fully or not at all.[93]

69 To the extent that s 10 of the AS Act is read down to accommodate a constitutional limitation, s 13(1)(c) of the *Legislation Act 2003* (Cth) provides that, subject to a contrary intention, any instrument made under enabling legislation is to be read and construed subject to the enabling legislation as in force from time to time and so as not to exceed the power to make the instrument. Further, s 15A of the AI Act is made directly applicable to regulations.[94] Consequently, regulations made under the AS Act must be construed as far as possible so as not to exceed that power so read down.

70 As has been explained, those rules of construction may be applied by formulating a "composite hypothetical question", namely whether, if regs 14 and 15 had been enacted as primary legislation, they would have complied with the constitutional limitation.[95]

---

92 *Bank of NSW v The Commonwealth* ("the *Bank Nationalisation Case*") (1948) 76 CLR 1 at 371.

93 *Tajjour v New South Wales* (2014) 254 CLR 508 at 585-586 [169], citing *Cam & Sons Pty Ltd v The Chief Secretary of New South Wales* (1951) 84 CLR 442 at 454.

94 *Legislation Act*, s 13(1)(a).

95 See *Palmer* (2021) 272 CLR 505 at 547 [122]-[124]; *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 12 [19]; 419 ALR 457 at 468.

Limits on reading down

71 There are three relevant limits to reading down in reliance on s 15A of the AI Act, which were first identified by Latham CJ in *Pidoto v Victoria*.[96]

72 First, a provision cannot be read down where "the law was intended to operate fully and completely according to its terms, or not at all".[97] Although, by s 15A of the AI Act, the Commonwealth Parliament has reversed the common law presumption that a statute is to "operate as a whole",[98] s 15A of the AI Act is subject to a contrary intention arising from the statute being interpreted.[99]

73 Second, a provision cannot be read down where it "would alter the policy or operation of the statute with respect to the cases which, after the reading down, would still remain within its terms".[100] This requires that the reading down not effect "a partial validation of a provision which extends beyond power" unless "the operation of the remaining parts of the law remains unchanged".[101] It also requires that the reading down result in a "consistent workable and effective body of provisions".[102]

74 Third, the "particular standard criterion or test" by which the law is to be read down must be able to be "discovered from the terms of the law itself or from the nature of the subject matter with which the law deals".[103] By contrast, "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

---

96 (1943) 68 CLR 87.

97 *Pidoto* (1943) 68 CLR 87 at 108.

98 *Bank Nationalisation Case* (1948) 76 CLR 1 at 371.

99 AI Act, s 2(2).

100 *Pidoto* (1943) 68 CLR 87 at 111.

101 *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 502, quoting *Pidoto* (1943) 68 CLR 87 at 108. See also *Bank Nationalisation Case* (1948) 76 CLR 1 at 371; *Spence v Queensland* (2019) 268 CLR 355 at 414 [87].

102 *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 493.

103 *Pidoto* (1943) 68 CLR 87 at 111.

invalid".[104] Underlying that limit is the fact that s 15A of the AI Act is an interpretation provision which 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".[105]

Reading down to comply with a constitutional limitation

75 In relation to the third limit on reading down, where a provision purports to operate in an area in respect of which there is a clear constitutional limitation, that constitutional limitation may itself provide the applicable "standard criterion or test". As will be explained, the existence of room for debate about how to articulate the constitutional limitation does not prevent reading down by reference to that limit.

76 In *Victoria v The Commonwealth (Industrial Relations Act Case)*, five judges of this Court observed that s 15A of the AI Act may apply in two distinct situations: first, in relation to particular clauses, provisos and qualifications which are separately expressed and beyond legislative power; and second, in relation to general words or expressions.[106] Their Honours said that "[t]he limitation by reference to which a law is to be read down may appear from the terms of the law or from its subject matter".[107] So, "where a law is intended to operate in an area where Parliament's legislative power is subject to a clear limitation, it can be read as subject to that limitation".[108]

77 In the *Industrial Relations Act Case*, s 6 of the *Industrial Relations Act 1988* (Cth) provided that the Act bound the Crown in right of each of the States. It thus purported to subject the States to a regime that specified terms and conditions with respect to employment generally and permitted the Industrial Relations Commission to regulate the terms and conditions on which people were employed, that being an area in which the legislative power of the Parliament is limited by the principle in *Re Australian Education Union; Ex parte Victoria*.[109]

---

104 *Pidoto* (1943) 68 CLR 87 at 111. See *Spence* (2019) 268 CLR 355 at 414-415 [87]. See also s 15AA of the AI Act.

105 *Pidoto* (1943) 68 CLR 87 at 111. See also *Spence* (2019) 268 CLR 355 at 415 [87].

106 (1996) 187 CLR 416 at 502.

107 *Industrial Relations Act Case* (1996) 187 CLR 416 at 502.

108 *Industrial Relations Act Case* (1996) 187 CLR 416 at 502-503.

109 *Industrial Relations Act Case* (1996) 187 CLR 416 at 503, referring to *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188.

In those circumstances, "[t]he nature and subject matter of the Act" supplied the limitation by which s 6 could be read down within constitutional power: s 6 could be read as "binding the States to the extent that the provisions of the Act do not prevent them from determining the number of persons they wish to employ, the term of their appointment, the number and identity of those they wish to dismiss on redundancy grounds and the terms and conditions of those employed at the higher levels of government".[110]

78 In *Tajjour v New South Wales*, Gageler J, in dissent, concluded that s 93X of the *Crimes Act 1900* (NSW), which provided that a person is guilty of an offence if they habitually consort with convicted offenders and consort with those convicted offenders after having been given an official warning in relation to each of those offenders, infringed the implied freedom of political communication in its application to association for a purpose of engaging in communication on governmental or political matter.[111] However, applying the *Industrial Relations Act Case*, his Honour concluded that s 93X could be read down by reference to the clear constitutional limitation supplied by the implied freedom.[112] In particular, it could be read down "as having no application in so far as the section would apply to consorting which is or forms part of an association for a purpose of engaging in communication on governmental or political matter".[113] His Honour observed:[114]

> "That a severance clause operates only as a rule of construction, however, is no impediment to its application to read down a provision expressed in general words so as to have no application within an area in which legislative power is subject to a clear constitutional limitation. Such 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. Where reading down can occur, the constructional imperative of a severance clause is that reading down must occur."

79 In *Graham v Minister for Immigration and Border Protection*, six members of this Court cited this passage with approval when concluding that the invalid

---

110 *Industrial Relations Act Case* (1996) 187 CLR 416 at 503.

111 (2014) 254 CLR 508 at 576 [138].

112 *Tajjour* (2014) 254 CLR 508 at 586 [171], 589 [178].

113 *Tajjour* (2014) 254 CLR 508 at 589 [178].

114 *Tajjour* (2014) 254 CLR 508 at 586 [171] (footnotes omitted); see also 586-587 [172] and the authorities cited.

application of the provision challenged in that case was severable.[115] Their Honours applied s 15A of the AI Act to read the word "court" to exclude the High Court when exercising jurisdiction under s 75(v) of the *Constitution*, and the Federal Court when exercising jurisdiction under s 476A(1)(c) and (2) of the *Migration Act 1958* (Cth), to review a purported exercise of power by the relevant Minister under s 501, 501A, 501B or 501C to which certain information was relevant.[116]

Can regs 14 and 15 be read down so as not to transgress the constitutional limitation?

80 The text of regs 14 and 15 reveals that they purport to operate in an area in which "the legislative power of the Parliament is limited"[117] by the constitutional limitation derived from s 75(v) of the *Constitution*. Regulations 14 and 15 regulate the use of "assets",[118] which on its face extends to assets that may be used to pay for legal advice and representation. Regulations 14(1)(b) and 15(1)(c) respectively provide that a person does not contravene the regulation if the making available of, or use of or dealing with, the asset is authorised by a permit granted under reg 18. Sub-regulations (1) and (2) of reg 20 provide for applications for a permit authorising the making available of, or use of or dealing with, an asset in relation to a basic expense dealing, a legally required dealing or a contractual dealing. "Basic expense dealing" is defined to include certain dealings that are necessary for any basic expenses, including "reasonable professional fees" and "reimbursement of expenses associated with the provision of legal services".[119]

81 The constitutional limitation thus supplies the applicable standard, criterion or test by reference to which regs 14 and 15 can be read down. As has been observed, such reading down can occur "even if the constitutional limitation is incapable of precise definition".[120] It is not judicial redrafting. Rather, the Court is exercising judicial power in an orthodox manner by interpreting the AS Act subject to the requirements of the AI Act and the *Constitution*. That the expression of the constitutional limitation might vary depending on the form of the legislation

---

115 (2017) 263 CLR 1 at 32-33 [66].

116 *Graham* (2017) 263 CLR 1 at 33 [66].

117 *Industrial Relations Act Case* (1996) 187 CLR 416 at 503.

118 AS Act, s 4 definition of "asset".

119 Regulations, reg 20(3)(b)(vii) and (viii).

120 *Tajjour* (2014) 254 CLR 508 at 586 [171].

under consideration[121] is not an obstacle to reading down a provision in a particular case.

82 It is also possible, in an appropriate case, to read down a statutory provision by reference to the purpose of a person's conduct to comply with a constitutional limitation. In *Tajjour*, Gageler J, in dissent, read down the criminal offence provision so as not to apply to consorting which was or formed part of "an association for a *purpose* of engaging in communication on governmental or political matter".[122] So too have provisions been read down on the basis of a constitutional limitation by reference to the object of a person's conduct.[123]

83 However, that does not mean that a provision will always be capable of being read down by reference to the purpose of a person's conduct. That is apparent from the Full Federal Court's approach to reading down the Regulations in this case, which would not necessarily be practically effective to protect a designated person's access to the entrenched jurisdiction. As read down, regs 14 and 15 might still prohibit conduct that would be a necessary precursor to a designated person knowing their rights and obligations and therefore having the capacity to invoke the entrenched jurisdiction.

84 For example, it is not clear that the limitation as expressed by the Full Federal Court would cover an initial conferral at which the designated person asks their solicitor what their rights and duties under Australian law are, at which point the purpose of challenging the validity of decisions or actions under the AS Act pursuant to s 75(v) of the *Constitution* or s 39B(1) of the *Judiciary Act* ("the challenge purpose") will not necessarily have transpired. Yet such a conferral would, in some cases, be practically necessary as a preliminary step towards invoking s 75(v) jurisdiction. If, at that early stage, a designated person transfers money into the lawyer's trust fund, pursuant to a retainer to advise the designated person on their rights and duties under Australian law, that transfer will not necessarily have the challenge purpose. So, too, might the generation of documents that are owned by, or made available for the benefit of, the designated person

---

121 *Austin v The Commonwealth* (2003) 215 CLR 185 at 249 [124].

122 (2014) 254 CLR 508 at 589 [178] (emphasis added).

123 See, eg, *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 487-488. See also *Carter v The Potato Marketing Board* (1951) 84 CLR 460 at 484; *Nominal Defendant v Dunstan* (1963) 109 CLR 143 at 151-152; *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 291-292.

constitute a breach, since the lawyer would be "using" or "dealing with" the assets of the designated person.[124]

85 In turn, the lawyer's conduct might itself constitute an offence under s 16 of the AS Act, since the lawyer will have engaged in conduct that contravenes a sanction law, namely by making an asset available to or for the benefit of the designated person, being reckless as to whether the asset was made available to or for the benefit of the designated person and as to whether the designated person was a designated person.[125] The designated person's contravention of reg 15 might also constitute an offence under s 16 of the AS Act, given they arguably will have engaged in conduct that contravenes a sanction law by holding a controlled asset and using or dealing with the asset without yet having the challenge purpose.[126]

86 These examples illustrate that the manner in which the Full Federal Court read down regs 14 and 15 is not a sufficient expression of the constitutional limitation. While the seeking or provision of such preliminary advice might be objectively characterised as arguably being for the challenge purpose, this will not always be clear, particularly in cases where the advice is that no such challenge is available or no challenge is ultimately commenced. For that constitutional limitation to be practically effective regs 14 and 15 should be read down in a manner that provides sufficient certainty to potential litigants and their lawyers.

87 Regulations 14 and 15 should instead be read down so as not to apply to the extent that they would, directly or as a matter of practical effect, curtail or limit the right or ability of a person to seek relief under s 75(v) of the *Constitution* or s 39B(1) of the *Judiciary Act*.[127]

88 The Regulations may be read down in this manner even though "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".[128] The same was true of the limitation identified in the *Industrial Relations Act Case*, which required an inquiry into whether a person

---

124 See *Wentworth v De Montfort* (1988) 15 NSWLR 348 at 353.

125 See AS Act, s 16(1); Regulations, reg 14(1)(a); *Criminal Code* (Cth), s 5.6(2).

126 AS Act, s 16(1); Regulations, reg 15(1)(a) and (b)(i).

127 See *Bodruddaza* (2007) 228 CLR 651 at 671 [53].

128 *Tajjour* (2014) 254 CLR 508 at 586 [171].

was engaged at the "higher levels of government".[129] What is important is that the constitutional limitation as framed would offer real protection for the designated person's access to the entrenched minimum provision of judicial review.

Other limits on reading down not infringed

89 The Regulations do not evince an intention that, if they could not validly prevent the use of controlled assets to invoke the entrenched jurisdiction, they do not apply at all. It may be accepted that, as the primary judge found, the scheme is designedly draconian in its reach. Any relaxation of the scheme would therefore reduce its effectiveness. However, that does not mean that the Regulations were intended to operate in an all-or-nothing manner. That permits may be issued to limit the operation of regs 14 and 15 suggests to the contrary.

90 Nor is the reading down inconsistent with the express, unqualified requirement that a designated person obtain a permit to pay legal expenses and professional fees. A person can obtain a permit, even with respect to professional fees and legal expenses, beyond the operation of the constitutional limitation. Consequently, the permit still has work to do. In any event, the fact that the scheme contemplates the obtaining of permits so that conduct will not fall foul of the prohibitions in regs 14 and 15 does not necessarily evince an intention that regs 14 and 15 should not be read down in the manner described.

91 Mr Deripaska submitted that the carving out of rights derived from s 39B(1) of the *Judiciary Act* is contrary to the AS Act's express provision that the Regulations override that statute. Section 12 of the AS Act relevantly provides that the Regulations have effect despite any Act enacted before its commencement. Contrary to Mr Deripaska's submission, s 12 should not be construed as overriding s 39B(1) of the *Judiciary Act*, consistent with the constitutional limitation identified. Section 12, which refers to Acts generally, does not express a contrary intention to the reading down of regs 14 and 15 in the manner described.

92 While the constitutional limitation confines the area of operation of regs 14 and 15, in cases where they continue to apply their operation is unchanged. Mr Deripaska submitted that regs 14 and 15 are criminal offences[130] that operate by reference to subjective intention,[131] which cannot be reconciled with the "judicially-invented defence" provided by the Full Federal Court's reading

---

129 (1996) 187 CLR 416 at 562.

130 cf [53] above.

131 *Criminal Code* (Cth), s 5.6(1).

down by reference to the objective purpose of the designated person's conduct. That argument does not arise given that the Regulations should not be read down by reference to the objective purpose of the designated person's conduct.

If regs 14 and 15 can be read down, are they invalid in any event?

93 Mr Deripaska submitted that, even if regs 14 and 15 were read down, they would remain invalid because they would infringe one of two other constitutional limitations: (a) they would impermissibly prevent designated persons from being legally represented in Ch III courts; or (b) they would offend a prohibition on placing a person's ability to invoke the jurisdiction under s 75(iii) of the *Constitution* at the discretion of a Commonwealth official. Section 75(iii) confers original jurisdiction on this Court in all matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party. Both of these submissions raise novel constitutional limitations which have not been accepted by a majority of this Court.

94 In accordance with the settled prudential approach of this Court, it is unnecessary for the Court to decide these issues given that, as read down, the Regulations do not relevantly constrain Mr Deripaska from bringing the present proceeding without a ministerial permit.

Prudential approach

95 The prudential approach of this Court is only to decide constitutional issues where there is a state of facts that makes it necessary to decide them.[132] In *Mineralogy Pty Ltd v Western Australia*, the plurality emphasised that the "cautious and restrained approach to answering questions agreed by the parties in a special case is a manifestation of a more general prudential approach to resolving questions of constitutional validity 'founded on the same basal understanding of the nature of the judicial function as that which has informed the doctrine that the High Court lacks original or appellate jurisdiction to answer any question of law (including but not confined to a question of constitutional law) if that question is divorced from the administration of the law'".[133]

96 The plurality stated that "[u]nderlying the prudential approach is recognition that the function performed by the Full Court in answering a question of law stated for its opinion is not advisory but adjudicative. Underlying it also is

---

132 *Farm Transparency* (2022) 277 CLR 537 at 549-550 [20], 576-577 [114]-[116], 602-603 [208] and the authorities cited. Cf *Zhang v Commissioner of the Australian Federal Police* (2021) 273 CLR 216 at 230 [22]-[23] and the authorities cited.

133 (2021) 274 CLR 219 at 248 [57].

recognition that performance of an adjudicative function in an adversary setting 'proceeds best when it proceeds if, and no further than is, warranted to determine a legal right or legal liability in controversy'".[134]

97 The plurality went on to identify four "implications of the prudential approach".[135] First, "a party will not be permitted to 'roam at large' but will be confined to advancing those grounds of challenge which bear on the validity of the provision in its application to that party".[136] Second, "it is ordinarily inappropriate for the [Full] 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".[137] Third, "the application of an impugned legislative provision to the facts must appear from the special case with sufficient clarity both to identify the right, duty or liability that is in controversy and to demonstrate the necessity of answering the question of law to the judicial resolution of that controversy".[138] Fourth, "the necessity of answering the question of law to the judicial resolution of the controversy may not sufficiently appear where there remains a prospect that the controversy can be judicially determined on another basis".[139]

98 Once regs 14 and 15 are read down, the Regulations do not relevantly constrain Mr Deripaska from bringing the present proceeding without a ministerial permit. Mr Deripaska sought to circumvent that issue by posing hypothetical examples of litigation that he may wish to bring – for example, if he loses the present appeal and then wishes to seek a declaration as to the impact of the Regulations on him; or if he were sued himself. Although Mr Deripaska has brought proceedings in a Ch III court, which would also fall within the scope of s 75(iii) of the *Constitution*, they are also proceedings within the meaning of s 75(v) so that they do not engage regs 14 and 15 once those provisions are read

---

134 *Mineralogy* (2021) 274 CLR 219 at 248 [58], quoting *Clubb* (2019) 267 CLR 171 at 217 [137].

135 *Mineralogy* (2021) 274 CLR 219 at 248-249 [59]-[60].

136 *Mineralogy* (2021) 274 CLR 219 at 248 [59], quoting *Knight v Victoria* (2017) 261 CLR 306 at 325 [33], in turn quoting *The Real Estate Institute of NSW v Blair* (1946) 73 CLR 213 at 227.

137 *Mineralogy* (2021) 274 CLR 219 at 248-249 [59], quoting *Knight* (2017) 261 CLR 306 at 324 [33]. See also *Mineralogy* (2021) 274 CLR 219 at 262 [107].

138 *Mineralogy* (2021) 274 CLR 219 at 249 [60].

139 *Mineralogy* (2021) 274 CLR 219 at 249 [60].

down. Applying the prudential approach, Mr Deripaska should not be permitted to roam at large over potential applications of the provisions that do not arise on the facts, provided that regs 14 and 15 would be capable of being read down so as not to apply in those cases.

99 As has been observed, Mr Deripaska submitted that, even if regs 14 and 15 were read down in the manner proposed by the Full Federal Court, they would be invalid in any event because they would: (a) prevent a person from being legally represented in a Ch III court; and (b) prevent a person from invoking the jurisdiction under s 75(iii) of the *Constitution*.

100 As for the proposed limitation on the Commonwealth's power to prevent a person from being legally represented in a Ch III court, the precise manner in which the Regulations might be read down to comply with that limitation would depend on the precise expression of the limitation. Nonetheless, it would be possible for this Court to read the Regulations down so that, for example, they only applied to the extent that they would not, directly or as a matter of practical effect, prevent a designated person from being legally represented in a Ch III court (however such a court is defined).

101 Reading down regs 14 and 15 by reference to the proposed s 75(iii) limitation would be simpler than with respect to s 75(v) because s 75(iii) jurisdiction simply turns on whether the Commonwealth (or a person suing or being sued on its behalf) is a party to the litigation. Further, the constitutional limitation derived from s 75(v) would be a subset of that derived from s 75(iii).

102 That the Regulations could be read down so as not to apply in those circumstances means that, for prudential reasons, consideration of whether the Regulations are invalid in those applications can generally be left to a case in which those circumstances actually arise. However, Mr Deripaska contends that, if the Minister were to revoke the permit, it would then be too late for him to test the proposed constitutional limitations because any litigation at that point would prima facie entail the commission of multiple criminal offences by Mr Deripaska and his lawyers.

103 In those circumstances, it is appropriate to make the following non-exhaustive observations about possible limitations on Commonwealth legislative and executive power to curtail access to legal advice and representation. First, an injunction may lie in respect of an actual or threatened action in excess of power in respect of which a plaintiff has standing to complain.[140] If the Minister

---

140 *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177 at 225 [112], 249 [176]; cf 206 [48], 219-221 [94]-[98], 238 [146], 266-271 [229]-[239].

were to revoke the permit, Mr Deripaska might seek relief in this Court in the form of an injunction under s 75(v) of the *Constitution* restraining an officer of the Commonwealth from enforcing regs 14 and 15 against him to the extent that he engaged lawyers to act for him in other proceedings on the basis that, in so applying, the Regulations were constitutionally invalid on either or both of the further bases on which Mr Deripaska relies.[141] If such a course were adopted, Mr Deripaska would be able to engage lawyers to represent him in the proceedings commenced under s 75(v) of the *Constitution* without breaching regs 14 and 15.

104 Second, in *Dietrich v The Queen*, a majority of this Court held that, where an accused is charged with a serious offence, a trial may miscarry by reason of a judge's failure to stay or adjourn the trial until arrangements have been made for counsel to appear, at public expense, for the accused.[142] Mason CJ and McHugh J described the right to a fair trial as "a central pillar of our criminal justice system", observing that the "power to grant a stay necessarily extends to a case in which representation of the accused by counsel is essential to a fair trial, as it is in most cases in which an accused is charged with a serious offence".[143] If, in the absence of an applicable permit, Mr Deripaska or his lawyers were to be charged with offences under s 16 of the AS Act, the charges being for indictable offences punishable by up to ten years' imprisonment,[144] and therefore serious offences,[145] the court would be empowered to stay the proceedings until Mr Deripaska or his lawyers obtained legal representation.

105 Third, in *APLA Ltd v Legal Services Commissioner (NSW)*, a majority of this Court relevantly concluded that regulations that prohibited advertising of certain legal services did not prevent the effective exercise of judicial power conferred by Ch III of the *Constitution* because nothing in the text or structure of the *Constitution* or in the nature of federal judicial power required that lawyers be able to advertise their services.[146] In dissent, McHugh J, with whom Kirby J relevantly agreed,[147] observed that it is a "principle inherent in Ch III that persons who have rights under federal law may enforce them in federal jurisdiction with

---

141 See *Smethurst* (2020) 272 CLR 177 at 225 [112], 247-252 [171]-[182].

142 (1992) 177 CLR 292 at 298, 326-329, 332, 357-358, 362-365.

143 *Dietrich* (1992) 177 CLR 292 at 298.

144 AS Act, s 16(3); *Crimes Act 1914* (Cth), s 4G.

145 See *Dietrich* (1992) 177 CLR 292 at 336.

146 (2005) 224 CLR 322.

147 *APLA* (2005) 224 CLR 322 at 441 [350].

the advice and assistance of qualified legal practitioners in accordance with the traditional judicial process".[148] McHugh J considered that a law that prevented potential litigants from "obtaining information about their rights in respect of ... federal causes of action" from legal practitioners would "impair[] the capacity of courts exercising federal jurisdiction to hear and determine 'matters' that Ch III authorises and for which the Parliament has legislated in the expectation that those 'matters' will be determined in federal jurisdiction".[149] His Honour explained that "[c]ommunications between legal practitioner and client ... are critical to the administration of justice in Australia" and such communications "make up part of the essential elements of judicial processes required under the *Constitution*, without which proceedings in federal jurisdiction would become a mockery of the judicial system contemplated by Ch III".[150]

106 The other members of the Court held that the impugned law did not prevent the effective exercise of judicial power conferred by Ch III of the *Constitution*. However, their Honours reached that conclusion in respect of a law that prevented lawyers from advertising their services, as distinct from a law preventing lawyers from providing legal services. To that end, Gleeson CJ and Heydon J described the "effective exercise of judicial power, and the maintenance of the rule of law" as "depend[ing] upon the providing of professional legal services so that citizens may know their rights and obligations, and have the capacity to invoke judicial power".[151] Similarly, Gummow J accepted, without deciding, 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".[152] And Hayne J observed that the impugned law did not preclude the seeking of advice or information about whether to invoke the judicial power of the Commonwealth.[153]

107 It may be seriously doubted whether a Commonwealth law could authorise the Executive Government to deprive a person of the ability to seek legal advice

---

148 *APLA* (2005) 224 CLR 322 at 369 [87].

149 *APLA* (2005) 224 CLR 322 at 369 [87].

150 *APLA* (2005) 224 CLR 322 at 368 [84], citing *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 607 and *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11.

151 *APLA* (2005) 224 CLR 322 at 351 [30]. See also *Polyukhovich* (1991) 172 CLR 501 at 607.

152 *APLA* (2005) 224 CLR 322 at 410 [245].

153 *APLA* (2005) 224 CLR 322 at 454-455 [394].

or representation either to know their rights and obligations under Commonwealth law or to invoke federal judicial power. Chapter III of the *Constitution*, which confers judicial power, gives practical effect to the assumption of the rule of law on which the *Constitution* is based.[154] The effectiveness of the exercise of judicial power, and the rule of law, would be significantly diminished by a law which purported to deprive a person of the capacity to know their rights and duties under federal law or to effectively participate in proceedings with respect to those rights and duties in a court exercising federal jurisdiction.[155] Such a law might also compromise the courts' ability to afford procedural fairness.[156] However, determining whether there is such a constitutional limitation or the content of such a limitation must await a case involving facts that make it necessary to decide.

Conclusion and orders

108 For those reasons, regs 14 and 15 can, and therefore must, be read down so as not to apply to the extent that they would, directly or as a matter of practical effect, curtail or limit the right or ability of a person to seek relief under s 75(v) of the *Constitution* or s 39B(1) of the *Judiciary Act*. Read down in that manner, regs 14 and 15 do not relevantly constrain Mr Deripaska from bringing this proceeding without a ministerial permit. The appeal must be dismissed with costs.

---

154 *APLA* (2005) 224 CLR 322 at 351 [30], citing *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 and *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193.

155 See also *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 36; *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 216; *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 1 at 32 [85], 32-33 [87].

156 *Western Australia v Ward* (1997) 76 FCR 492 at 497.

EDELMAN J.

How far can a court go to save legislation and regulations from invalidity?

109 Quite a long way. The issue in this appeal is whether two executive regulations can be saved from invalidity in their entirety in circumstances in which the respondent Minister for Foreign Affairs ("the Minister") accepts that they are invalid in some of their applications because those applications of the regulations go beyond the constitutional limits of the relevant statutory regulation-making power.

110 The regulations can be saved by disapplying them from the applications in which they extend beyond legislative power. But the technique by which they are saved is important. As was properly, and fundamentally, common ground on this appeal, there is no scope in this case for a court to adopt a conforming interpretation of the meaning of the regulations to save them from invalidity. In adopting conforming meanings, courts must tread with great care lest they overreach and enter the realm of a legislating judiciary: *lasciate ogne speranza, voi ch'intrate*. This case is all about the application of meaning. Legitimate technique begins with clear language,[157] which is sadly lacking in this area of law which, for over a century, has been beset with hopelessly confused jargon.

111 The issue arises in the context of sanctions placed upon the appellant, Mr Deripaska. Mr Deripaska is a Russian national who was described in material before the Minister as an oligarch with close personal ties to President Putin. In 2022, Mr Deripaska was the subject of designation for targeted financial sanctions and declaration for travel bans by a legislative instrument made by the Minister.[158] The instrument of designation and declaration was made under the *Autonomous Sanctions Regulations 2011* (Cth). One practical effect of designation is that the designated person is "unlikely to be able to retain an Australian lawyer to advise or represent them unless the Minister granted a permit".[159] Mr Deripaska was immediately exposed to that practical effect.

112 A permit was subsequently issued, which extended to Mr Deripaska, but the permit was for a limited period and subject to revocation at any time. Mr Deripaska challenged the validity of regs 14 and 15 of the *Autonomous Sanctions*

---

157 Gray, "Some Definitions and Questions in Jurisprudence" (1892) 6 *Harvard Law Review* 21 at 21, quoted in *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 618 [150].

158 No issue on this appeal arises in relation to the declaration for travel bans: *Deripaska v Minister for Foreign Affairs* (2024) 184 ALD 393 at 409 [64(b)].

159 *Deripaska v Minister for Foreign Affairs* (2025) 308 FCR 175 at 183-184 [33].

Regulations. Mr Deripaska submitted that there was no power to make regs 14 and 15. He submitted that there were numerous different ways in which regs 14 and 15 could be disapplied and that a court could not choose between those different ways without assuming the role of legislator.[160] Mr Deripaska's broadest proposed disapplication of regs 14 and 15 was based upon an argument that Ch III of the *Constitution* prohibited the regulation-making power in the *Autonomous Sanctions Act 2011* (Cth) from empowering the Executive to make laws that deprived a person of access to legal services (whether legal advice or legal representation or anything associated with obtaining such advice or representation) in relation to matters that might be raised or litigated in a court recognised in Ch III of the *Constitution*.

113 The Minister, supported by the intervention of the Attorney-General of the Commonwealth, confessed and avoided. The Minister conceded that the regulation-making power in the *Autonomous Sanctions Act* did not extend to empower a prohibition on "actions taken for the purpose ['in an objective sense'] of challenging the validity of decisions or actions under the [*Autonomous Sanctions Act*] pursuant to s 75(v) or s 39B(1) of the *Judiciary Act* [*1903* (Cth)]".[161] But the Minister submitted that the regulation-making power could be disapplied to that extent and also that regs 14 and 15 could be disapplied to the extent that they would be ultra vires as a consequence of the Executive exceeding the regulation-making power. The Minister also submitted that the courts should abstain from deciding whether there are any further constitutional constraints upon that regulation-making power and, hence, whether regs 14 and 15 could otherwise validly prevent Mr Deripaska from engaging an Australian lawyer to advise or represent him.

114 The primary judge in the Federal Court of Australia (Kennett J)[162] and the Full Court of the Federal Court (Wigney, Stewart and Neskovcin JJ)[163] accepted the concession of the Minister and also declined to decide whether any further constitutional constraint exists. In this Court, Mr Deripaska had two broad submissions. One submission was that the Minister's conceded disapplication did not go far enough; it was not sufficient for the primary judge and the Full Court to recognise only that Mr Deripaska had a freedom to instruct Australian lawyers for an "objective" purpose of challenging the validity of decisions or actions under the *Autonomous Sanctions Act* pursuant to s 75(v) of the *Constitution* or s 39B(1) of the *Judiciary Act*. There would remain a vast set of rights and freedoms under

---

160 *Pidoto v Victoria* (1943) 68 CLR 87 at 110-111.

161 *Deripaska v Minister for Foreign Affairs* (2024) 184 ALD 393 at 406 [51].

162 *Deripaska v Minister for Foreign Affairs* (2024) 184 ALD 393 at 406 [51], 411 [74].

163 *Deripaska v Minister for Foreign Affairs* (2025) 308 FCR 175 at 184 [39], 195 [96].

Australian law about which Mr Deripaska could not obtain legal services for the purpose of vindicating those rights and freedoms in a Ch III court. Mr Deripaska's other submission was that the disapplication proposed by the Minister was effectively a legislative act and beyond the powers of a federal court.

115 For the reasons below, Mr Deripaska is correct in his submission that broader disapplication of the *Autonomous Sanctions Act* and the *Autonomous Sanctions Regulations* is required to ensure their validity. The scope of his constitutionally protected liberty is not limited to a select range of legal services concerned with s 75(v) of the *Constitution*, a provision which, by itself, says and implies nothing about legal services. Rather, the application of a course of unchallenged decisions in this Court is best understood as requiring constitutional justification for any legislation that abolishes a liberty to obtain legal services concerning any rights and freedoms which might be vindicated in any Ch III court. No justification was offered in this case. The broader disapplication of the *Autonomous Sanctions Act* and the *Autonomous Sanctions Regulations* to protect that liberty is not a legislative act.

The sanctions regime and the designation of Mr Deripaska

The sanctions regime

116 The *Autonomous Sanctions Act* provides for the imposition and enforcement of autonomous sanctions for reasons including threats to international peace and security, serious violations or serious abuses of human rights, and serious violations of international humanitarian law.[164] An "autonomous sanction", relevantly, "is intended to influence, directly or indirectly ... in accordance with Australian Government policy ... another person or entity outside Australia ... or ... involves the prohibition of conduct in or connected with Australia that facilitates, directly or indirectly, the engagement by [such] a person or entity ... in action outside Australia that is contrary to Australian Government policy".[165]

117 Section 28 of the *Autonomous Sanctions Act* authorises the Governor-General to make regulations, including to prescribe matters that are required or permitted by the Act to be prescribed. Subject to the Minister's satisfaction of certain matters (which is not in issue in this case),[166] ss 10(1)(a) and 10(1)(b) respectively, and relevantly, provide that regulations may make provision for "proscription of persons ... (for specified purposes or more generally)" and for the "restriction or prevention of uses of, dealings with, and making available of,

---

164 *Autonomous Sanctions Act*, ss 3(1), 3(2), 3(3)(b), 3(3)(d), 3(3)(f).

165 *Autonomous Sanctions Act*, s 4 (definition of "autonomous sanction").

166 *Autonomous Sanctions Act*, s 10(2).

assets". "Asset" is defined in s 4 in very broad terms that include "an asset of any kind or property of any kind, whether tangible or intangible, movable or immovable, however acquired".

118 The *Autonomous Sanctions Act* empowers the Minister, for the purpose of furthering the main objects of the Act, to make a legislative instrument that specifies a regulation as a "sanction law".[167] Under s 16 of the *Autonomous Sanctions Act* it is an offence for an individual[168] or a body corporate[169] to contravene a sanction law.

119 On 7 December 2011, the Governor-General, acting under s 28 of the *Autonomous Sanctions Act*, made the *Autonomous Sanctions Regulations*. Among the regulations in the *Autonomous Sanctions Regulations* that have been specified by the Minister as a sanction law are regs 14 and 15.[170] Those regulations create contraventions, and (due to the Minister's specification) criminal offences under s 16 of the *Autonomous Sanctions Act*, for certain conduct by a person who has been designated under reg 6 by the Minister. A designation under reg 6 can be made by the Minister including of a person for the country mentioned in an item of the table in that regulation. Item 6A of the table in reg 6 refers to the country of Russia and "[a] person ... that the Minister is satisfied is, or has been, engaging in an activity or performing a function that is of economic or strategic significance to Russia".

120 The criminal offences under s 16 of the *Autonomous Sanctions Act* committed by a contravention of regs 14 and 15 arise in the following relevant circumstances:

1. A person directly or indirectly makes an asset available to, or for the benefit of, a designated person without the authorisation of a permit granted under reg 18.[171]

2. A person uses or deals with a controlled asset (an asset owned or controlled by a designated person), or allows the controlled asset to be used or dealt

---

167 *Autonomous Sanctions Act*, s 6(1).

168 *Autonomous Sanctions Act*, s 16(1).

169 *Autonomous Sanctions Act*, s 16(5).

170 *Autonomous Sanctions (Sanction Law) Declaration 2012* (Cth), s 3 and Sch 1, item 1.

171 *Autonomous Sanctions Regulations*, reg 14(1).

with, or facilitates the use of or dealing with the asset, without the authorisation of a permit granted under reg 18.[172]

121 Under regs 18(1)(e) and 18(1)(f) respectively, the Minister may grant a permit relevantly authorising "the making available of an asset to a person ... that would otherwise contravene regulation 14" or "a use of, or a dealing with, a controlled asset". The Minister must not grant the permit unless, among other conditions, the Minister is satisfied that "it would be in the national interest to grant the permit".[173] The permit may authorise a "basic expense dealing", which includes "reasonable professional fees" and "reimbursement of expenses associated with the provision of legal services".[174] A change in circumstances sufficient to change the "discretionary value judgment"[175] of the Minister can lead to the revocation of the permit.[176]

122 The effect of the offence created by s 16 of the *Autonomous Sanctions Act* together with regs 14 and 15 of the *Autonomous Sanctions Regulations*, and the specification and designation by the Minister, is that a designated person cannot remunerate a lawyer for legal services. And even if a lawyer were prepared to perform legal services for free for the designated person, there would be insurmountable obstacles to the performance of that work. Many documents created by the lawyer in acting as agent for the designated person will be assets owned by the designated person and will accordingly be controlled assets which the lawyer would be prohibited from using or with which the lawyer would be prohibited from dealing.[177]

123 The scope of the chilling effect of regs 14 and 15, in effectively prohibiting even free legal work, was colourfully illustrated in oral argument by the example of a lawyer performing photocopying at their firm. A photocopier owned or leased by the lawyer would fall within the broad definition of "asset". If the photocopier were used by the lawyer in the course of performing any legal work for a designated person then the asset will have been made available for the benefit of the designated person. If the lawyer, who meant to make the photocopier available

---

172 *Autonomous Sanctions Regulations*, reg 15(1) read with reg 3 (definition of "controlled asset").

173 *Autonomous Sanctions Regulations*, reg 18(3)(a).

174 *Autonomous Sanctions Regulations*, regs 20(1)(a), 20(3)(b)(vii), 20(3)(b)(viii).

175 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at 401 [42].

176 *Acts Interpretation Act 1901* (Cth), s 33(3); *Legislation Act 2003* (Cth), s 13(1)(a).

177 See *Wentworth v De Montfort* (1988) 15 NSWLR 348.

to do the copying,[178] knew or was reckless as to the circumstance that it was for the benefit of a designated person,[179] then the lawyer would commit an offence. If the photocopier were owned by an incorporated legal practice then, irrespective of any knowledge or recklessness, the incorporated legal practice would be strictly liable under the *Autonomous Sanctions Act* unless it could prove that it took reasonable precautions, and exercised due diligence, to avoid that contravention.[180] The photocopying example is a simple illustration of the many instances in which the provision of legal services involves making an asset available to a client. Many other examples could be given involving intellectual property, notes and memoranda, and correspondence.

The designation of Mr Deripaska

124 On 17 March 2022, the Minister signed a submission which noted that Mr Deripaska has "business interests and close personal ties to [President] Putin" and that it was open to the Minister to conclude that Mr Deripaska "is, or has been, engaging in an activity or performing a function that is of economic or strategic significance to Russia". The same day, Mr Deripaska was named by the Minister in the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Russia and Ukraine) List 2014* (Cth) as a "designated" person and as a "declared" person under regs 6(a) and 6(b) of the *Autonomous Sanctions Regulations*.[181]

125 Nearly eight months later, on 7 November 2022, the Minister issued a permit, which applied to persons including Mr Deripaska, under reg 18 of the *Autonomous Sanctions Regulations*. The permit was valid until 7 November 2024 unless it was revoked earlier by the Minister. In broad terms, the permit authorised the use of or dealings with assets or controlled assets, or the making of assets available to Mr Deripaska, "to the extent doing so is required to receive legal advice, legal representation, and Ancillary Services [directly related to the provision of legal advice or legal representation, including services relating to: the organisation and filing of court documents; the engagement of expert witnesses; and administrative tasks necessary for legal proceedings], in relation to matters arising under or related to Australian law". On 30 October 2024, the Minister

---

178 *Autonomous Sanctions Act*, s 16(1); *Criminal Code* (Cth), ss 5.2(1), 5.6(1).

179 *Autonomous Sanctions Act*, s 16(1); *Criminal Code*, ss 5.3, 5.4(1), 5.6(2).

180 *Autonomous Sanctions Act*, ss 16(5), 16(7).

181 *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Russia and Ukraine) Amendment (No 7) Instrument 2022* (Cth), s 4 and Sch 1, item 1.

revoked the permit which applied to persons including Mr Deripaska and issued a new permit with similar scope.

The real issues and the decisions below

The issues that arise

126 Between 17 March 2022 and 7 November 2022, the sanctions regime had the practical effect of denying Mr Deripaska the ability to access legal services. Although the permit issued on 7 November 2022 applied to Mr Deripaska, that permit was subsequently revoked and replaced. Mr Deripaska's practical ability to obtain legal services in the future rested on the discretion of the Minister. Mr Deripaska challenged both the Minister's decision[182] and the validity of regs 14 and 15 of the *Autonomous Sanctions Regulations*. His challenges were dismissed by the primary judge and an appeal to the Full Court of the Federal Court was dismissed.

127 The only issue in this Court concerns the validity of the operation of regs 14 and 15 of the *Autonomous Sanctions Regulations*. The starting point for Mr Deripaska's challenge in this Court is that the Commonwealth Parliament has no power in s 28 of the *Autonomous Sanctions Act* to make regulations with the scope of operation of regs 14 and 15. Both at trial and on appeal, and in this Court, the Minister conceded that "regs 14 and 15 [cannot] apply according to their terms to actions taken for the purpose of challenging the validity of decisions or actions under the Act pursuant to s 75(v) [of the *Constitution*] or s 39B(1) of the Judiciary Act".[183] But the Minister submitted that those laws could be disapplied from their invalid applications so that regs 14 and 15 would not be ultra vires the regulation-making power.

128 As all counsel rightly emphasised on numerous occasions throughout this appeal, this issue does not concern the *meaning* of any of the words of regs 14 and 15 of the *Autonomous Sanctions Regulations*. Instead, the issue concerns the scope of the application of regs 14 and 15. Consequently, it was not (and could not be) suggested that this Court, effectively operating by a legislative drafting division, could alter the meaning of the regulations so that expressions such as "deals with", "makes an asset available", or "uses" would have a distorted *meaning* as though they somehow contained an exception such as "other than in relation to a proceeding concerning s 75(v) of the *Constitution*". The submission for the Minister was, instead, that regs 14 and 15 were ultra vires the regulation-making power in s 28 of the *Autonomous Sanctions Act* only to the extent that they

---

182 *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Russia and Ukraine) Amendment (No 7) Instrument 2022* (Cth).

183 *Deripaska v Minister for Foreign Affairs* (2025) 308 FCR 175 at 184 [39].

applied to actions taken for the objective purpose of challenging the validity of decisions or actions under the *Autonomous Sanctions Act* pursuant to s 75(v) of the *Constitution* or s 39B(1) of the *Judiciary Act*.

129 The primary judge and the Full Court held that regs 14 and 15 of the *Autonomous Sanctions Regulations* could be disapplied to preserve their validity. The primary judge said that the proposed disapplication was not a judicially chosen or legislated constraint but arose from a standard supplied by the constitutional limit in s 75(v) itself.[184] Nevertheless, the primary judge recognised that a "full articulation" of the extent to which regs 14 and 15 should "be confined in their denotation" was unnecessary.[185]

130 A similar approach was taken by the Full Court, which also accepted the Minister's proposed disapplication in holding that "regs 14 and 15 do not apply to actions taken for the purpose, in an objective sense, of challenging the validity of decisions or actions under the [*Autonomous Sanctions Act*] pursuant to s 75(v) of the *Constitution* or s 39B(1) of the *Judiciary Act*".[186] The Full Court considered it to be "unnecessary and inappropriate" to decide whether disapplication should extend further based on s 75(iii) of the *Constitution*, and held that present authority did not extend to the recognition of a constitutional constraint upon Commonwealth legislation that prohibited a person from being "legally represented in [federal] jurisdiction".[187]

131 Mr Deripaska has consistently submitted in this proceeding that the disapplication conceded by the Minister, reducing the circumstances in which regulations such as regs 14 and 15 could validly operate by reference to s 75(v) of the *Constitution*, is not within the scope of judicial power. In Mr Deripaska's submission, such a disapplication is judicial legislation. Further, Mr Deripaska has consistently submitted in this proceeding that a partial disapplication of the power to make regulations by reference to an objective purpose of seeking relief under s 75(v) of the *Constitution* or s 39B(1) of the *Judiciary Act* would be unworkable and would still have the practical, and invalid, effect of depriving Mr Deripaska of access to courts in many circumstances. As Mr Deripaska put the point: "[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

---

184 *Deripaska v Minister for Foreign Affairs* (2024) 184 ALD 393 at 410 [68].

185 *Deripaska v Minister for Foreign Affairs* (2024) 184 ALD 393 at 415 [87].

186 *Deripaska v Minister for Foreign Affairs* (2025) 308 FCR 175 at 193 [84].

187 *Deripaska v Minister for Foreign Affairs* (2025) 308 FCR 175 at 195-196 [93]-[104].

much later direct attention to that jurisdiction." Further, Mr Deripaska submitted, without a permit he would be prevented even from obtaining legal representation (and presumably any associated legal services) to seek a declaration concerning the impact of the sanctions regime upon him. He would be practically precluded from seeking forms of relief that are unrelated to s 75(v) of the *Constitution*.

This Court should confront the issues in this case

132 The Minister submitted that this Court should restrict its consideration of the constitutional limits to the scope of s 28 of the *Autonomous Sanctions Act* in the same manner as the primary judge and the Full Court. In other words, it was submitted that this Court need only accept the concession that s 75(v) of the *Constitution* constrains the Commonwealth Parliament from empowering regulations that prevent or substantially impair a designated person from seeking relief under s 75(v) of the *Constitution*. Regulations 14 and 15 of the *Autonomous Sanctions Regulations* could then be disapplied to the extent that they apply in that manner beyond statutory power. It was submitted that a prudential approach should be taken by this Court so that any further invalidity of regs 14 and 15 would be left for another day. The Minister submitted that Mr Deripaska is presently within the terms of a permit and can obtain legal services pursuant to that permit. If the permit that applies to Mr Deripaska were later revoked then issues arising from that revocation could be addressed at that later time. The Minister's submission about this proposed prudential approach relied upon a view of the decision of this Court in *Knight v Victoria*[188] which was said to support this case falling within an approach that should "ordinarily"[189] be taken.

133 Different understandings have developed of the approach taken by this Court in *Knight*.[190] On one view of the approach it is nothing more than an insistence that courts should not decide constitutional issues in the abstract "unless there exists a state of facts which makes it necessary to decide such a question in order to do justice in the given case and to determine the rights of the parties".[191]

---

188 (2017) 261 CLR 306 at 324 [33].

189 *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at 248-249 [59]. See also *Zhang v Commissioner of the Australian Federal Police* (2021) 273 CLR 216 at 230 [21].

190 *Zhang v Commissioner of the Australian Federal Police* (2021) 273 CLR 216 at 230 [23].

191 *Lambert v Weichelt* (1954) 28 ALJ 282 at 283, quoted in *Knight v Victoria* (2017) 261 CLR 306 at 324 [32]. See also *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at 259 [99].

A court should not "roam at large" over a statute.[192] Of course, the state of facts might not be presently existing facts but they might arise from a present apprehension. For instance, this Court held in *Croome v Tasmania*[193] that it was not necessary for criminal proceedings to be brought against Mr Croome and Mr Toonen for this Court to have the authority to adjudicate on the constitutional validity of laws that exposed them both to the possibility of criminal proceedings in the future. There was not a hint of a suggestion by this Court that it should decline to resolve, or should avoid, the issue that would be put in dispute.

134 There is, however, a more extreme view of this aspect of the decision in *Knight*. That more extreme view, which underlies the Minister's submission in this case, is that if a court can do so, a constitutional dispute should "ordinarily" be resolved without deciding a constitutional issue even if the issue is an important issue raised by a party whose rights are affected by it. Although I was a party to the decision in *Knight*, and although I accept that the reasoning in that case might be open to be understood in this more extreme way, I consider not merely that this more extreme view is wrong[194] but that it is a view that can be inimical to the process of justice.

135 As I explained in *Mineralogy Pty Ltd v Western Australia*,[195] the proper approach should be to evaluate all relevant factors in deciding whether to exercise judicial restraint by declining to address an argued issue that affects the rights of a party. As Gageler J said in *Private R v Cowen*,[196] prudential considerations "do not inevitably weigh in favour of a conclusion that leaving a constitutional issue unresolved is best". Indeed, they do not even ordinarily do so. If there should be any approach that is "ordinarily" taken as a result of that weighing process then it ought to be ordinary for this Court to decide a legal issue arising from the facts where the issue has been squarely raised for resolution by a party. That is what interpersonal justice should ordinarily require.

136 If the more extreme view of the *Knight* approach were applied to Mr Croome and Mr Toonen then they would have had to wait at least until criminal proceedings had been brought against them, and possibly until they were convicted, before this Court would exercise the discretion to make a declaration as

---

192 *The Real Estate Institute of NSW v Blair* (1946) 73 CLR 213 at 227; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 69 [156].

193 (1997) 191 CLR 119.

194 See *Private R v Cowen* (2020) 271 CLR 316 at 375 [158]; *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at 603 [209].

195 (2021) 274 CLR 219 at 259-262 [100]-[107].

196 (2020) 271 CLR 316 at 355 [107].

to the validity of the criminal laws under which they were charged. For this Court to adopt an approach that would make litigants live under such a sword is injustice enough. But this case is worse.

137 Suppose the permit that applies to Mr Deripaska were revoked and he needed to obtain legal services regarding a matter before a court which was unrelated to issues concerning s 75(v) of the *Constitution* or s 39B(1) of the *Judiciary Act*. In that circumstance, if this Court were to apply the more extreme view of the approach in *Knight* then it would be practically impossible for Mr Deripaska to obtain legal services with respect to that issue without artificially creating an issue under s 75(v) or s 39B(1) in order to litigate his real dispute. Mr Deripaska could not even obtain legal advice about whether he was entitled to obtain such legal advice on that issue. And even if an issue concerning s 75(v) or s 39B(1) could be manufactured, how would Mr Deripaska be able to manufacture that issue without legal advice? Mr Deripaska could therefore be precluded from raising in the future one of the very issues which he raises in anticipation in this proceeding. The chilling effect of regs 14 and 15 could freeze Mr Deripaska from access to a court. This Court should perform its role by adjudicating upon Mr Deripaska's submission of partial disapplication to the full extent to which that submission was made.

The technique of partial disapplication

The proper starting point

138 Over a period of forty years, members of this Court have repeated on many occasions that where a constitutional challenge is brought to the scope of the application of regulations made by the Executive, the proper starting point is usually the constitutional scope of the earlier, empowering legislation: if the executive regulations exceed that valid legislative scope, then they will be ultra vires the earlier empowering legislation and no enquiry as to the operation of the *Constitution* upon the later executive regulations would be necessary.[197] It is only necessary to consider the direct operation of the *Constitution* upon executive regulations if, for reasons of principle or timing, there was said to be a

---

197 *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 612-614; *Wotton v Queensland* (2012) 246 CLR 1 at 9-10 [10], 13-14 [21]-[24], 29-30 [74]; *Comcare v Banerji* (2019) 267 CLR 373 at 405 [44], 421-422 [96], 458-459 [209]-[211]; *Palmer v Western Australia* (2021) 272 CLR 505 at 530-531 [63]-[68], 545-548 [117]-[128], 573-574 [200]-[202], 578 [219], 580 [224]-[225]; *The Commonwealth v AJL20* (2021) 273 CLR 43 at 69-70 [43]; *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at 12 [19], 43 [170]; 419 ALR 457 at 468, 510. See also *A v Independent Commission Against Corruption* (2014) 88 NSWLR 240 at 256-257 [56]; *Cotterill v Romanes* (2023) 413 ALR 360 at 374 [64], 377 [81].

constitutional constraint upon executive power that went beyond the constitutional constraint on legislative power. No such suggestion was made in this case.

139 Once the relevant constitutional limits of a regulation-making power are identified, a further issue can arise, as it does in this case, if executive regulations, properly interpreted, have an application that extends beyond the scope of the regulation-making power. The further issue is whether the executive regulations can be partially disapplied, excluding their application only in the respect to which they exceed the regulation-making power, so that they are ultra vires only in that application.

Partial disapplication and jargonic mess

140 For centuries, many of the greatest thinkers and writers in linguistics, philosophy, and law have recognised a very basic distinction between the meaning of words and the application of that meaning. The distinction has sometimes been expressed in different language intended to convey a similar contrast: connotation and denotation; sense and reference; semantics and pragmatics; and meaning and extension.[198] Fried once described those who deny the distinction between meaning and application as "the enemies of meaning and, therefore, the enemies of the very conditions of human creativity".[199] The distinction should be as obvious as it is fundamental. Even without a close study of linguistics or the repeated exhortations by generations of the finest minds, a young child can comprehend that a sign which says "Caution: Shark infested waters" might *mean* that there are many sharks in that body of water but should be *applied* by abstaining from swimming in those waters.

141 As is the case for ordinary language, comprehensible even to the child who decides not to swim where there are sharks, so too it is the case for the language of the law. In a passage from *R v G*,[200] the effect of which has been repeatedly

---

198 Mill, *A System of Logic, Ratiocinative and Inductive, Being a Connected View of the Principles of Evidence, and the Methods of Scientific Investigation* (1843), vol 1 at 37-50; Frege, "Über Sinn und Bedeutung" (1892) 100 *Zeitschrift für Philosophie und philosophische Kritik* 25, translated as Frege, "Sense and Reference" (1948) 57 *The Philosophical Review* 209, tr Black; Carnap, *Meaning and Necessity: A Study in Semantics and Modal Logic* (1947) at 177-178; Grice, "Logic and Conversation", in Cole and Morgan (eds), *Syntax and Semantics, Volume 3: Speech Acts* (1975) 41 at 42-43; Kripke, *Wittgenstein on Rules and Private Language* (1982) at 81-83; Dworkin, *Law's Empire* (1986) at 71; Endicott, *Vagueness in Law* (2000) at 31-32.

199 Fried, "Sonnet LXV and the 'Black Ink' of the Framers' Intention" (1987) 100 *Harvard Law Review* 751 at 758.

200 [2004] 1 AC 1034 at 1054 [29].

endorsed in this Court,[201] Lord Bingham of Cornhill remarked that the "application of a statutory expression may change over time, but the meaning of the expression itself [at the right level of generality[202]] cannot change". As Bell and Gageler JJ said (not in dissent on this point) in *R v A2*,[203] after quoting Lord Bingham's distinction between meaning and application, "the starting point is what the Parliament meant by its use of the words". Once the meaning of legislative words is determined then the court turns to the application of those words to the facts and circumstances before it.

142 A failure to appreciate the difference between the meaning of a law and the application of that meaning to facts and circumstances will inevitably lead to a failure to appreciate a difference between the techniques used to fulfil the command in s 15A of the *Acts Interpretation Act 1901* (Cth), that:

> "[e]very Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power".

The command in s 15A is applied to executive regulations by s 13(1)(a) of the *Legislation Act 2003* (Cth). By the operation of s 13(1)(a), the same techniques that can save legislative provisions from being entirely constitutionally invalid can also save executive regulations from being entirely ultra vires.

143 The expression "read and construed" in s 15A, like the equivalent Tasmanian provision, which uses the same expression[204] interchangeably with "interpretation and construction",[205] was originally concerned with the basic distinction between meaning and application. In the mid-nineteenth century, Lieber had drawn a distinction between "interpretation" as "the art of finding out

---

201 *Lake Macquarie Shire Council v Aberdare County Council* (1970) 123 CLR 327 at 331; *Aubrey v The Queen* (2017) 260 CLR 305 at 321-322 [29]; *Clubb v Edwards* (2019) 267 CLR 171 at 318 [425]; *R v A2* (2019) 269 CLR 507 at 553 [144], 562-563 [169]-[170]; *BMW Australia Ltd v Brewster* (2019) 269 CLR 574 at 598 [44], 638 [171]. See also *Birmingham City Council v Oakley* [2001] 1 AC 617 at 631; *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 at 695 [9]; *Owens v Owens* [2018] AC 899 at 916-917 [30].

202 *Farshchi v The King* (2025) 100 ALJR 6 at 16 [35]; 426 ALR 185 at 194-195.

203 (2019) 269 CLR 507 at 553 [144].

204 *Acts Interpretation Act 1931* (Tas), s 3.

205 *Acts Interpretation Act 1931* (Tas), s 4(1).

the true sense of any form of words" and "construction" as "the drawing of conclusions respecting subjects".[206] As Black explained in relation to written laws,[207] "[i]nterpretation ... is the art or process of discovering and expounding the intended signification of the language used" while "[c]onstruction ... is the art or process of ... expounding [that] meaning ... with respect to its application to a given case". Whether the language used was "interpret and construe", "read and construe", or some other related expression, as Lindley LJ observed in *Chatenay v Brazilian Submarine Telegraph Co*,[208] there were two different concepts involved: "first, the meaning of the words; and, secondly, their legal effect, or the effect which is to be given to them". As Isaacs J noted in 1925, the distinction was one between the "meaning of the words" (which he called "interpretation") and "[t]heir effect" (or application, which he called "construction").[209]

144 The two concepts were deployed as early as 1815[210] in the antique expression "read and construed", which was grandiloquent gobbledegook to describe the process of interpreting and applying different legislation as though it were a single Act.[211] That unfortunate expression was then adopted in s 2(2) of the *Navigation Act 1912* (Cth), from which s 15A of the *Acts Interpretation Act* was modelled,[212] to mandate, where possible, the interpretation and application of an invalid part of a law separately from the valid part.

145 The separate techniques of ensuring the validity of legislation or regulations—by (i) interpretation (ascertainment of meaning) and (ii) application of meaning—became further confused by the jargonic mess introduced by the use of the phrase "reading down" to describe both techniques. The phrase "reading down" appears to have been coined, at least in Australia, by Isaacs J[213] at a time

---

206 Lieber, *Legal and Political Hermeneutics*, enlarged ed (1839) at 23, 56.

207 Black, *Handbook on the Construction and Interpretation of the Laws* (1896) at 1.

208 [1891] 1 QB 79 at 85.

209 *Life Insurance Company of Australia Ltd v Phillips* (1925) 36 CLR 60 at 78.

210 *Stamp Act 1815* (55 Geo 3 c 184), s 2. See also 11 & 12 Vict c 5, s 7; 11 & 12 Vict c 18, s 4; 13 & 14 Vict c 97, s 2; *International Copyright Act 1852* (15 & 16 Vict c 12), s 10; *Crown Lands Act Amendment Act 1903* (NSW), s 1; *Public Service Act 1900* (Vic), s 1.

211 Hardcastle and Craies, *A Treatise on the Construction and Effect of Statute Law*, 2nd ed (1892) at 148.

212 See *Clubb v Edwards* (2019) 267 CLR 171 at 319 [427].

213 *New South Wales v The Commonwealth* (1915) 20 CLR 54 at 96.

when the common law techniques of saving legislation were only interpretative: the validity of legislation could be preserved only by choice of a valid meaning, not by reducing the scope of its application. A court would prefer a meaning that ensured constitutional validity, in the words of Isaacs J, by the application "with more than ordinary anxiety [of] the maxim *Ut res magis valeat quam pereat*".[214]

146 The use by Isaacs J of the expression "reading down" to describe this process of conforming interpretation was little better than the expression "writing down", which had been described as a "meaningless" label.[215] But at least "reading down" was understood to refer to the technique of conforming interpretation. And it was understood that this technique would not always be sufficient to avoid invalidity. For instance, in *Owners of SS Kalibia v Wilson*,[216] Isaacs J (in the majority) had held that the expression "coasting trade" was a single expression which could not be divided by interpretation between interstate trade (valid) and intrastate trade (invalid). As a technique of *interpretation*, Isaacs J said, this would "exceed[] our functions as interpreters of the law".[217] It was in response to that decision that s 2(2) of the *Navigation Act* was introduced.[218]

147 In respect of their inclusion of the technique of conforming interpretation (the unfortunate "reading down"), s 2(2) of the *Navigation Act*—and, following s 2(2), s 15A of the *Acts Interpretation Act*—reflected, and possibly even developed, the common law. As many, many judges in this Court have held, the command in s 15A includes the duty to apply the technique of conforming interpretation.[219] It is unnecessary in this case to consider whether the statutory

---

214 *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 180. "[I]t is better for a thing to have effect than to be made void": *Jowitt's Dictionary of English Law*, 6th ed (2024), vol 2 at 2688.

215 *Dawson v The Commonwealth* (1946) 73 CLR 157 at 178.

216 (1910) 11 CLR 689.

217 *Owners of SS Kalibia v Wilson* (1910) 11 CLR 689 at 715.

218 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 19 July 1912 at 1058-1060; Australia, House of Representatives, *Parliamentary Debates* (Hansard), 17 October 1912 at 4387.

219 *McDonald v Victoria* (1937) 58 CLR 146 at 153-154; *Lockwood v The Commonwealth* (1954) 90 CLR 177 at 183; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 14; *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 469; *Airservices Australia v Canadian Airlines International Ltd* (2000) 202 CLR 133 at 271 [408]; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR

command permits an approach to conforming interpretation that is broader than that recognised by the common law, with more weight on the "presumption" of conformity, although without interpreting s 15A as "impermissibly entrusting legislative power to Ch III courts".[220] No submission was made in this Court to that effect because the issue of conforming interpretation does not arise in this case.

148 There was, however, a respect in which s 2(2) (and later the similar provision in s 15A) certainly extended beyond the common law. That was by introducing an additional technique of partial disapplication. As this Court held in *Newcastle and Hunter River Steamship Co Ltd v Attorney-General for the Commonwealth*,[221] one effect of s 2(2) of the *Navigation Act* was to permit the opposite result from the decision in *Owners of SS Kalibia* to be achieved. The major addition that was introduced by s 2(2) of the *Navigation Act* was that it also required a court, wherever possible, to disapply a provision's meaning from particular facts or circumstances if application would lead to invalidity. This was not to confer on a court "the power of making a new law"[222] by giving the words of the legislation a new meaning rather than choosing a conforming meaning. Instead, s 2(2) did this by requiring a court, where possible, to disapply the invalid application of the law.

149 As mentioned, the language in s 2(2) of the *Navigation Act*, and s 15A of the *Acts Interpretation Act* which followed s 2(2), that was used to describe the two techniques of conforming interpretation and partial disapplication was "read and construe[]". Unfortunately, however, the expression "reading down", which had previously been used only to describe conforming interpretation, came to be used to describe the techniques of both conforming interpretation and partial disapplication of a law.[223] In the words of Dixon J, the expression "read and

---

476 at 504 [71]; *Coleman v Power* (2004) 220 CLR 1 at 87-88 [227]; *Ruhani v Director of Police* (2005) 222 CLR 489 at 538-539 [148]; *Monis v The Queen* (2013) 249 CLR 92 at 208 [327]-[328]; *MJZP v Director-General of Security* (2025) 99 ALJR 1108 at 1122 [62]; 423 ALR 378 at 395. See also Pearce, *Statutory Interpretation in Australia*, 10th ed (2024) at 85-86 [2.67].

220 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 94 [251], citing *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 485-486.

221 (1921) 29 CLR 357 at 369.

222 *Owners of SS Kalibia v Wilson* (1910) 11 CLR 689 at 709.

223 For instance, *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 93 [249]-[250]; *Tajjour v New South Wales* (2014) 254 CLR 508 at 585-589 [168]-[178].

construed" covered the two separate techniques of "rescue", being the "imputation of a meaning" and a change to "the legal operation or effect" (although he speculated that the expression might be confined to the latter).[224]

150 The problems of jargon in this area are not limited to the expression "reading down" being born to describe a technique of conforming interpretation but growing up to be used also as an expression concerning circumstances that in no real sense involve "reading". To make matters worse, the technique described by the confused language of "reading down" was also used to describe "read[ing] up" by giving a broader conforming interpretation to a provision.[225] Fortunately, some modernising State legislation, by provisions equivalent to s 15A, now focuses upon the language of interpretation and application of meaning rather than the antique language of "read and construed". Thus, New South Wales legislation refers to the possibility of invalidity arising from construing "any provision ... or the application of any such provision".[226] And Queensland legislation refers to the possibility of invalidity arising from a provision being "*interpreted* as exceeding power" or from "the *application* of a provision".[227] So too, Commonwealth provisions such as s 3A of the *Migration Act 1958* (Cth) are now more clearly expressed as concerned with the disapplication of a law from those facts or circumstances where it does "not validly apply[]".[228]

151 It might be said, in Pythonesque fashion, that to use the expression "reading down" to describe the technique of partial disapplication is perfectly adequate provided that it is not forgotten that the technique: (i) has nothing to do with "reading"; (ii) has no one direction; and (iii) was coined to describe a different concept. At the very least, if the unfortunate expression is to be used, then it should be clearly explained that the court is not here involved in the usual interpretative process. The issues in this case are therefore whether: (i) the regulation-making power in s 28 of the *Autonomous Sanctions Act* can be "read" in a manner that confines its *application* to ensure its constitutional validity; and (ii) whether

---

224 *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 653.

225 *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531 at 548 [37] compared with 547 [35], quoting *R v PLV* (2001) 51 NSWLR 736 at 743-744 [88] (doubting the authority of "reading up"). See also Hume, "The Rule of Law in Reading Down: Good Law for the 'Bad Man'" (2014) 37 *Melbourne University Law Review* 620 at 623-624.

226 *Interpretation Act 1987* (NSW), s 31(2).

227 *Acts Interpretation Act 1954* (Qld), ss 9(1), 9(3) (emphasis added).

228 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 at 166 [71].

regs 14 and 15 of the *Autonomous Sanctions Regulations* can be "read" in a manner that confines their *application* to ensure that they are not otherwise ultra vires the regulation-making power in s 28. As the Solicitor-General of the Commonwealth correctly expressed the point, there is no issue concerning "the task of working out a [constraining] phrase or a set of precise words that are to be read into [regs 14 and 15]". Since this case is concerned only with partial disapplication, I will use only the language of partial disapplication rather than "reading down" or "conforming interpretation".

Limits to partial disapplication of a law

152 As the primary judge recognised, there are three limits to partial disapplication of a law.[229] The first two limits are based on the same principle, namely that a court cannot partially disapply a law if doing so would change the scheme of the statute or the purpose of the law.[230] Hence, a court cannot partially disapply a law in a manner which would change the application of the law in the remaining circumstances.[231] Nor can a court partially disapply a law if the intention of the enacting Parliament is that the law should have an all-or-nothing operation.[232]

153 A third limit is that "there should be a partial operation of the law based upon some particular standard criterion or test ... discovered from the terms of the law itself or from the nature of the subject matter with which the law deals".[233] This limit really just reiterates the nature of partial disapplication as a technique that operates by reference to specific facts or circumstances. For instance, if a law is challenged on the basis that it operates, in part, to impose an unjustified burden upon freedom of political communication then it is not permissible for a court to declare that the law is disapplied wherever there would be an unjustified burden upon freedom of political communication by reference to unspecified facts or

---

229 *Deripaska v Minister for Foreign Affairs* (2024) 184 ALD 393 at 408 [60].

230 *Clubb v Edwards* (2019) 267 CLR 171 at 321 [431]-[432].

231 *Re F; Ex parte F* (1986) 161 CLR 376 at 385. See also *Pidoto v Victoria* (1943) 68 CLR 87 at 110-111.

232 *Cam & Sons Pty Ltd v The Chief Secretary of New South Wales* (1951) 84 CLR 442 at 454. See also *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 652; *Pidoto v Victoria* (1943) 68 CLR 87 at 108; *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 502.

233 *Pidoto v Victoria* (1943) 68 CLR 87 at 111.

circumstances.[234] It is not open for a court to validate the law by reasoning that it can "discover and prescribe an appropriate limitation as various cases present[] themselves".[235] By contrast, if a law is challenged on the basis that it operates invalidly in particular circumstances, such as intrastate or interstate trade, then it can be disapplied from that particular invalid application.[236]

154 Apart from these three limits there is no limit to the extent of partial disapplication of a law.[237] And therein lies the distinction of greatest importance between the different techniques of preserving the validity of legislation in: (i) conforming interpretation; and (ii) partial disapplication. If there were almost no further limits to the technique of conforming interpretation, such that judges could effectively add or subtract any words in legislation to change meaning, then judges would truly have legislative power.

Partial disapplication of s 28 and regs 14 and 15

The scope of the constitutional implication in Graham

155 In *Graham v Minister for Immigration and Border Protection*,[238] a majority of this Court held that "first principles" gave rise to a newly discovered implication within s 75(v) of the *Constitution* constraining the power of the Commonwealth Parliament. The implication was not merely the natural implicature that the Commonwealth Parliament cannot remove the remedies provided by s 75(v): writs of mandamus or prohibition, or an injunction, against an officer of the Commonwealth. The implication was said to be one that prohibited legislation that involved any "substantial curtailment of the capacity of a court exercising

---

234 *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at 573 [102].

235 *Pidoto v Victoria* (1943) 68 CLR 87 at 109.

236 *Newcastle and Hunter River Steamship Co Ltd v Attorney-General for the Commonwealth* (1921) 29 CLR 357 at 370; *Cam & Sons Pty Ltd v The Chief Secretary of New South Wales* (1951) 84 CLR 442 at 454, 456; *Carter v Potato Marketing Board* (1951) 84 CLR 460 at 477; *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 73; *Nominal Defendant v Dunstan* (1963) 109 CLR 143 at 151-152.

237 *Clubb v Edwards* (2019) 267 CLR 171 at 322 [433].

238 (2017) 263 CLR 1 at 24 [38].

jurisdiction under or derived from s 75(v) of the *Constitution* to discern and declare whether or not the legal limits of powers ... have been observed".[239]

156 The application of the new implication which prevented "substantial curtailment" of judicial review under s 75(v), as well as statutory judicial review by the Federal Court,[240] was said to be a question of "substance and degree".[241] The implication was applied to invalidate a law that, with long antecedents prior to Federation and subsequently,[242] had purported to limit the powers of the court to obtain access to a category of information.[243]

157 No party to this appeal sought to challenge any aspect of the implicature recognised in *Graham* concerning restrictions on the capacity of a court exercising the relevant jurisdiction. But even on the broadest application of that decision it is difficult to see the basis for the concession by the Minister that the implicature recognised in *Graham* is, by itself, sufficient to constrain the power of the Commonwealth Parliament to limit a person's access to legal services for the objective purpose of seeking relief under s 75(v) of the *Constitution* or s 39B(1) of the *Judiciary Act*. Under the purported application of s 28 of the *Autonomous Sanctions Act* and regs 14 and 15 of the *Autonomous Sanctions Regulations*, the practical impossibility of a designated person obtaining legal services without a permit will impair both the ability of a designated person to identify the potential for such a proceeding and the cogency of any submissions that might be made by a designated person in such a proceeding. Yet that impairment says nothing about the capacity of a court exercising jurisdiction under or derived from s 75(v) of the *Constitution* to discern and declare whether the legal limits of powers have been observed. The court's capacity is unaffected. The impairment concerns a *designated person's* ability to seek and prosecute a claim for relief in a Ch III court. It does not concern the capacity of a court.

158 The Minister submitted that this concession concerning s 75(v) should not be extended to s 75(iii) of the *Constitution*, which provides for original jurisdiction

---

239 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 32 [64].

240 *Migration Act 1958* (Cth), ss 476A(1)(c), 476A(2). See *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 28 [52].

241 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 32 [63].

242 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 55-72 [123]-[167].

243 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 28 [52].

of this Court in any case "in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party". The Minister submitted that, unlike s 75(v), s 75(iii) "is predicated on liability existing under the general law". But so too is liability for the remedy of an injunction in s 75(v).[244] There is some strain in treating the reasoning of the majority in *Graham* as concerned only with two of the three remedies in s 75(v). Further, even if the injunction were treated as falling within the scope of the *Graham* implication only in circumstances concerning exercises of power by an officer of the Commonwealth, the injunction in those cases, like the liability in s 75(iii), remains based upon general law principles.

159 On the assumption that the reasoning in *Graham* applies equally to the availability of relief under s 75(iii), the same leap in logic arises when attempting to extend the implication in *Graham* so that it would apply to a law which empowers regulations that would create a practical impossibility of the provision of legal services to a designated person without a permit. Again, the impairment of a *designated person's* ability to seek and prosecute a claim concerning s 75(iii) says nothing about the capacity of a court to exercise jurisdiction under or derived from s 75(iii).

The true basis for the implication in Graham

160 In *Graham*, the majority of this Court supported the new constitutional implication by reference to "the rule of law".[245] The rule of law is a marvellous sounding thing but it is a concept with hotly disputed content and boundaries.[246] It is perhaps best understood as a "cluster of ideals",[247] although it has a habit of being used to replace substantive reasoning and treated as "so uniquely important that other ideals (democracy, respect for human rights, the eradication of poverty, 'life, liberty, and the pursuit of happiness,' solidarity, cultural diversity, etc) had

---

244 *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177 at 221 [98], 236-238 [144]-[146], 266-268 [229]-[232].

245 (2017) 263 CLR 1 at 24 [40], 25 [44], quoting (respectively) *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193 and *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 482 [5].

246 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 38 [82], 48-49 [105]-[107]. See also *Palmer v Western Australia* (2021) 274 CLR 286 at 297-301 [19]-[25]; *Benbrika v Minister for Home Affairs* (2023) 280 CLR 1 at 33-34 [87].

247 Waldron, *Thoughtfulness and the Rule of Law* (2023) at 35.

better be part of it, or else be condemned to unimportance".[248] Nevertheless, at the core of that concept is the "constitutional right of access to the courts".[249]

161 The concept of the rule of law, as used in *Graham* to describe the foundation for the novel implication recognised in that case, can equally be seen as the foundation of the novel reasoning in the extreme circumstances arising in cases such as *Kable v Director of Public Prosecutions (NSW)*,[250] and contemplated in cases such as *Plaintiff S157/2002 v The Commonwealth*[251] and *Kirk v Industrial Court (NSW)*.[252] Perhaps with a little more precision, that foundation can be alternatively described, in the words of the submission of Mr Deripaska, which echoed the language of Gummow J,[253] as concerned with extreme laws that are considered to be "obnoxious" to presuppositions of Ch III of the *Constitution* concerning the exercise of judicial power (in accordance with substantive and procedural justice). For the terms of particular presuppositions, there are different textual indications which support their existence and shape their content as constitutional implications. But the presuppositions are closely related.[254]

162 The particular presupposition recognised by the majority in *Graham* is an implicature, an implication derived more from context and assumptions (such as the rule of law) than from the text of s 75(v). Whatever the view of its legitimacy, that implicature recognised by the majority in *Graham* should be seen, at a higher level of generality, as forming part of the now-established skein of constitutional jurisprudence mentioned above in which, at the extreme boundaries,[255] Commonwealth or even State laws are invalid if they substantially impair the institutional integrity of a court within the integrated federal system established by Ch III of the *Constitution*. Indeed, the Supreme Court of Canada has recognised an implicature involving a constitutional guarantee of judicial review, encompassing similar content to those recognised in *Kirk* and in *Graham*, from the very different text of s 96 of the *Constitution Act 1867* (Can), which (in broad terms) provides

---

248 Gardner, *Law as a Leap of Faith: Essays on Law in General* (2012) at 197.

249 *R (UNISON) v Lord Chancellor [Nos 1 and 2]* [2020] AC 869 at 896 [66]. See also at 896-897 [67]-[68].

250 (1996) 189 CLR 51.

251 (2003) 211 CLR 476 at 512 [102].

252 (2010) 239 CLR 531 at 579-581 [94]-[100].

253 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 410 [245].

254 See *Citta Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216 at 229 [18]-[20].

255 *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 246 [56].

for federal appointment of provincial judges.[256] That implicature has since been said to be based upon the same "rule of law" foundation,[257] and has been applied to recognise that all "powers which are 'hallmarks of superior [sic[258]] courts' cannot be removed from those courts",[259] and that "[m]easures that prevent people from coming to the courts to have [disputes] resolved are at odds with" the "very book of business" of courts and strike "at the core" of the jurisdiction protected by s 96.[260]

163 For these reasons, there must be at least serious doubt whether the decision in *Graham* should be taken to have been intended by the majority in that case to be confined to the pocket of the *Constitution* concerned with preventing curtailment only of judicial review capacities of a court exercising federal jurisdiction under s 75(v) of the *Constitution* or s 39B(1) of the *Judiciary Act.* Indeed, as has been astutely observed,[261] if the decision in *Graham* were so confined then the majority may have created one of the very things which Ch III is said to deny: two separate systems of justice, one for Ch III courts operating in federal jurisdiction and one for Ch III courts operating outside it.[262]

---

256 *Crevier v Attorney General of the Province of Quebec* [1981] 2 SCR 220 at 237-239.

257 See especially *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)* [2014] 3 SCR 31 at 51-52 [38]-[40]; compare at 71 [93]. See also Tallent, "A Judicially Nourished Provision: Has Section 96 Once Again Become a Barrier to Justice?" (2024) 29 *Appeal* 63.

258 *Queensland v Stradford (a pseudonym)* (2025) 99 ALJR 396 at 448 [228], 472 [325]; 421 ALR 376 at 435, 467-468.

259 *MacMillan Bloedel Ltd v Simpson* [1995] 4 SCR 725 at 752 [35]. See also Mancini, "Foxes, Henhouses, and the Constitutional Guarantee of Judicial Review: Re-evaluating *Crevier*" (2024) 102 *Canadian Bar Review* 315.

260 *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)* [2014] 3 SCR 31 at 49 [32].

261 Forsaith, "*Graham* and its Implications" (2019) 94 *AIAL Forum* 24 at 30-34.

262 See *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 103. See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 617 [101]; *Wainohu v New South Wales* (2011) 243 CLR 181 at 209 [45], 229 [105]; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 89 [123]; *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 278 [147]; *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 92 [20]; *Garlett v Western Australia* (2022) 277 CLR 1 at 44 [115], 66

164 Curiously, despite concluding that the impugned law in *Graham* involved a substantial curtailment of the court's judicial review capacity, the majority also held, in succinct reasoning, that the same impugned law did not offend the doctrine developed in *Kable* in that it did not substantially impair the court's institutional integrity.[263] I agreed with that conclusion,[264] but essentially for the same reasons that I held that there was no substantial curtailment of the court's judicial review capacity: it is implausible that the *Constitution* had impliedly excluded a law that reflected an unbroken tradition of more extreme constraints "which had existed for more than 150 years before Federation, and which had become a standardised restriction in the mid-19th century".[265] This was especially so in circumstances in which this Court had upheld constraints on judicial review that were more extreme than the impugned law.[266] But if the objections in my minority reasons are put to one side, as they must now be, and it is accepted that there was a substantial curtailment of the court's judicial review capacity by the law considered in *Graham*, then it is very difficult to see why such a curtailment of a core function of a Ch III court is not a substantial impairment of the institutional integrity of that Ch III court.

165 The same point has been made by commentators concerning the succinct reasoning of the majority on this *Kable* issue, in terms which, respectfully, are unanswerable. As one commentator observed:[267] (i) the majority reasoning was in tension with reasoning in earlier decisions of this Court concerning the matters that could be a substantial impairment of the institutional integrity of a Ch III court;[268] (ii) the majority reasoning "sat uneasily" with the implication drawn by the Court concerning s 75(v); and (iii) the majority reasoning involved "an apparent failure

---

[181], 74-75 [199]; *SDCV v Director-General of Security* (2022) 277 CLR 241 at 269 [58], 291 [129], 323 [222].

263 (2017) 263 CLR 1 at 24 [37].

264 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 35 [72].

265 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 38 [80].

266 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 40 [85].

267 Stellios, *Zines and Stellios's The High Court and the Constitution*, 7th ed (2022) at 307-308.

268 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38.

... to fully appreciate the relationship between jurisdiction and judicial power". As another commentator observed, the factors relied upon by the majority in support of the implication concerning s 75(v) were "the very same factors that did not move the Court in the context of the broader Chapter III argument [concerning *Kable*]".[269] In short, what the majority in *Graham* took away with the hand that denied a substantial impairment of the institutional integrity of a court was given right back with the hand that recognised "a substantial curtailment of the capacity of a court".[270]

166 The expression "institutional integrity" might not provide much more clarity than the well-meaning sloppiness of thought sometimes underlying rhetorical appeals to the rule of law. But it does encapsulate, at that higher level of generality, the presupposition, or "assumption",[271] which has been consistently reinforced by what is now a significant line of decisions concerning Ch III of the *Constitution*. The numerous applications of the concept of substantial impairment of institutional integrity range from depriving a Ch III court of one of its essential functions, to treating a Ch III court as a mere arm of the Executive, to conferring incompatible functions upon a judge of a Ch III court as *persona designata*. The applications of the concept must also extend to extreme instances where a Ch III court is required by Parliament to act with manifest individual injustice, in its procedure or outcome, where that action is not reasonably capable of being seen as necessary for any legitimate purpose of Parliament.[272]

The application of the constitutional implication

167 One instance where manifest injustice can arise is by a law which, without being necessary for any legitimate purpose, denies a person the liberty to access legal services by which they might seek to vindicate their rights in a Ch III court. Hence, in *APLA Ltd v Legal Services Commissioner (NSW)*,[273] McHugh J described as a "principle inherent in Ch III" 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".

---

269 Forsaith, "*Graham* and its Implications" (2019) 94 *AIAL Forum* 24 at 30. See also Stellios, *The Federal Judicature: Chapter III of the Constitution*, 2nd ed (2020) at 340-341 [6.53].

270 (2017) 263 CLR 1 at 32 [64].

271 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 607.

272 *MJZP v Director-General of Security* (2025) 99 ALJR 1108 at 1122 [61]; 423 ALR 378 at 395. See also *SDCV v Director-General of Security* (2022) 277 CLR 241 at 325-326 [230]-[231].

273 (2005) 224 CLR 322 at 369 [87].

So too, Gummow J said that it may be conceded, without deciding, that a law "denying or forbidding ... legal representation" would be "obnoxious to the exercise of the judicial power of the Commonwealth".[274] Again, in the same case, Gleeson CJ and Heydon J said:[275]

> "The effective exercise of judicial power, and the maintenance of the rule of law, depend upon the providing of professional legal services so that citizens may know their rights and obligations, and have the capacity to invoke judicial power."

168 The extreme denial of a person's liberty to obtain legal services in all courts and in all circumstances is an indirect attack on all of a person's basic rights. It is hard to see how such an extreme denial could ever be justified. The protection of basic rights in civilised societies depends upon the extent to which the State will permit those rights to be prosecuted and vindicated. Information technology has not yet bridged the vast gap in the protection of basic rights between those who obtain legal services to assist with the prosecution of their rights and those who do not. The practical effect of regs 14 and 15, in denying a designated person the ability to obtain any legal services, is to place a substantial impediment upon that person's ability to protect their basic rights. The operation of regs 14 and 15 in this respect is an extreme instance of manifest injustice.

169 The Minister did not even attempt to point to any legitimate purpose for treating s 28 of the *Autonomous Sanctions Act* as extending to regulations of the scope of regs 14 and 15 with the practical effect of denying a designated person the liberty of obtaining any legal services in relation to any matter that might arise in a Ch III court. Instead, the Minister submitted only that "there is no decision ever that Chapter III constitutionally entrenches [a] right to seek legal advice". The Full Court had effectively rejected Mr Deripaska's submission for the same reason.[276] But, putting to one side the point that a liberty to obtain legal services is not absolute, and might therefore be confined in limited circumstances in the pursuit of legitimate purposes, Mr Deripaska is entirely correct to submit that, by itself, an appeal to novelty "is not a recognised mode of judicial reasoning".

170 In the application of the constitutional implication that prevents substantial impairment of the institutional integrity of a Ch III court, there is no principled reason for confining (or limiting the consideration in this case to) a constitutional freedom to laws which impair a designated person's liberty to take actions for the objective purpose of challenging the validity of decisions or actions under the

---

274 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 410 [245].

275 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351 [30].

276 *Deripaska v Minister for Foreign Affairs* (2025) 308 FCR 175 at 196 [101]-[104].

Autonomous Sanctions Act pursuant to s 75(v) of the *Constitution* or s 39B(1) of the *Judiciary Act*. Suppose, for instance, Mr Deripaska's life or liberty were in immediate peril and the permit which covered his ability to obtain legal services had been revoked. Could it seriously be suggested that the institutional integrity of a Ch III court would require only that Mr Deripaska have the liberty of obtaining legal services for the sterile purpose of challenging the revocation of the permit but not for purposes of protecting or prosecuting his rights to life and liberty? That would be the effect tomorrow if the Minister's submission were accepted today.

No barrier to disapplication

171 Mr Deripaska submitted that regs 14 and 15 of the *Autonomous Sanctions Regulations* were entirely invalid because there were different ways in which those regulations could be disapplied. In effect, his submission was that the choice of the extent of disapplication would cross "the borderland between legislative and judicial power".[277] That submission should not be accepted. The statutory direction to disapply a law (ie a legal rule), relevantly here by s 15A of the *Acts Interpretation Act* and s 13(1)(a) of the *Legislation Act*, is to disapply partially a law or to sever an invalid law and any other laws inextricable from it, but only to the extent of invalidity and inseverability. It is not a legislative act for a court to determine the minimum degree to which a law can be partially disapplied.

172 In any event, however, Mr Deripaska's broadest submission concerning disapplication—that s 28 of the *Autonomous Sanctions Act* does not authorise regulations that constrain a designated person from any action for the purpose of obtaining legal services concerning a matter that could arise in a Ch III court—should be accepted. For that reason, Mr Deripaska cannot succeed in the submission that because the disapplication proposed by the Minister is too limited or might involve choices by this Court, the entirety of regs 14 and 15 should be treated as invalid. It is also unnecessary to consider in any detail Mr Deripaska's submissions about the uncertainty of the Minister's more limited partial disapplication of s 28 and regs 14 and 15, the asserted lack of "factual reality" of that partial disapplication, or the asserted inconsistency of that partial disapplication with the scheme of regs 14 and 15. It suffices to make two observations.

173 First, in their application, both s 28 of the *Autonomous Sanctions Act* and regs 14 and 15 of the *Autonomous Sanctions Regulations* are "distributable or

---

277 *Clubb v Edwards* (2019) 267 CLR 171 at 221 [148], citing *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 502. See more recently *Hopper v Victoria* [2026] HCA 11 at [53], [62], [68].

divisible"[278] laws in the sense that there is no intention by Parliament or the Executive that they cannot be partially disapplied to preserve their validity.

174 Secondly, the Minister's submission that a lesser extent of partial disapplication should occur by reference to some "objective" purpose of obtaining legal services (whether confined to s 75(v) of the *Constitution* or not) is confusing. One sensible possibility, which may be what the Full Court meant when it adopted this submission, is that the purpose is the "ultimate end, object or goal *the person* seeks to achieve".[279] The reference by the Full Court to the "objective sense" of that purpose may be coherently understood as emphasising that the person's object could be established indirectly by inference from the circumstances independently of any direct evidence of the person about their state of mind.

175 A far less coherent possibility is that the Full Court's reference to an "objective" purpose of a designated person was a reference to a purpose that would be held by a reasonable person in the designated person's position.[280] It would be most curious if constitutional justification were required for laws that abolish a liberty to obtain legal services concerning any rights and freedoms which might be vindicated in any Ch III court, but only in circumstances where a reasonable person would have sought those legal services. When would it be unreasonable for a designated person to seek legal services? Would the answer depend upon the level of education or legal knowledge of the designated person concerned? Could it really be said that a designated person is required to ask themself before obtaining legal advice concerning a matter that might arise in a Ch III court whether a reasonable person in their position would obtain legal advice? Would a reasonable person in their position require legal advice to answer that question?

Conclusion

176 Section 28 of the *Autonomous Sanctions Act* must be partially disapplied to the extent that it empowers regulations that constrain a designated person from undertaking any action for the purpose of obtaining legal services (whether legal advice or legal representation or anything associated with such advice or representation) concerning a matter that could arise in a Ch III court. Regulations 14 and 15 of the *Autonomous Sanctions Regulations* must be disapplied to the same extent to ensure that they remain within power. That partial disapplication of

---

278 *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 651.

279 *Deripaska v Minister for Foreign Affairs* (2025) 308 FCR 175 at 193 [86] (emphasis added), referring to *Automotive Invest Pty Ltd v Federal Commissioner of Taxation* (2024) 98 ALJR 1245 at 1265 [110]; 419 ALR 324 at 351.

280 *Automotive Invest Pty Ltd v Federal Commissioner of Taxation* (2024) 98 ALJR 1245 at 1266 [115]; 419 ALR 324 at 352-353.

regs 14 and 15 leaves the remainder of those regulations to apply validly within the regulation-making power of the *Autonomous Sanctions Act*. Mr Deripaska's challenge to regs 14 and 15 in their entirety cannot succeed. The appeal must be dismissed with costs.

177 BEECH-JONES J. The appellant, Oleg Deripaska, is a Russian national. On 17 March 2022, the respondent, the Minister for Foreign Affairs ("the Minister"), acting pursuant to reg 6 of the *Autonomous Sanctions Regulations 2011* (Cth) ("the Sanctions Regulations"), determined the appellant to be a "designated person" and "declared" him for the purpose of preventing his travelling to, entering or remaining in Australia ("the Minister's decision").[281]

178 The Sanctions Regulations impose broad prohibitions on any person using or dealing with any assets (including any legal document or instrument evidencing title to or interest in such an asset)[282] owned or controlled by a designated person[283] and any person directly or indirectly making any assets available to, or for the benefit of, a designated person.[284] A contravention of the prohibitions in the Sanctions Regulations is a criminal offence. On their face, these prohibitions preclude designated persons from retaining lawyers, and preclude any lawyer from advising or acting for the designated person, regardless of whether the lawyer is remunerated by the designated person, by someone else, from public funds or not at all, and render it practically impossible for a designated person to represent themselves in court.[285]

179 The appellant brought proceedings in the Federal Court of Australia seeking to set aside the Minister's decision. Those proceedings were dismissed.[286] The appellant's appeal to the Full Court of the Federal Court was also dismissed.[287] Having been granted special leave to appeal to this Court, the appellant contends that the Minister's decision should be set aside because the regulations that effect the prohibitions are wholly invalid as they contravene limitations that derive from

---

281 *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Russia and Ukraine) List 2014* (Cth), Sch 2, Pt 1, item 63.

282 See *Autonomous Sanctions Act 2011* (Cth) ("Sanctions Act"), s 4 (definition of "asset").

283 *Autonomous Sanctions Regulations 2011* (Cth) ("Sanctions Regulations"), regs 3, 15(1).

284 Sanctions Regulations, reg 14(1).

285 See below at [188]-[191].

286 *Deripaska v Minister for Foreign Affairs* (2024) 184 ALD 393.

287 *Deripaska v Minister for Foreign Affairs* (2025) 308 FCR 175.

Ch III of the *Constitution* and cannot be "read down" by applying s 15A of the *Acts Interpretation Act 1901* (Cth) ("the AIA").[288]

180 For the reasons that follow, the appellant's contention should be rejected and the appeal dismissed. The regulations that effect the prohibitions described above are not wholly invalid. Instead, in accordance with s 15A of the AIA the prohibitions should be read down so as to not prohibit making available, using or dealing with assets for the (objective) purpose of a designated person: (i) challenging the validity of decisions or actions taken under the *Autonomous Sanctions Act 2011* (Cth) ("the Sanctions Act") (or the Sanctions Regulations) or some other exercise of statutory or non-statutory power pursuant to s 75(v) of the *Constitution* or s 39B(1) of the *Judiciary Act 1903* (Cth) or seeking and obtaining legal advice in relation thereto; or (ii) applying to a Ch III court[289] to determine their rights and obligations under the Sanctions Act (or the Sanctions Regulations) or seeking and obtaining legal advice in relation thereto.

The Sanctions Act and the Sanctions Regulations

181 The combination of ss 10 and 28 of the Sanctions Act authorises the Governor-General to make regulations which relevantly relate to the "proscription of persons or entities (for specified purposes or more generally)";[290] the "restriction or prevention of uses of, dealings with, and making available" of assets;[291] and the "restriction or prevention of the supply, sale or transfer of goods or services".[292] "Asset" is defined widely as meaning any asset or property of any kind including intangible assets and, as noted, specifically includes a legal document or instrument evidencing title to or interest in an asset.[293] Before the Governor-General can make such regulations, the Minister must be satisfied that the proposed regulations will facilitate the conduct of Australia's relations with other countries or with entities or persons outside Australia or will otherwise deal with matters, things or relationships outside Australia.[294]

---

288 Made applicable to the Sanctions Regulations by s 13(1)(a) of the *Legislation Act 2003* (Cth).

289 See below at [189].

290 Sanctions Act, s 10(1)(a).

291 Sanctions Act, s 10(1)(b).

292 Sanctions Act, s 10(1)(c).

293 Sanctions Act, s 4.

294 Sanctions Act, s 10(2).

182 The prohibitions in the Sanctions Regulations may be enforced by an injunction granted by the Federal Court of Australia or the Supreme Court of a State or Territory on the application of the Attorney-General of the Commonwealth.[295] It is an offence punishable by a fine or a maximum term of imprisonment of 10 years for any individual to engage in conduct that contravenes a "sanction law" or a condition of an authorisation under a sanction law.[296]

183 Within Pt 2 of the Sanctions Regulations, reg 6 provides country-specific criteria for the designation of persons or entities as a "designated person or entity" (a "designation") and the declaration of persons for the purpose of preventing those persons from travelling to, entering or remaining in Australia (a "declaration"). The Minister may do either or both of making a designation or a declaration with respect to a person where the person is mentioned in an item in the table of countries listed in reg 6 of the Sanctions Regulations.[297] In the case of Russia, the declaration or designation may be made in respect of a person or entity where the Minister is (relevantly) satisfied that the person or entity is, or has been, engaging in an activity or performing a function that is of economic or strategic significance to Russia.[298]

184 A declaration is a ground for a refusal of a visa[299] or the cancellation of an existing visa.[300] A designation enlivens the prohibitions provided for in regs 14 and 15 of the Sanctions Regulations. Regulations 14 and 15 have each been declared to be a "sanction law" for the purposes of s 6 of the Sanctions Act, making a contravention of those regulations an offence.[301]

185 Within Pt 3, reg 14(1) prohibits any person from "directly or indirectly mak[ing] an asset available to, or for the benefit of, a designated person or entity" unless the making available of the asset is authorised by a permit granted under reg 18. Regulation 15(1) prohibits any person who holds any "controlled asset" –

---

295 Sanctions Act, s 14(1)-(2).

296 Sanctions Act, s 16(1)-(4).

297 Sanctions Regulations, reg 6(a)-(b).

298 Sanctions Regulations, reg 6, item 6A.

299 *Migration Regulations 1994* (Cth), Sch 4, cl 4003.

300 *Migration Regulations 1994* (Cth), reg 2.43(1)(aa)(i).

301 See Sanctions Act, s 16; *Autonomous Sanctions (Sanction Law) Declaration 2012* (Cth), Sch 1.

that is, an asset owned or controlled by a designated person or entity[302] – from "us[ing] or deal[ing] with [that] asset", "allow[ing] the asset to be used or dealt with", or "facilitat[ing] the use of the asset or dealing with the asset" unless the use or dealing is authorised by a permit granted under reg 18. With both regulations, strict liability applies to the circumstance that the "making available of" or "use or dealing with" the asset, as the case may be, is not in accordance with a permit under reg 18.[303]

186 The prohibitions in regs 14 and 15 have extraterritorial operation.[304] It suffices to state that the prohibitions operate upon any conduct engaged in by a person who is an Australian citizen,[305] or upon any conduct or the result of any conduct that occurs partly in Australia.[306] The former would include any legal services provided anywhere in the world by an Australian citizen. The latter would cover any conduct in, or in relation to, any Australian court or the provision of legal services within or from Australia.

187 Relevantly, reg 18 of the Sanctions Regulations permits the Minister to grant a permit authorising the making available of an asset to a person that would otherwise contravene reg 14 or the use of or dealing with an asset owned or controlled by a designated person or entity.[307] On 7 November 2022 the Assistant Minister for Foreign Affairs granted a permit the overall effect of which was to enable the retention, instruction and remuneration of "legal service providers" to provide legal advice, legal representation and ancillary services to or on behalf of designated persons in relation to matters arising under or related to Australian law. This permit operated for two years or until it was revoked by the Minister. One condition of the permit was that it could be amended or revoked at the discretion of the Minister. Shortly before its expiry a new permit in similar terms was granted.

Effect of prohibitions on legal advice and proceedings

188 Of significance to this appeal is the effect of regs 14 and 15 on the capacity of a designated person such as the appellant to retain and instruct a lawyer to provide legal services in or in relation to proceedings in an Australian court or

---

302 Sanctions Regulations, reg 3.

303 Sanctions Regulations, regs 14(1A), 15(1A).

304 Sanctions Regulations, regs 14(2), 15(2).

305 *Criminal Code* (Cth), s 15.1(1)(c)(i).

306 *Criminal Code* (Cth), ss 15.1(1)(a), 15.1(1)(b).

307 Sanctions Regulations, reg 18(1)(e)-(f); see also reg 20.

otherwise arising under and concerning Australian law. The primary judge described that effect as follows:[308]

> "First, a designated person or entity is prevented from remunerating an Australian lawyer who works for them. Secondly, it will very likely be impossible for a lawyer effectively to advise or represent a designated person or entity without dealing with 'controlled assets' (which include legal documents or instruments belonging to the person or entity, including documents brought into existence by the lawyer on the client's instructions). Thirdly, any 'asset' in the lawyer's possession, including intellectual property (and likely including the lawyer's own notes) would not be able to be made available 'to, or for the benefit of' a designated person or entity who was the lawyer's client."

189 To be specific, one of the practical effects of regs 14 and 15 is that, absent a permit granted under reg 18, a designated person is prohibited from retaining, instructing or remunerating any lawyer practising in Australia to provide legal services in relation to any matter arising under Australian law, including in relation to any matter that is or may be litigated in a court established under, or referred to in, Ch III of the *Constitution* (a "Ch III court"). Regulation 14 also has the consequence that, absent a permit under reg 18, no lawyer can accept a retainer or otherwise advise or appear on behalf of a designated person in relation to any matter arising under Australian law, including in relation to any matter that is or may be litigated in a Ch III court.

190 The effect of these regulations on a designated person's capacity to receive legal assistance and representation extends beyond that which results from the seizure of assets of an accused person under proceeds of crime legislation.[309] Unlike those provisions, the practical effect of reg 14 is to preclude any lawyer who might be willing to act pro bono on behalf of a designated person in an Australian court from so acting and to preclude any lawyer remunerated by public funds from appearing on behalf of a designated person in a Ch III court, including at a criminal trial.

191 Lastly, the wide definition of "asset" confirms that, on its face, reg 15 seriously impedes, if not completely precludes, a designated person from appearing for themselves and presenting their own case in a Ch III court. For

---

308 *Deripaska v Minister for Foreign Affairs* (2024) 184 ALD 393 at 404 [41].

309 See, eg, *Proceeds of Crime Act 2002* (Cth), s 293; *Criminal Assets Recovery Act 1990* (NSW), s 16A-16B; *Confiscation Act 1997* (Vic), s 143; *Criminal Assets Confiscation Act 2005* (SA), s 207; *Criminal Proceeds Confiscation Act 2002* (Qld), ss 227-230; *Crime (Confiscation of Profits) Act 1993* (Tas), s 193. See also *Mansfield v Director of Public Prosecutions (WA)* (2006) 226 CLR 486.

example, a designated person's conduct in serving and filing a pleading or submission they have prepared or which has been prepared on their behalf or tendering a documentary exhibit (or other tangible asset) which they control would constitute a "use[]" of or "deal[ing]" with an asset as defined.[310]

Proceedings in the Federal Court

192 The only basis for the appellant's challenge to the Minister's decision in the Federal Court which is presently relevant is that the effect of regs 14 and 15 on the appellant's ability to obtain legal representation is "inconsistent with principles embedded in Ch III of the Constitution"[311] and, as a consequence, those regulations are wholly invalid. The appellant contended that, if those regulations are invalid, then the Minister's decision was made on an erroneous understanding as to the effect of designating the appellant and must be set aside.[312]

193 As the issue of constitutional validity arose in relation to the exercise of the broadly expressed regulation-making power conferred by s 10 of the Sanctions Act, the validity of regs 14 and 15 fell to be addressed as a "composite hypothetical question",[313] namely whether, if those regulations had been enacted as primary legislation, they would have been compliant with the relevant constitutional limitation(s) found within Ch III.[314]

194 It was not in dispute before the primary judge and the Full Court that one such limitation is the conferral of original jurisdiction on this Court by s 75(v) of the *Constitution*. The primary judge held that, by the application of s 15A of the AIA, regs 14 and 15 are not wholly invalid but instead should be read down so that they do not operate upon "actions taken for the purpose [in an objective sense] of challenging the validity of decisions or actions [taken] under the [Sanctions] Act pursuant to s 75(v) [of the *Constitution*] or s 39B(1) of the Judiciary Act".[315] The Full Court went further and held that this constitutional limit on the operation of regs 14 and 15 also extends to actions taken for the (objective) purpose of not only

---

310 Sanctions Regulations, reg 15(1)(b)(i).

311 *Deripaska v Minister for Foreign Affairs* (2024) 184 ALD 393 at 404 [43].

312 See *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 33 [68]-[69].

313 *Deripaska v Minister for Foreign Affairs* (2024) 184 ALD 393 at 407 [55]; *Deripaska v Minister for Foreign Affairs* (2025) 308 FCR 175 at 185 [41].

314 See *Palmer v Western Australia* (2021) 272 CLR 505 at 547 [122]-[124].

315 *Deripaska v Minister for Foreign Affairs* (2024) 184 ALD 393 at 406 [51].

challenging the validity of decisions or actions taken under the Sanctions Act but also challenging any other exercise of statutory or non-statutory power.[316]

195 Before the primary judge and the Full Court the appellant contended that there were other limitations derived from Ch III that were violated by regs 14 and 15. The formulation of those asserted limits varied in ways that are unnecessary to describe. The existence of some of those limits was either rejected by the primary judge and the Full Court or not determined because the appellant did not contend that the operation of the Sanctions Regulations in relation to him breached those limits. In this latter respect the Full Court applied a practice, based on "prudential considerations",[317] of not deciding whether a legislative provision would have an invalid operation in circumstances which have not yet arisen.[318]

The appeal to this Court

196 In this Court, the appellant again seeks to have the Minister's decision set aside on the basis that the Minister misunderstood the effect of regs 14 and 15.[319] The appellant contended that, having identified a limit on their operation by reference to s 75(v) of the *Constitution*, the Full Court erred in applying s 15A of the AIA and not concluding that those regulations were wholly invalid.

197 The appellant also contended that regs 14 and 15 infringe two further constitutional limitations said to be derived from Ch III. The first asserted limitation is that legislation cannot prohibit the legal representation of designated persons in Ch III courts. The second asserted limitation is that legislation cannot prohibit designated persons from invoking the jurisdiction conferred by s 75(iii) of the *Constitution* without the favourable exercise of a discretion by a Minister or officer of the Commonwealth. Section 75(iii) confers original jurisdiction on this Court in a matter in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party.

The s 75(v) limitation

198 Section 75(v) of the *Constitution* confers original jurisdiction on this Court in matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

---

316 *Deripaska v Minister for Foreign Affairs* (2025) 308 FCR 175 at 194 [89].

317 *Clubb v Edwards* (2019) 267 CLR 171 at 192 [35].

318 See *Knight v Victoria* (2017) 261 CLR 306 at 324-325 [33].

319 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 33 [68].

199 The power of this Court in exercising jurisdiction under or derived from s 75(v) of the *Constitution* to grant one of the specified (or "constitutional") writs against an officer of the Commonwealth is a "power to enforce the law that limits and governs the power of that officer".[320] Section 77(i) and (iii) of the *Constitution* empower the Commonwealth Parliament to confer or invest an equivalent statutory jurisdiction to s 75(v) on or in other courts. Such a jurisdiction has been conferred on the Federal Court.[321] According to *Graham v Minister for Immigration and Border Protection*, while the Commonwealth Parliament may delimit the jurisdiction conferred on other courts by reference to s 77(i) and (iii), and may regulate that jurisdiction and the jurisdiction conferred on this Court under s 75(v),[322] Parliament cannot deny such courts "the ability to enforce the legislated limits of an officer's power".[323]

200 Consistent with the position the Minister adopted before the primary judge and the Full Court, in this Court the Minister, joined by the Attorney-General of the Commonwealth intervening,[324] accepted that regs 14 and 15 cannot validly impede or stultify the invocation of the jurisdiction conferred by s 75(v) of the *Constitution* or its statutory analogue in s 39B(1) of the *Judiciary Act*. The Minister embraced the Full Court's "partial disapplication" or reading down[325] of regs 14 and 15 by the application of s 15A of the AIA so that they do not apply to actions undertaken "for the purpose, in an objective sense, of challenging the validity of decisions or actions under the [Sanctions] Act pursuant to s 75(v) of the *Constitution* or s 39B(1) of the *Judiciary Act*".[326] The appellant described that formulation as "self-defeating" in that it precludes conduct that is a necessary precursor to a client embarking on that challenge, such as by ascertaining their rights in order to evaluate their "capacity to invoke judicial power".

---

320 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 25 [42].

321 *Judiciary Act 1903* (Cth), s 39B(1A).

322 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 26-27 [47].

323 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 27 [48]; cf *Abebe v The Commonwealth* (1999) 197 CLR 510.

324 Collectively referred to from this point as "the Minister", unless context indicates otherwise.

325 See below at [208].

326 *Deripaska v Minister for Foreign Affairs* (2025) 308 FCR 175 at 193 [84].

201 *Graham* described the question of whether or not a law infringes upon the conferral of jurisdiction by s 75(v) of the *Constitution* as "one of substance, and therefore of degree", the answer to which "requires an examination not only of the legal operation of the law but also of the practical impact of the law on the ability of a court, through the application of judicial process, to discern and declare whether or not the conditions of and constraints on the lawful exercise of the power conferred on an officer have been observed in a particular case".[327]

202 The findings of the primary judge as to the practical impact of the regulations on a designated person's capacity to be legally represented are set out above.[328] The Minister's concession that, to preserve their validity, regs 14 and 15 should be disapplied or read down so that they do not prohibit actions taken for the (objective) purpose of invoking s 75(v) carries with it an acceptance that prohibiting lawyers advising and acting for a party seeking to invoke s 75(v) has at least a tendency to stultify that grant of jurisdiction. This concession accords with the observation of Gleeson CJ and Heydon J in *APLA Ltd v Legal Services Commissioner (NSW)* that the "effective exercise of judicial power, and the maintenance of the rule of law, depend upon the providing of professional legal services so that citizens may know their rights and obligations, and have the capacity to invoke judicial power".[329] In this context that statement can be extended to non-citizens affected by Australian laws and taken as encompassing so much of judicial power as is conferred by s 75(v), the capacity to determine rights and obligations that is entrenched by that provision and the provision of professional legal services (including legal advice) in relation thereto.

Severance clauses and reading down

203 As noted, the appellant contended that, having identified a limit on the ex facie operation of regs 14 and 15 derived from s 75(v) of the *Constitution*, the Full Court erred in applying s 15A of the AIA to preserve the validity of regs 14 and 15.

204 The effect of a so-called severance clause such as s 15A of the AIA is "to reverse the presumption that a statute is to operate as a whole".[330] Instead, s 15A effects a presumption that the legislature is taken to have prima facie intended that

---

327 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 27 [48]; see also *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 671 [53].

328 See [188].

329 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351 [30].

330 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 371.

a statute is divisible and that any parts found constitutionally unobjectionable should be carried into effect independently of those which fail.[331] The outcome of the application of s 15A will or may be that an "entirely artificial construction" is to be placed on a statute found to be partly invalid to save that part which could be validly enacted.[332] When engaged, severance clauses can operate with the prudential practice noted earlier so that, if the alleged unconstitutional operation of a broadly expressed provision can be severed from the balance of the provision which has valid application, a litigant whose conduct falls within the valid application of the law cannot be heard to challenge the statute on the basis that it is invalid in its application to other conduct.[333]

205 Three limits on the operation of s 15A should be noted.

206 First, s 15A is not engaged if it is apparent that the law was intended to "operate fully and completely according to its terms, or not at all".[334] However, there is nothing in the Sanctions Act or the Sanctions Regulations which suggests that regs 14 and 15 were not meant to operate unless those regulations applied to all forms of conduct that fall within their terms.

207 Second, s 15A can only be applied if to restrict the operation of a provision by reference to some relevant constitutional limitation such as that referable to s 75(v) would leave the "operation of the remaining parts of the law … unchanged".[335] Provided a reading down of regs 14 and 15 referable to s 75(v) operates to limit some circumstances in which the "mak[ing] available" of, "use" of or "dealing with" an asset is prohibited then the operation of the remaining parts of those regulations would be unchanged.

208 Third, s 15A does not authorise a court to hold that "all laws are to be construed as validly applying wherever they could by suitable limitations [having] been made validly applicable", as that approach would require the court to engage

---

331 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 371; *Clubb v Edwards* (2019) 267 CLR 171 at 218 [141].

332 *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 652.

333 See *Clubb v Edwards* (2019) 267 CLR 171 at 220 [146], 288-289 [333]-[336]; see also *Tajjour v New South Wales* (2014) 254 CLR 508 at 586-588 [170]-[174].

334 *Pidoto v Victoria* (1943) 68 CLR 87 at 108; *Victoria v The Commonwealth* (1996) 187 CLR 416 at 502; see also *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 651-652.

335 *Pidoto v Victoria* (1943) 68 CLR 87 at 108; *Victoria v The Commonwealth* (1996) 187 CLR 416 at 502; see also *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 652.

in the essentially "legislative and not judicial" task of "discover[ing] and prescrib[ing] an appropriate limitation as various cases presented themselves".[336] However, the position is different where the law itself indicates a standard or test which may be applied for the purpose of limiting, and thereby preserving the validity of, a law.[337] In the case of a law which uses general words or expressions and which applies in its terms both to cases within power and to cases beyond power, then "if an intention of Parliament that there should be a partial operation of the law based upon some particular standard criterion or test can be discovered from the terms of the law itself or from the nature of the subject matter with which the law deals, it can be *read down* so as to give valid operation of a partial character".[338] In applying this principle in this case it is not necessary to consider whether the principle involves a "reading down" or a partial disapplication of the Sanctions Regulations or whether there is any difference between the two concepts.[339]

209 The approach to reading down a broadly expressed statutory provision is applicable to both the circumstance where certain of its applications exceed the grant of legislative power that may support the provision,[340] and where certain of its applications traverse some clear limitation on legislative power.[341] In such cases, s 15A can be applied to restrict the scope of application of the generally expressed provision. Thus, a law expressed to apply to all "trade and commerce" has been read down so that the law only applies to "inter-State and foreign trade and commerce".[342] A law expressed to bind the States in relation to the terms and

---

336 *Pidoto v Victoria* (1943) 68 CLR 87 at 108-109, citing *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 676.

337 *Pidoto v Victoria* (1943) 68 CLR 87 at 110-111.

338 *Pidoto v Victoria* (1943) 68 CLR 87 at 110-111 (emphasis added), cited in *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at 572 [100]; see also *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 487.

339 cf *Clubb v Edwards* (2019) 267 CLR 171 at 313-322 [415]-[433].

340 *Pidoto v Victoria* (1943) 68 CLR 87 at 110-111; *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 518-521, 527; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 335, 339-340, 349, 366, 371-372.

341 *Victoria v The Commonwealth* (1996) 187 CLR 416 at 503; *Tajjour v New South Wales* (2014) 254 CLR 508 at 586-588 [170]-[174]; *Clubb v Edwards* (2019) 267 CLR 171 at 220 [146], 288-289 [333]-[336].

342 So as to conform to the *Constitution*, s 51(i): *Pidoto v Victoria* (1943) 68 CLR 87 at 109-110, citing *Newcastle and Hunter River Steamship Co Ltd v Attorney-General*

conditions of employment generally has been read down to conform to the principle derived from *Melbourne Corporation v The Commonwealth*[343] so that the law did not bind the States in relation to persons "employed at the higher levels of [State] government".[344] A law expressed to apply to the conduct of s 51(xx) corporations generally has been read down so that it had no application to a corporation's conduct to the extent that the corporation engaged in State banking not extending beyond the limits of the State concerned (to conform to s 51(xiii) of the *Constitution*).[345]

210 The appellant contended that the courts below erred because this principle could only be engaged to read down a statute by reference to a constitutional limitation where the subject matter of the Act suggested the limitation, and that the principle could not be engaged by a limitation that was "alien to the statute". This submission is overly restrictive if it is meant to suggest anything other than the necessity to identify, from a law's terms or subject matter,[346] a textual basis upon which a constitutional restriction on a broadly expressed provision can operate so as to make the provision conform with the relevant constitutional limitation. Hence, in *Tajjour v New South Wales*, Gageler J applied an analogue to s 15A so that a criminal offence, an element of which was "consort[ing] with convicted offenders", was read down so that the offence would not infringe the constitutional freedom of political communication.[347] His Honour held that the offence could have "no application in so far as the section would apply to consorting which is or forms part of an association for a purpose of engaging in communication on governmental or political matter".[348] The definition of consorting in the relevant legislation included communication,[349] but nothing in the text of the relevant

---

for the Commonwealth (1921) 29 CLR 357 and *Huddart Parker Ltd v The Commonwealth* (1931) 44 CLR 492.

343 (1947) 74 CLR 31.

344 *Victoria v The Commonwealth* (1996) 187 CLR 416 at 503, applying a limitation explained in *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 233.

345 *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 291; see also *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 486-488.

346 *Pidoto v Victoria* (1943) 68 CLR 87 at 110-111.

347 *Tajjour v New South Wales* (2014) 254 CLR 508 at 589 [178].

348 *Tajjour v New South Wales* (2014) 254 CLR 508 at 589 [178].

349 *Tajjour v New South Wales* (2014) 254 CLR 508 at 559 [63]-[64].

legislation referred to government or political matters, and the provision "creating the offence" "sa[id] nothing at all about the purpose for the consorting".[350]

211 As noted, regs 14 and 15 effect a broad prohibition on conduct in the form of making available, using and dealing with assets for all purposes, where assets are defined to include "legal document[s]".[351] These aspects of the prohibitions only serve to emphasise that the subject matter of the regulations "operate[s] in an area where Parliament's legislative power is subject to a clear limitation".[352] Thus the regulations, by their terms and subject matter,[353] provide a textual basis upon which a limitation derived from s 75(v) can be applied. The scope of the blanket prohibition on making available of, "use" of, or "dealing with" assets can be limited to permit that conduct to occur for some purpose or purposes associated with invoking the jurisdiction conferred by s 75(v).

The formulation of the s 75(v) limitation

212 An important aspect of the appellant's resistance to the application of s 15A to regs 14 and 15 concerned the alleged imprecision in the formulation of any limitation referable to s 75(v). It is no impediment to the process of reading down by applying s 15A that the constitutional limitation is "incapable of precise definition"[354] or that an inquiry of fact is required to determine whether the constitutional limitation would or would not be engaged in its application to particular persons in particular circumstances.[355] That said, the formulation of any limit that reflects any reading down should not undermine the constitutional limit or values that are at stake.

213 The appellant contended that the practical infringement of Ch III that would result from any reading down of regs 14 and 15 referable to s 75(v) being framed too narrowly means that the capacity to invoke s 75(v) would still be imperilled, casting doubt on whether the regulations can be read down at all. Absent a permit

---

350 *Tajjour v New South Wales* (2014) 254 CLR 508 at 559 [66].

351 Specifically, those "legal document[s] ... evidencing title to, or interest in, such an asset": Sanctions Act, s 4 (para (b) of the definition of "asset").

352 *Victoria v The Commonwealth* (1996) 187 CLR 416 at 503.

353 *Pidoto v Victoria* (1943) 68 CLR 87 at 110-111.

354 *Tajjour v New South Wales* (2014) 254 CLR 508 at 586 [171], citing *Victoria v The Commonwealth* (1996) 187 CLR 416 at 503.

355 *Tajjour v New South Wales* (2014) 254 CLR 508 at 586 [171], citing *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 291-292 and *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 487-488.

granted under reg 18, the express terms of regs 14 and 15 render a lawyer who advises or appears for a designated person in relation to matters arising in a Ch III court liable to criminal prosecution. The effect of regs 14 and 15 is such that, if any limitation on their operation to prevent the stultification of s 75(v) is expressed too narrowly, then the practical impact of those regulations will still result in that stultification. Lawyers most likely will not (and should not be expected to) run the gauntlet of potential prosecution, disbarment and incarceration by advising and acting for a designated person where there is an appreciable risk that their conduct will not fall within any judicially expressed reading down of regs 14 and 15.

214 As noted, one concern raised by the appellant concerning the Full Court's formulation was that it prohibits conduct engaged in by the designated person and their lawyer to ascertain the designated person's rights prior to invoking judicial power, including by preventing the designated person from obtaining and being provided with legal advice.[356] I have already accepted that the entrenchment of the jurisdiction conferred by s 75(v) extends to the provision of advice in relation thereto.[357] The Full Court's formulation can be modified accordingly.

215 Even so, a broader potential for possible stultification remains where there is doubt about whether legal advice sought by or given to a designated person relates to their rights and obligations under the Sanctions Act, the Sanctions Regulations or Commonwealth law generally but does not concern any proceeding against an officer of the Commonwealth that could be the subject of a constitutional writ. In those circumstances a lawyer may, and most likely will, be reticent to advise and act. It is no answer to that difficulty to postulate the making of an application to a Ch III court for the grant of declaratory relief to resolve a doubt about whether some proposed step falls within any reading down of regs 14 and 15 formulated to preclude the stultification of s 75(v). Such a proceeding would invoke the jurisdiction conferred by s 75(iii)[358] of the *Constitution* in that the Commonwealth in one manifestation or another[359] would be a necessary party. However, absent a "genuinely raised" claim for a constitutional writ not "incapable

---

356 Citing *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351-352 [30].

357 See above at [202].

358 Section 75(iii) confers original jurisdiction on this Court in a matter in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party.

359 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 362-363; *Bainbridge-Hawker v The Minister of State for Trade and Customs* (1958) 99 CLR 521 at 554; *Austral Pacific Group Ltd (In liq) v Airservices Australia* (2000) 203 CLR 136 at 152-153 [48].

on its face of legal argument",[360] such proceedings would not invoke s 75(v).[361] Thus, it may be doubted that such a proceeding would itself be considered for the (objective) purpose of invoking s 75(v) and thus the conduct of the designated person and their lawyer in bringing those proceedings might leave them exposed to prosecution for a breach of regs 14 and 15. Ultimately, the resolution of this concern is interrelated with the issue of whether regs 14 and 15 infringe further limitations derived from Ch III, as contended for by the appellant. That issue is addressed next.

Further limitations derived from Ch III?

216 The appellant contended that regs 14 and 15 contravene Ch III by prohibiting (absent ministerial permission) the legal representation of a designated person in a Ch III court and also by prohibiting the designated person from invoking the jurisdiction conferred by s 75(iii) of the *Constitution* without the favourable exercise of a discretion by a Minister.

217 The appellant referred to the proceedings that have just been described,[362] namely an application for declaratory relief as to the scope and effect of the Sanctions Regulations, as an example of proceedings that he may bring in the event that his challenge to regs 14 and 15 in this appeal fails. As noted, the Commonwealth would be a necessary party to those proceedings. The appellant contends that if regs 14 and 15 are not invalid or read down further any such proceedings would be affected by these regulations, because he cannot be legally represented in those proceedings absent ministerial exemption. As explained, in that event he would also be effectively precluded from appearing for himself.

Incapacity to challenge sanctions must be addressed

218 The Minister's principal contention was that, applying s 15A of the AIA and adopting the prudential practice described above, these further limitations should not be addressed as no factual foundation was established for concluding that the appellant would seek to bring and to be represented in other proceedings in a Ch III court or to bring and be represented in proceedings that invoke s 75(iii).[363]

---

360 *Citta Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216 at 234 [35].

361 Declarations not being a remedy enumerated in s 75(v): Leeming, *Authority to Decide: The Law of Jurisdiction in Australia*, 2nd ed (2020) at 247.

362 See above at [215].

363 Citing *Knight v Victoria* (2017) 261 CLR 306 at 324 [32]; *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at 248-249 [57]-[60].

219 To the extent that the Minister's submission concerns proceedings that do not involve a determination of the appellant's rights and obligations under the Sanctions Act or the Sanctions Regulations, they should be accepted. There is nothing at present to suggest the possibility of factual circumstances arising that might result in such proceedings being commenced. However, the position is different so far as proceedings concerning the appellant's rights and obligations under the Sanctions Act or the Sanctions Regulations are concerned. On the Minister's approach, absent a permit, the appellant would have to bring separate proceedings invoking the jurisdiction conferred by s 75(iii) to ascertain the scope of his rights and obligations under the Sanctions Act or the Sanctions Regulations and in so doing contend that the commencement and conduct of those proceedings was not validly precluded by regs 14 and 15. If that contention was not accepted then the appellant and his lawyers would be exposed to prosecution for having brought those proceedings.

220 A variation on this dilemma also arises in relation to any suit commenced by or on behalf of the Commonwealth against the designated person, including a criminal prosecution. Such proceedings would also invoke the jurisdiction conferred by s 75(iii).[364] On their face the regulations would preclude a designated person retaining a lawyer in those proceedings, prevent any lawyer from acting on their behalf in relation to the proceedings, and seriously impede the designated person representing themselves. In those circumstances a lawyer would likely not act on any application in those proceedings challenging the scope of regs 14 and 15 because, if the application were unsuccessful, then the designated person and the lawyer would have committed a criminal offence. The end result is that, on the Minister's approach, even if regs 14 and 15 impose an invalid limitation on the capacity of a designated person to invoke the jurisdiction conferred by s 75(iii), and thus the regulations need to be read down to be valid, a judicial determination to that effect is unlikely to occur.

221 Ultimately I do not accept that the prudential practice[365] described above precludes the Court from determining in this appeal whether there is any further limit on regs 14 and 15 derived from Ch III as concerns the practical capacity of the appellant to invoke this Court's jurisdiction under s 75(iii) (and the equivalent jurisdiction in the Federal Court) to determine his rights and obligations under the Sanctions Act or the Sanctions Regulations. The appellant is currently engaged in

---

364 *R v Kidman* (1915) 20 CLR 425 at 438; see generally *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334 at 335-336; *Maguire v Simpson* (1977) 139 CLR 362 at 398, 406.

365 The practice being, in any event, "not a rigid rule imposed by law" and which can "yield to special circumstances": *Clubb v Edwards* (2019) 267 CLR 171 at 193 [36], citing *Universal Film Manufacturing Co (Australasia) Ltd v New South Wales* (1927) 40 CLR 333 at 350-351.

litigation that seeks to set aside his designation and declaration under the Sanctions Regulations. As part of that challenge he contends that regs 14 and 15 are wholly invalid. If he is unsuccessful he will be subject to an ongoing legal disability under the Sanctions Regulations of uncertain scope in circumstances where it is unlikely that this uncertainty can be resolved unless the question of whether regs 14 and 15 are to be further read down is now determined. Those circumstances, especially the uncertainty over what is prohibited and what is not,[366] mean that there does presently exist a "state of facts which makes it necessary to decide [a question about the validity and permissible scope of regs 14 and 15] in order to do justice in [this] case and to determine the rights of the parties".[367]

222 This conclusion is not affected by the fact that the Minister has granted permits under reg 18 which authorise making assets available to the appellant in connection with legal services, settlement of legal proceedings, and payment of legal costs. The current permit is of limited duration and can be revoked by the Minister. Thus the current "state of facts" is that the appellant's entitlement to retain lawyers and bring proceedings is fragile and dependent on executive favour. To make access to a Ch III court so dependent on the exercise of executive power is to subvert the proper relationship between the judicial branch and the executive branch that is at the heart of s 75(v)[368] and the balance of Ch III.[369]

Prescribing an unfair procedure for challenging sanctions

223 Accordingly, the appellant's contention that Parliament may not limit or exclude legal representation in Ch III courts or limit or exclude proceedings that might fall within s 75(iii) of the *Constitution* should be addressed, but only so far as that contention concerns actions and potential actions falling within s 75(iii) that relate to the appellant's rights and obligations under the Sanctions Act and Sanctions Regulations.

224 The Minister accepted that, to the extent that the jurisdiction conferred by s 75(iii) overlaps with that conferred by s 75(v), it is entrenched. However, the Minister submitted that the extent to which the balance of the grant of jurisdiction conferred by s 75(iii) can be inhibited is "far from settled" because, unlike s 75(v),

---

366 See, eg, *Clubb v Edwards* (2019) 267 CLR 171 at 193 [37].

367 *Lambert v Weichelt* (1954) 28 ALJ 282 at 283.

368 See, eg, *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513-514 [104]; *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 25-26 [42]-[46].

369 See, eg, *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27-28; *Garlett v Western Australia* (2022) 277 CLR 1 at 48-50 [128]-[134].

s 75(iii) does not require the existence of a particular cause of action or remedy but instead is "expressed in terms of parties"[370] and is predicated on a claim for liability under general law, such as the law of tort.[371]

225 The different types of proceedings that involve matters attracting jurisdiction under s 75(iii)[372] suggest that the question of whether some aspect of the jurisdiction that is conferred by or reflected in s 75(iii) is "entrenched" should only be determined in a case that concerns that aspect.[373] That said, it is difficult to see how Parliament could remove so much of the original jurisdiction of this Court conferred by s 75(iii) which encompasses matters involving the interpretation of the *Constitution* or which involves ascertaining the interpretation, boundaries and limits of Commonwealth law,[374] irrespective of whether that jurisdiction overlaps with s 75(v).[375] The contrary conclusion is hard to reconcile with the "assumption of the rule of law",[376] in the sense of government under law, upon which the *Constitution* is framed.[377]

---

370 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155.

371 See, eg, *The Commonwealth v Mewett* (1997) 191 CLR 471.

372 See, eg, claims against the Commonwealth in contract (*The Commonwealth v Mewett* (1997) 191 CLR 471), claims in tort (*The Commonwealth v New South Wales* (1923) 32 CLR 200; *Blunden v The Commonwealth* (2003) 218 CLR 330 at 336 [9]), claims in equity (*The Commonwealth v Verwayen* (1990) 170 CLR 394), claims arising under and concerning the interpretation of a law made by the Commonwealth Parliament (*Austral Pacific Group Ltd (In liq) v Airservices Australia* (2000) 203 CLR 136 at 141-142 [10]) and claims arising under the *Constitution* (*Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 36).

373 For example, as to tortious claims, see *Blunden v The Commonwealth* (2003) 218 CLR 330 at 336 [9].

374 See *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 276, 366-368; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 36; *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 216; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 505 [73].

375 Or answers the description of matters in s 76(i) or s 76(ii).

376 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [31], see also at 513 [103].

377 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 1 at 32-33 [85]-[87].

226 In any event, both parties' submissions do not engage with how regs 14 and 15 operate upon a designated person in relation to matters which involve or concern their rights and obligations under the Sanctions Act and Sanctions Regulations in relation to s 75(iii). Regulations 14 and 15 do not purport to exclude such actions against the Commonwealth in this Court or any other court with similar jurisdiction.[378] The regulations also do not give effect to some generally applicable rule affecting all parties to litigation such as restricting advertising by lawyers to persons other than their clients.[379] Instead, those regulations preclude a designated person from being legally represented and seriously impede the designated person from representing themselves while placing no limitation or restriction on representation by the Commonwealth. This not only includes matters against the Commonwealth but matters in which the Commonwealth is suing the designated person, including an application by the Commonwealth for an injunction under the Sanctions Act[380] or a criminal prosecution for an offence under the Sanctions Act or the Sanctions Regulations.[381]

227 If the effect of a Commonwealth law is that, in proceedings in a Ch III court between a person and the Commonwealth, including a criminal prosecution, the Commonwealth may be legally represented but the other person cannot and the other person is otherwise impeded in representing themselves then a real question arises as to whether such a law "requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power".[382] In the case of a criminal prosecution, the unfairness that would result from the legislated outcome of the prosecutor being represented and the accused being unable to be represented and seriously impeded in representing themselves may enable the court to grant a stay of the prosecution.[383]

228 However, the remedy of a stay is irrelevant in the case of a suit by a designated person against the Commonwealth in which that person seeks to ascertain their rights and obligations under the Sanctions Act or the Sanctions

---

378 *Judiciary Act*, ss 39(2), 39B(1)-(1A).

379 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322.

380 Sanctions Act, s 14.

381 Sanctions Act, ss 16-17, 21-22; Sanctions Regulations, regs 12-16.

382 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27, citing *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 607, 689, 703-704.

383 See *Dietrich v The Queen* (1992) 177 CLR 292 at 311, 335-337; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 115 [212].

Regulations.[384] In such a case the court would be obliged to hear and determine the case in circumstances where the designated person is prevented from being legally represented and is seriously impeded in representing themselves while the Commonwealth is legally represented and not subject to any restrictions on the assets and resources it could deploy in the litigation. The unfairness occasioned by that disparity travels well beyond that which might follow from such measures as limiting the evidence a party may have access to and challenge in a proceeding.[385] Instead, the practical effect of regs 14 and 15 is that the designated person cannot effectively be heard at all in a Ch III court while the Commonwealth can. Such a manner of proceeding is inconsistent with the essential character of a court or with the nature of judicial power.[386]

229 Applying s 15A of the AIA in the manner described, it follows that regs 14 and 15 should be (further) read down so as to not preclude the making available of, dealing with or using of assets for the (objective) purpose of a designated person applying to a Ch III court to determine their rights and obligations under the Sanctions Act or the Sanctions Regulations or seeking and obtaining legal advice in relation thereto.

230 There may be further limits on the permissible operation of regs 14 and 15 that derive from Ch III but no factual predicate currently exists to ascertain those limits. In the event that factual circumstances arise which require that any additional limit be considered then the restriction on the scope of operation of regs 14 and 15 that I have identified would enable that inquiry to be undertaken. This restriction also avoids the potential difficulty that arises from only limiting the scope of regs 14 and 15 by reference to s 75(v) of the *Constitution* as discussed above.[387]

---

384 See *New South Wales v Canellis* (1994) 181 CLR 309 at 328.

385 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38; *SDCV v Director-General of Security* (2022) 277 CLR 241. See also *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1.

386 See *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27-28; see also *Cameron v Cole* (1944) 68 CLR 571 at 589; *Taylor v Taylor* (1979) 143 CLR 1 at 4; *Nicholas v The Queen* (1998) 193 CLR 173 at 208-209 [73]-[74]; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 99 [156]; *SDCV v Director-General of Security* (2022) 277 CLR 241 at 297 [150], 306 [175].

387 See [219].

Conclusion

231 In this Court the appellant's challenge to the Minister's decision was predicated on establishing that regs 14 and 15 were wholly invalid. As he has not done so, it follows that the appeal should be dismissed with costs.