Federal Court of Australia

Deripaska v Minister for Foreign Affairs [2024] FCA 62

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| File number: | WAD 15 of 2023 |
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| Judgment of: | **KENNETT J** |
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| Date of judgment: | 8 February 2024 |
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| Catchwords: | **ADMINISTRATIVE LAW –** judicial review of Instruments made by the Minister designating and declaring the applicant pursuant to item 6A(a) of reg 6 of the *Autonomous Sanctions Regulations 2011* (Cth) (**Regulations**) – whether Regulations infringe common law right to be represented by lawyer of one’s own choice – whether use of amending instrument effectively designated and declared applicant for purposes of reg 6 – whether Minister misunderstood nature of power being exercised by failing to appreciate scope of her discretion – whether Minister was aware of discretion – whether Minister aware she had discretion to designate and declare, neither designate nor declare, and designate or declare the applicant – materiality of failure to appreciate scope of discretion – inferences to be drawn from Minister not having been called to give evidence – whether rational foundation for Minister’s state of satisfaction that applicant met criteria in item 6A – application dismissed  **CONSTITUTIONAL LAW –** judicial power of the Commonwealth – whether regs 14 and 15 have applications that would subvert the exercise of jurisdiction under s 75(v) of the *Constitution* or s 39B(1) of the *Judiciary Act 1903* (Cth) – whether Regulations are invalid by reason of inconsistency with the constitutional entrenchment of that jurisdiction – where s 75(v) introduces an “entrenched minimum provision of judicial review” – whether designation under the Regulations prevents designated persons or entities from obtaining legal representation to challenge decision – whether terms of Regulations can be read down to exclude actions taken for the purpose of challenging designation or other things purportedly done under the *Autonomous Sanctions Act 2011* (Cth) in proceedings commenced under s 75(v) or 39B(1)  **CONSTITUTIONAL LAW** – implied freedom of political communication – where parties agreed that Regulations burdened the implied freedom – where Regulations impede lawyers’ ability to communicate meaningful advice or representations to or on behalf of a designated person or entity – whether nature of such communications is political – whether Regulations serve a legitimate purpose in allowing Australian government to pursue foreign policy objectives through sanctions – whether Regulations proportionate to the achievement of legitimate purpose – Regulations not invalid by reason of infringement of the implied freedom |
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| Legislation: | *Constitution* ss 7, 24, 75, 76, 77  *Acts Interpretation Act 1901* (Cth) ss 2, 15A  *Autonomous Sanctions Act 2011* (Cth) ss 3, 4, 6, 10, 11, 12, 13, 14, 16, 17, 28  *Judiciary Act 1903* (Cth) s 39B(1)  *Legislation Act 2003* (Cth) s 13  *Migration Act 1958* (Cth) s 438  *Autonomous Sanctions Bill 2010* (Cth)  *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment (No 4) Instrument 2022* (Cth)  *Autonomous Sanctions (Designated Persons and Entities and Declared Persons — Russia and Ukraine) Amendment (No 7) Instrument 2022* (Cth)  *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Russia and Ukraine) List 2014* (Cth) s 3A, sch 2  *Autonomous Sanctions (Sanction Law) Declaration 2012* (Cth)  *Autonomous Sanctions Amendment (Russia) Regulations 2022* (Cth)  *Autonomous Sanctions Regulations 2011* (Cth) regs 3, 6, 14, 15, 18, 20  *Migration Regulations 1994* (Cth) reg 2.43, PIC4003 of sch 4  *Criminal Law Consolidation Act 1935* (SA) s 83GA  *Interpretation Act 1987* (NSW) s 31 |
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| Cases cited: | *Abramov v Minister for Foreign Affairs (No 2)* [2023] FCA 1099 *APLA Ltd v Legal Services Commissioner (NSW)* [2005] HCA 44; 224 CLR 322  *Attorney-General (SA) v Adelaide City Corporation* [2013] HCA 3; 249 CLR 1  *Australian Securities and Investments Commission v BHF Solutions Pty Ltd* [2021] FCA 684  *Bank Nationalisation Case* (1948) 76 CLR 1  *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1  *BHP Group Ltd v Impiombato* [2022] HCA 33; 96 ALJR 956  *Bodruddaza v Minister for Immigration and Multicultural Affairs* [2007] HCA 14; 228 CLR 651  Brodie v Singleton Shire Council [2001] HCA 29; 206 CLR 512  *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107; 252 FCR 352  *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1  *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; 203 CLR 194  *Cole v Whitfield* (1988) 165 CLR 360  *Cunliffe v Commonwealth* (1994) 182 CLR 272  *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2013] FCAFC 8  *Disorganized Developments Pty Ltd v South Australia* [2022] SASCA 6; 140 SASR 206  *Disorganized Developments Pty Ltd v South Australia* [2023] HCA 22; 97 ALJR 575  *ETA067 v Republic of Nauru* [2018] HCA 46; 92 ALJR 1003  *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416  *Forge v Australian Securities and Investments Commission* [2006] HCA 44; 228 CLR 45  *Graham v Minister for Immigration and Border Protection* [2017] HCA 33; 263 CLR 1  *Hamzy v Commissioner of Corrective Services (NSW)* [2022] NSWCA 16; 107 NSWLR 544  *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; 264 CLR 123  *Jones v Dunkel* (1959) 101 CLR 298  *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520  *LibertyWorks Inc v Commonwealth* [2021] HCA 18; 274 CLR 1  *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCAFC 64; 297 FCR 1  *Mackie v Minister for Home Affairs* [2021] FCA 1326  *Mackie v Minister for Home Affairs* [2022] FCAFC 120  *Masi-Haini v Minister for Home Affairs*[2023] FCAFC 126; 298 FCR 277  *Minster for Aboriginal and Torres Strait Islander Affairs v Western Australia* (1996) 67 FCR 40  *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; 264 CLR 421  *Minister for Immigration and Border Protection v SZSRS* [2014] FCAFC 16  *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; 205 CLR 507  *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; 206 CLR 323  *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; 273 CLR 506  *Nathanson v Minister for Home Affairs* [2022] HCA 26; 96 ALJR 737  *Palmer v Western Australia* [2021] HCA 5; 272 CLR 505  *Pape v Federal Commissioner of Taxation* [2009] HCA 23; 238 CLR 1  *Pidoto v Victoria* (1943) 68 CLR 87  *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; 211 CLR 476  *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4; 264 CLR 1  *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188  *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323  *Re East; Ex parte Nguyen* [1998] HCA 73; 196 CLR 354  *Tajjour v New South Wales* [2014] HCA 35; 254 CLR 508  *Vairy v Wyong Shire Council* [2005] HCA 62; 223 CLR 422  *Victoria v Commonwealth (the Industrial Relations Act case)* (1996) 187 CLR 416  *Wainohu v New South Wales* [2011] HCA 24; 243 CLR 181  *Wotton v Queensland* [2012] HCA 2; 246 CLR 1  *XYZ v Commonwealth* [2006] HCA 25; 227 CLR 532  *Zhang v Commissioner of the Australian Federal Police* [2021] HCA 16; 273 CLR 216  *Macquarie Dictionary* (8th ed, Macquarie Dictionary Publishers, 2020) vol L-Z, 1223 |
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| Division: |  |
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| Registry: | Western Australia |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Number of paragraphs: | 180 |
|  |  |
| Date of hearing: | 11-12 December 2023 |
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| Counsel for the Applicant: | CC Porter with DA Ward |
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| Solicitor for the Applicant: | Pragma Law |
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| Counsel for the Respondent: | P Herzfeld SC with H Ryan |
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| Solicitor for the Respondent: | Australian Government Solicitor |
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ORDERS

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|  | | WAD 15 of 2023 |
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| BETWEEN: | OLEG VLADIMIROVICH DERIPASKA  Applicant | |
| AND: | MINISTER FOR FOREIGN AFFAIRS  Respondent | |

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| order made by: | KENNETT J |
| DATE OF ORDER: | 8 february 2024 |

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The applicant pay the respondent’s costs as agreed or assessed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

KENNETT J:

# introduction

1. The applicant challenges a decision made by the Minister for Foreign Affairs (**the Minister**) on 17 March 2022 to designate him for targeted financial sanctions and declare him for travel bans under the *Autonomous Sanctions Act 2011* (Cth) (**the Act**). The applicant is a Russian national, described in the material that was before the Minister as an oligarch and prominent businessman with close personal ties to President Putin.
2. The decision of the Minister is embodied in, and purported to be given legal effect by, a statutory instrument entitled the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons — Russia and Ukraine) Amendment (No 7) Instrument 2022* (Cth) (**the Amending Instrument**), which amended an earlier instrument so as to include the applicant’s name in a list of persons and entities in that instrument. It will be necessary to consider these instruments in more detail below.
3. The Minister at the time, who made the decision, was Senator the Hon Marise Payne. She is no longer a member of the Government or indeed a Senator. Appropriately, orders are not sought against Ms Payne in a personal capacity, but against the current Minister in her capacity as an officer of the Commonwealth. It will be necessary to refer briefly to Ms Payne in a personal capacity later in these reasons. References to “the Minister” in these reasons are references to the office holder at relevant times: ie, the decision-maker, in her capacity as such, and the respondent in these proceedings.
4. The applicant pressed six arguments. They are, in summary (and in the order presented in written submissions):
5. the regulations under which the instruments were made are wholly invalid by reason of inconsistency with principles entrenched in Ch III of the Constitution;
6. the regulations are wholly invalid because they infringe the implied freedom of political communication;
7. the regulations are wholly invalid because they are inconsistent with fundamental common law principles;
8. the Amending Instrument fails to perform the statutory function of “designating” or “declaring” the applicant;
9. the Minister misunderstood the nature of the power that she purported to exercise; and
10. the Minister’s satisfaction that a relevant criterion was met was not supported by any probative material.
11. The arguments will be addressed in this order. Before doing so, it is necessary to note the relevant aspects of the statutory scheme and the decision-making process in the present case.

# relevant aspects of the statutory scheme

1. The Act provides for the imposition and enforcement of “autonomous sanctions” which are, broadly, sanctions that:
2. are intended to influence foreign governments, persons or entities outside Australia in accordance with Australian Government policy; or
3. involve the prohibition of conduct in or connected with Australia that facilitates the engagement by a person or entity in conduct outside Australia that is contrary to Australian Government Policy.
4. The objects of the Act, set out in s 3, make clear that such sanctions may be country-specific or may be thematic (in that they may be directed at identified international problems such as the proliferation of weapons of mass destruction, malicious cyber activity or serious violations of human rights).
5. The Act operates principally by authorising the making of regulations which impose sanctions of the kinds contemplated. Section 28 of the Act is a general power to make regulations prescribing matters required or permitted to be prescribed or necessary or convenient to be prescribed for carrying the Act into effect. Section 10 expressly provides for the regulations to apply sanctions, as follows.

**10 Regulations may apply sanctions**

(1) The regulations may make provision relating to any or all of the following:

(a) proscription of persons or entities (for specified purposes or more generally);

(b) restriction or prevention of uses of, dealings with, and making available of, assets;

(c) restriction or prevention of the supply, sale or transfer of goods or services;

(d) restriction or prevention of the procurement of goods or services;

(e) provision for indemnities for acting in compliance or purported compliance with the regulations;

(f) provision for compensation for owners of assets that are affected by regulations relating to a restriction or prevention described in paragraph (b).

(2) Before the Governor-General makes regulations for the purposes of subsection (1), the Minister must be satisfied that the proposed regulations:

(a) will facilitate the conduct of Australia’s relations with other countries or with entities or persons outside Australia; or

(b) will otherwise deal with matters, things or relationships outside Australia.

…

1. Regulations may have extraterritorial effect (s 11). They are to have effect despite any other laws including pre-existing Acts of the Commonwealth (s 12). Later Commonwealth Acts are not to be interpreted as amending or repealing the regulations (or authorising the making of any instrument affecting their operation) except to the extent that they do so expressly (s 13).
2. The Act provides for enforcement of the regulations by an injunction granted by a court on the application of the Attorney-General (s 14). The Act also creates the following offences:
3. contravening a “**sanction law**” (ie a law specified under s 6 as a sanction law) (s 16); and
4. giving false or misleading information to the Commonwealth in connection with the administration of a sanction law (s 17).
5. The *Autonomous Sanctions Regulations 2011* (Cth) (**the Regulations**) provide for the imposition of sanctions. Relevantly for present purposes, reg 6 provides as follows:

**6 Country-specific designation of persons or entities or declaration of persons**

For paragraph 10(1)(a) of the Act, the Minister may, by legislative instrument, do either or both of the following:

(a) 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;

(b) 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.

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| **Countries, persons and entities** | | | | | |
| **Item** | | **Country** | | **Activity** | |
| 6A | Russia | | 1. A person or entity 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. 2. A current or former Minister or senior official of the Russian Government. 3. An immediate family member of a person mentioned in   paragraph (a) or (b). | |

1. Item 6A was inserted into the table in reg 6 by the *Autonomous Sanctions Amendment (Russia) Regulations 2022* (Cth) (**the Russia Regulations**), which commenced on 25 February 2022 (shortly before the Minister’s decision in the present case was made).
2. Where a person is *declared* under reg 6(b), provisions in the *Migration Regulations 1994* (Cth) make that declaration a ground for refusal of a visa (PIC 4003 in Schedule 4) or for cancellation of an existing visa (reg 2.43(1)(aa)(i)).
3. Where a person or an entity is *designated* under reg 6(a), later provisions of the Regulations come into play. Regulations 14 and 15 provide as follows.

**14 Prohibition of dealing with designated persons or entities**

(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.

**15 Prohibition of dealing with controlled assets**

(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

(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.

1. “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 Act, as follows:

***asset*** means:

(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.

Note: Some examples of documents and instruments described in paragraph (b) are bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, debt instruments, drafts and letters of credit.

1. Regulation 15 is thus contravened by a very wide range of dealings involving “assets” (which is also a wide concept, including intangible property and documents) owned or controlled by a designated person or entity.
2. Regulations 14 and 15 are declared to be “sanction laws”, for the purposes of s 6 of the Act, by the *Autonomous Sanctions (Sanction Law) Declaration 2012* (Cth). That means that contravention of reg 14 or 15 is (subject to proof of the relevant fault elements) an offence under s 16 of the Act.
3. The effect of regs 14 and 15 can be mitigated by the grant of a permit by the Minister under reg 18. Regulation 18(1) authorises (*inter alia*) the grant of a permit authorising the making available of an asset that would otherwise contravene reg 14, or the use of or dealing with a controlled asset (paras (e), (f)). The regime for granting permits is discussed further below.

## Designation of persons and entities and declaration of persons in respect of Russia

1. On 19 June 2014 the Minister made an instrument under reg 6 of the Regulations entitled the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Russia and Ukraine) List 2014* (Cth) (**the 2014 Instrument**). Section 3A of that Instrument, which was inserted by the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment (No 4) Instrument 2022* (Cth) (**the No 4 Instrument**) with effect from 26 February 2022, is as follows.

**3A Designated persons and entities and declared persons—Russia**

(1) For the purposes of paragraph 6(a) of the *Autonomous Sanctions Regulations 2011*, each person or entity mentioned in an item of a table in Schedule 2 is designated as a *designated person or entity* for Russia.

(2) For the purposes of paragraph 6(b) of the *Autonomous Sanctions Regulations 2011*, each person mentioned in an item of the table in Part 1 of Schedule 2 is declared for the purpose of preventing the person from travelling to, entering or remaining in Australia.

1. Schedule 2 to the 2014 Instrument comprises two tables. The table in Part 1 of the Schedule lists individuals who, as a result of their inclusion, are declared for the purposes of reg 6(b) (by s 3A(2)) and designated for the purposes of reg 6(a) (by s 3A(1)). Part 2 of Schedule 2 lists entities which are designated (by s 3A(1)) but which are not within the scope of reg 6(b).
2. The 2014 Instrument is the Instrument which was amended by the Amending Instrument signed by the Minister on 17 March 2022. The Amending Instrument added the applicant’s name to the table in Part 1 of Schedule 2.

# the present case

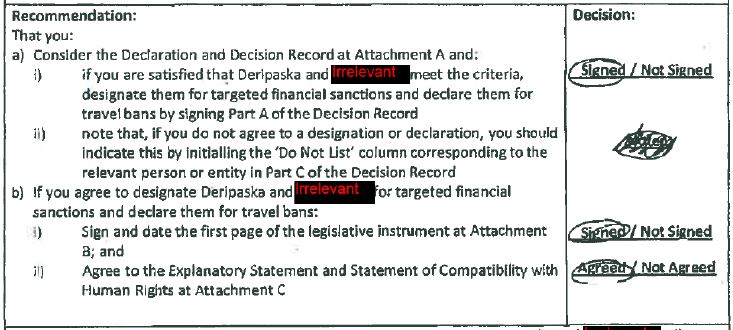
1. Pursuant to proposed consent orders drawn up by the parties (which were ultimately not made by the Court, but implemented by agreement), the Minister’s solicitors were, subject to any claims for public interest immunity, to file and serve “a book comprising copies of all documents relating to the respondent’s decision in relation to the applicant made on 17 March 2022 that were before the respondent at the time of making that decision”. They filed and served a book of documents in compliance with that proposed order, which is now in evidence. I proceed on the basis (no party having suggested otherwise) that these documents comprise everything relevant to the decision that was before the Minister at the time she made the decision.

## What the Minister received

1. The Minister was provided with a “**Ministerial Submission**” prepared by officers in her Department. The submission itself is undated, but other evidence indicates that it was sent to her office on the morning of 16 March 2022 (the day before the Minister made the decision under review). The Ministerial Submission dealt with the applicant and one other person, and the discussion of that other person (which is irrelevant) has been redacted. In what follows I omit references to the other person.
2. The Ministerial Submission was headed “Russia: Autonomous sanctions against Russian oligarchs Deripaska and [redacted]”. Its first page set out what it described as “Key Issues” and its “Recommendation”. The “Key Issues” section said:

This submission seeks your (Minister Payne’s) agreement to list Oleg Deripaska, founder of United Company Rusal, and [redacted] for targeted financial sanctions and travel bans. Statements of case are at Attachment A. Deripaska and [redacted] have interests in Queensland Alumina Limited (QAL), which Rio Tinto controls. [Redacted]. Any impact on QAL [redacted] would depend on the detail of the relevant commercial arrangements. Deripaska and [redacted] have been listed by the United States and the United Kingdom. Deripaska has also been listed by Canada.

1. The “**Recommendation**” set out the Department’s recommendations, with a facility opposite each recommendation for the Minister to indicate her decision thereon. The following is an image of this part of the document, including the Minister’s annotations. (The “decision” next to para (a)(ii), which the Minister has circled and then crossed out, appears to read “Noted”.)



1. On the next page, under the heading “Background”, came a brief discussion of the applicant’s case.

You (Minister Payne) decided on 13 March to list 11 Russian oligarchs for targeted financial sanctions and travel bans (see MS22-000360). They did not include Oleg Vladimirovick Deripaska and [redacted] pending further analysis of their Australian business interests. Now that we have undertaken that analysis, we recommend that you list Deripaska and [redacted].

Imposing targeted financial sanctions against Deripaska and [redacted] would prohibit Australians from using or dealing with any asset that is owned or controlled by either of them; and prohibit Australians from providing any asset directly or indirectly to, or for the benefit of, either of them. The *Autonomous Sanctions Act 2011* defines ‘asset’ for these purposes broadly to include an asset or property of any kind, whether tangible or intangible, movable or immovable.

Both Deripaska and [redacted] have interests in United Company Rusal, a state-owned Russian company. Rusal owns a 20 per cent share of Queensland Alumina Limited (QAL), which operates an alumina refinery in Gladstone. Rio Tinto owns the remaining 80 per cent. Rio issued statement on 10 March that it would sever all business links with Rusal. Separately, Rio informed DFAT in-confidence on 16 March that it had planned for the possible listings of Deripaska and [redacted] which Rio indicated would not affect QAL’s operations.

[Redacted].

Listing Deripaska and [redacted] would further align us with like-minded partners. Both have been listed by the United States and the United Kingdom. Deripaska has also been listed by Canada. Neither has been listed by the EU. Beyond merely aligning with like-minded partners, listing Deripaska and [redacted] would demonstrate that we are committed to imposing severe sanctions on Russia in response to its invasion of Ukraine, even where that may have an impact on our economic interests and those of Australian businesses. To the contrary, not listing Deripaska and [redacted] may attract domestic criticism questioning our commitment to sanctions that actually bite. Largely because of their greater exposure to Russia, our like-minded partners have already suffered direct economic damage, whereas we have not.

On balance, we consider that our prevailing interest is in aligning with like-minded partners to demonstrate our commitment to strong sanctions against Russia. Should you agree to list Deripaska and [redacted] we would register the legislative instrument on the same day. The listings would take effect at 12.01 am on the following day.

1. The next section of the Ministerial Submission was headed “**Decision Record**”. It was evidently prepared for the Minister to sign if she agreed with its contents, so that there would be a record of what the Minister had decided and on what basis (even though the Minister was under no legal obligation to give reasons for her decision). The Decision Record was divided into four parts.
2. **Part A** was headed “Designation and Direction”. Underneath was a space for the Minister to sign. The text of this section was as follows.

I am satisfied that the persons identified in Part C meet the criteria for designation and declaration (if applicable), outlined in Part B below, unless I have initialled the ‘Do Not List’ column in respect of a person.

I confirm that I considered the statements of case supporting designation for targeted sanctions and declaration for travel bans in respect of each person in Part D in reaching my decision.

1. **Part B** was headed “criteria for listing” and set out the relevant text of item 6A of reg 6 (set out at [11] above).
2. **Part C** was headed “Decision on designation and declaration”. It began with a table listing the name and some other details of the applicant, including the “Do Not List” column referred to in the Recommendation. Under the heading “Context”, there was some further text describing the applicant’s role and interests. There was then a brief reference to the sanctions imposed on the applicant by the United Kingdom, the United States and Canada.
3. **Part D** was headed “Statements of Case supporting designation and direction” It set out information which it said was, “to the Australian Government’s knowledge, accurate and reliable”. In relation to the applicant, that information was as follows.

**Name: Oleg Vladimirovich Deripaska**

**Nationality: Russian Federation, Cyprus**

Oleg Vladimirovich DERIPASKA is a prominent Russian businessman (oligarch) and public reports state he has particularly close personal tied to President Putin.4

DERIPASKA is the founder of UC Rusal which has a 20 percent interest in Queensland Alumina.5 On 10 March 2022, Rio Tinto, which owns the remaining 80 percent, announced that it would sever all business links with Russia.6

DERIPASKA has said that he does not separate himself from the Russian state. He has also acknowledged possessing a Russian diplomatic passport and claims to have represented the Russian government in other countries.7

DERIPASKA has been subject to US sanctions since 20188 and Canadian sanctions since 6 March 2022.9 The UK imposed sanctions on DERIPASKA on 10 March 2022.10

In March 2019, DERIPASKA sued the US, alleging that it had overstepped its legal bounds in imposing sanctions on him and made him the “latest victim” in the US probe into Moscow’s election interference. The lawsuit was dismissed in June 2021, as lacking merit.11

DERIPASKA is or has been involved in obtaining benefit from or supporting the Government of Russia, by carrying on business in, and owning or controlling and working as a director or equivalent in businesses in the Russian extractives and energy sectors, sectors of strategic significance to the Government of Russia.12

Given his business interests and close personal ties to Putin, it is open for the Minister to be satisfied that Oleg Vladimirovich DERIPASKA is, or has been, engaging in an activity or performing a function that is of economic or strategic significance to Russia.

1. I have retained the footnote references in this extract to indicate which of the assertions in this part of the Ministerial Submission were supported by reference to sources, but I have not reproduced the footnotes themselves. The Minister’s legal representatives did not include the footnoted material in the bundle of documents that was filed and served. It was submitted that I should infer that that material was available to the Minister if she wanted to see it, and I see no reason not to draw that inference. However, it was not submitted that I should infer that the Minister had physically in front of her, or read, any of that material.
2. Two further documents were included with the Ministerial Submission. One was a draft of what ultimately became the Amending Instrument (**the draft Instrument**). The other was a draft Explanatory Statement for the Amending Instrument (**the draft Explanatory Statement**), which had annexed to it a draft Statement of Compatibility with Human Rights (**the Compatibility Statement**). The draft Explanatory Statement included, immediately under its main heading, the words “Issued by the Authority of the Minister for Foreign Affairs”.

## What the Minister did

1. It is not in contest that the markings and signatures on the documents that are in evidence are those of the Minister.
2. First, the Minister signed Part A of the Decision Record and inserted the date. She thereby indicated that she was satisfied that the applicant met the criteria for designation and declaration in item 6A of reg 6, and said that she had considered the “statement of case” appearing in the Decision Record in respect of him. The qualification in the first paragraph of Part A, referring to the “Do Not List” column, did not apply because the Minister did not make any mark in that column.
3. Secondly, the Minister signed and dated the draft Instrument. This was the legally operative aspect of what she did.
4. Thirdly, the Minister marked the first page of the Ministerial Submission to indicate what she had done, and signed and dated that page.
5. As to para (a)(i) of the Recommendation, which recommended that she sign Part A of the Decision Record, she circled “Signed”.
6. As to para (a)(ii), which invited her to initial the “Do Not List” column if she did not agree to a designation or declaration, she appears to have initially circled “Noted” but then struck it through.
7. As to para (b)(i), which invited her to sign the draft Instrument if she agreed to designate and declare the applicant, she circled “Signed”.
8. Paragraph (b)(ii) of the Recommendation asked the Minister to indicate whether she agreed to the draft Explanatory Statement and the Compatibility Statement. The Minister circled “Agreed”.
9. The operative provision of the Amending Instrument is s 4, which provides:

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

1. Schedule 1 to the Amending Instrument refers to the 2014 Instrument as the instrument being amended, and provides that the name of the applicant and his date and place of birth are to be inserted into the table in Part 1 of Schedule 2 to that Instrument.
2. The other exercise of statutory power that should be noted is that, on 7 November 2022, the Assistant Minister for Foreign Affairs issued a permit under reg 18 of the Regulations (**“the permit”**). The permit applied to any “designated person or entity” as described in reg 3 of the Regulations. In general terms, it 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. It is discussed further below.

# The validity of the regulations

1. The arguments concerning the validity of the regulations focus on the effect that regs 14 and 15 have, absent a permit, on the provision of legal advice and representation to a designated person or entity. These effects were carefully explained in the submissions but can be noted fairly briefly. The substance was not in dispute. 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.
2. The permit referred to at [40] above largely if not wholly avoids these effects. However, the applicant’s point is that the Regulations cannot validly make access to legal representation a matter for executive discretion. This is also uncontroversial, up to a point.
3. The applicant submits that, because of the effects of regs 14 and 15 on the ability to obtain legal representation, the Regulations as a whole:
4. are inconsistent with principles embedded in Ch III of the Constitution;
5. infringe the implied freedom of political communication; and
6. are inconsistent with fundamental common law rights.

## Chapter III

1. It is necessary, under this heading, to give separate consideration to three levels of particularity at which the argument is pitched. They are:
2. challenges to the validity of the particular instrument designating the person or entity, or other things done under the Act itself;
3. all proceedings brought by the designated person or entity in the jurisdiction conferred on the High Court by s 75(v) of the Constitution (and the analogous jurisdiction of this Court under s 39B(1) of the *Judiciary Act 1903* (Cth) (**Judiciary Act**)); and
4. all proceedings in federal jurisdiction to which the designated person or entity is a party.

### Challenging the validity of the designating instrument

#### The potential invalidity

1. Section 75 of the Constitution provides:

In all matters:

(i) arising under any treaty;

(ii) affecting consuls or other representatives of other countries;

(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;

(iv) between States, or between residents of different States, or between a State and a resident of another State;

(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

the High Court shall have original jurisdiction.

1. In these classes of matter, jurisdiction is conferred directly by the Constitution. That conferral cannot be interfered with or set at naught by legislation. This is to be contrasted with the classes of matter in s 76, in respect of which federal jurisdiction has long been (but in principle need not be) conferred on various Australian courts by statute.
2. Leaving aside s 75(i) (which may have no operation at all: see *Re East; Ex parte Nguyen* [1998] HCA 73; 196 CLR 354 at [16]-[18] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ)), s 75(v) is the only head of entrenched jurisdiction that is defined by reference to legal remedies. Paragraphs (ii) to (iv) depend on who the parties are.
3. Because s 75(v) confers an entrenched jurisdiction to hear matters in which recognised remedies are sought — and hence to apply the legal principles relating to the grant of those remedies — it has been understood to introduce an “entrenched minimum provision of judicial review” (*Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; 211 CLR 476 at [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) (***Plaintiff S157***)). It thus serves the important purpose of making it “constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power” (*Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 363 (Dixon J), cited in *Bodruddaza v Minister for Immigration and Multicultural Affairs* [2007] HCA 14; 228 CLR 651 at [45] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ) (***Bodruddaza***).
4. In *Plaintiff S157*, the centrality and protective purpose of s 75(v) was an important element of the reasoning leading to a narrow reading of a privative clause purporting to limit judicial review of decisions under the *Migration Act 1958* (Cth) (**the Migration Act**). It was observed that, while Parliament may define the scope of Commonwealth officers’ powers and the content of the laws to be obeyed, “it cannot deprive this Court of its constitutional jurisdiction to enforce the law so enacted” (at [5] (Gleeson CJ)). In *Bodruddaza*, a short and inflexible time limit for judicial review applications to the High Court in relation to migration decisions was held to be invalid on the basis that it “subverts the constitutional purpose of the remedy provided by s 75(v)” (at [58]).
5. The plurality in *Graham v Minister for Immigration and Border Protection* [2017] HCA 33; 263 CLR 1 (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ) (***Graham***) took up the same theme at [38]-[49], and extended the analysis to the exercise of jurisdiction conferred by statute “by reference to s 75(v)”. At [48], their Honours said:

What Parliament cannot do under s 51(xxxix) or under any other source of legislative power is 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. The question whether or not a law transgresses that constitutional limitation is one of substance, and therefore of degree. To answer 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.

1. The Minister therefore accepted, correctly, 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 Act pursuant to s 75(v) or s 39B(1) of the Judiciary Act. (“Purpose” was used here in an objective sense, to describe the end served by the actions referred to rather than the subjective intentions of the people involved.) There would be an obvious and compelling vice in the Regulations if they did operate in this way. The decision to designate a person or entity would effectively insulate itself against legal challenge.

#### The issue

1. 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 this purpose. The applicant, however, submitted that such an exercise in reading down was not permissible.
2. Before turning to this question in more detail, it should be noted that issues of constitutional validity are to be assessed at the level of the Act. This may affect how the issue of construction in play here is conceptualised, but does not affect its resolution.
3. If a statute complies with constitutional limitations on its proper construction, the only issues remaining in relation to exercises of power under that statute are administrative law questions: *Palmer v Western Australia* [2021] HCA 5; 272 CLR 505 at [63]-[67] (Kiefel CJ and Keane J) (***Palmer***). In stating this proposition their Honours referred to *Wotton v Queensland* [2012] HCA 2; 246 CLR 1 (***Wotton***), where French CJ, Gummow, Hayne, Crennan and Bell JJ accepted a submission in relation to a parole order that (at [22]):

(i) where a putative burden on political communication has its source in statute, the issue presented is one of a limitation upon legislative power; (ii) whether a particular application of the statute, by the exercise or refusal to exercise a power or discretion conferred by the statute, is valid is not a question of constitutional law; (iii) rather, the question is whether the repository of the power has complied with the statutory limits; (iv) if, on its proper construction, the statute complies with the constitutional limitation, without any need to read it down to save its validity, any complaint respecting the exercise of power thereunder in a given case, such as that in this litigation concerning the conditions attached to the Parole Order, does not raise a constitutional question, as distinct from a question of the exercise of statutory power.

1. Step (iv) in that argument envisaged that the statute in question was compliant with the constitutional limitation “without any need to read it down to save its validity”. That may not be the case where the statute contains a broadly expressed regulation making power. A power of that kind may itself need to be construed in the light of the constitutional limitation. Thus, it is appropriate to proceed by formulating a “composite hypothetical question”: whether, if the regulations had been enacted as primary legislation, they would have been compliant with the relevant constitutional limitation (***Palmer*** at [122]-[124] (Gageler J)). If the answer to that question is negative, it will likely follow that the regulation making power is to be read down so as not to permit the making of regulations in those terms.
2. It is well established that a construction of legislation that is consistent with the Constitution should be adopted if it is reasonably open: *Wainohu v New South Wales* [2011] HCA 24; 243 CLR 181 at [97] (Gummow, Hayne, Crennan and Bell JJ) (***Wainohu***); *Acts Interpretation Act 1901* (Cth) s 15A (**Acts Interpretation Act**). Section 15A of the Acts Interpretation Act is made applicable to subordinate legislation by s 13(1)(a) of the *Legislation Act 2003* (Cth) (**Legislation Act**). Section 13(1)(c) of that Act requires subordinate legislation to be read subject to the enabling Act and not to exceed power; and s 13(2) (perhaps repetitively) substantially reproduces, as a rule of construction for all legislative instruments, the terms of s 15A. Thus, in addressing the composite hypothetical question referred to in the previous paragraph in relation to a regulation, the regulation must be construed (as if it were an Act) subject to s 15A. Another way of framing the task is that the enabling provision must be construed so as not to exceed constitutional power if possible (pursuant to s 15A), and then the regulation must be read so as not to go beyond the enabling provision if possible (pursuant to s 13(1)(c) and (2)). Either way one arrives, in practice, at the issue posed by the competing submissions referred to at [52] above: can regs 14 and 15 be construed so as not to apply to actions undertaken for the purposes of challenging, under s 75(v) or s 39B(1), decisions or actions taken under the Act? The questions of what is the correct construction of the Regulations and whether they are valid are thus closely connected. Validity cannot be determined without identifying the correct construction; however, the correct construction cannot be finally settled without consideration of whether “reading down”, to preserve validity, is required by the constructional rule being referred to here.
3. Reference was made in argument to *Zhang v Commissioner of the Australian Federal Police* [2021] HCA 16; 273 CLR 216 at [25]-[27] (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ) (***Zhang***), where the Court mentioned the problems that arise where a plaintiff seeking to invalidate a statute propounds an expansive, draconian construction (potentially contrary to their own interests if the statute is valid) while the party seeking to defend the statute urges a narrow construction (again, potentially against its own interests). Such circumstances lead to a lack of concreteness in the presentation of constitutional questions. In *Zhang*, these considerations led the High Court to answer the questions reserved in the special case in a minimalist way which avoided a binding determination of the constitutional issue.
4. The present case has this problem. The applicant is not relevantly affected in his acquisition of legal services by regs 14-15, having the benefit of the permit mentioned above. His argument relies on their potential effect in other cases and on other people. The issue concerning the extent to which expressions used in regs 14 and 15 need to be read down to avoid invalidity, and the effect of that exercise on the operation of the Regulations, therefore have a somewhat nebulous character.
5. While I agree (with respect) with what was said in *Zhang*, I do not have the leeway that was available to the High Court in that case. The applicant seeks orders setting aside the decision to designate and declare him under the Regulations and asserts the complete invalidity of the Regulations as a reason why there was no power to make that decision. Because I have not found the decision to be invalid on any other grounds (as will appear below), the argument that the Regulations are invalid must be dealt with.

#### Reading down of general expressions to avoid invalid operation

1. The application of s 15A in relation to general words and expressions was discussed in *Victoria v Commonwealth (the Industrial Relations Act case)* (1996) 187 CLR 416 at 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). Their Honours there identified three considerations that may prevent s 15A (or an analogous provision) being applied so as to give a provision a valid partial operation. The applicant invokes each of these (albeit by reference to the later and briefer discussion, referring to s 31 of the *Interpretation Act 1987* (NSW), in *Wainohu* at [102]) and ultimately makes five points.
2. *First*, s 15A cannot be implied to effect a partial validation unless “the operation of the remaining parts of the law remain unchanged”. Reference to the cases cited for this proposition (eg *Pidoto v Victoria* (1943) 68 CLR 87 at 108 (Latham CJ) (***Pidoto***) and *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 347-348 (Dawson J)) indicates that s 15A is limited in this way because the Parliament, in enacting the impugned law, is assumed not to have intended to enact some other, different law. In other words s 15A, being an interpretation provision, is displaced by a contrary intention appearing from the Act that that is being interpreted. That is unsurprising, and consistent with s 2 of the Acts Interpretation Act in the form in which it stood at the time these cases were decided (and s 2(2) as it now stands). Section 13(2) of the Legislation Act is not subject to a similar qualification (although s 13(1) is expressed to be subject to a contrary intention, and so are the provisions of the Acts Interpretation Act that it imports). There may be a question whether a constructional rule imposed by an Act can be qualified or displaced by a contrary intention appearing in subordinate legislation. It may be, therefore, that s 13(2) can operate to save parts of a regulation even if that results in what is left having a different operation to that intended by the regulation maker.
3. That question does not need to be decided, because the operation of regs 14 and 15 following the “carve-out” proposed by the Minister would not be materially different from that which the provisions have if given their ordinary meaning. The consequence would be that circumstances would exist in which the prohibitions in regs 14 and 15 did not apply. That would not involve any change to the operation of the prohibitions in circumstances to which they did apply. It is true that the Minister’s construction would do some of the work presently done by the permit, and would to that extent make reg 18 unnecessary. However, the potential scope for permits is vastly broader than the exception that is created by the Minister’s construction. That is illustrated by the dealings that can be the subject of an application for a permit under reg 20 (which include, among many other things, “reasonable professional fees” (reg 20(3)(b)(vii)). The Minister also has power to grant a permit on their own initiative (reg 18(2)(a)), which may be for a purpose for which no application can be made under reg 20. The Minister’s construction does not leave reg 18 with no work to do.
4. *Secondly*, s 15A cannot apply “if it appears that ‘the law was intended to operate fully and completely according to its terms, or not at all’”. The quotation is from *Pidoto* at 108. Again, the reasoning appears to be that s 15A has to give way to an intention of the legislature that appears from the statute being interpreted. As noted above, there is scope for doubt as to whether the same is true of s 13(2) of the Legislation Act.
5. I do not discern in the Regulations an intention that they are not to have any operation at all if the prohibitions in regs 14 and 15 cannot apply to the full extent of their language.
6. The provisions enact draconian prohibitions which were clearly intended to operate as broadly as they could. The carving out of cases in which the prohibitions cannot apply for constitutional reasons results in a slightly less comprehensive regime but does not in any way compromise what appears to be the policy rationale for the scheme of designating persons and entities. It is very unlikely that, if informed during the drafting process that a prohibition on people using their resources to challenge decisions made in respect of them under the Act could not validly be put into effect, the legislator would have given up on the project. It is much more likely that they would have included a form of words that avoided having that effect.
7. The provision for declaring a person for travel bans in reg 6(b) is completely separate and has consequences under other legislation. There is no reason to think that this provision was not intended to operate if part of the designation regime could not validly be put into effect.
8. The Regulations expressly contemplate that provisions of regs 14 and 15 will not apply in all cases, by providing for the issue of permits whose effect is to create exemptions from their effect. As noted above, the power to grant permits is broad. It is inconsistent with any suggestion that regs 14 and 15 were intended to operate completely or not at all.
9. *Thirdly*, there is an additional difficulty if the impugned law “can be reduced to validity by adopting any one or more of a number of several possible limitations”. The problem in such a case is not a legislative intention against reading down; it is the limits of the judicial function. It is not appropriate for the Court to choose for itself between two or more possible ways of limiting the operation of a law, as this would involve performing a legislative function. Thus, “if, in a case of that kind, ‘no reason based upon the law itself can be stated for selecting one limitation rather than another, the law should be held to be invalid’” (quoting *Pidoto* at 111). (This consideration covers the applicant’s third and fourth arguments against reading down, which are closely related.)
10. The applicant’s submissions emphasised this limitation. It was said that the reference to “purpose” in the Minister’s submissions introduced a controlling factor that had no basis in the legislation; however, this point fell away when it was confirmed that the Minister was not invoking any person’s subjective purpose as a limiting factor. The applicant nevertheless maintained that carving out things done for the purpose of challenging purported exercises of power under the Act was essentially a legislative choice, not based on anything in the language of the Regulations, which the Court was being asked to make.
11. The majority in the *Industrial Relations Act case* also said 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” (at 502-503). Their Honours went on to hold that the section under consideration, which provided in completely general terms that the legislation bound the Crown in right of each of the States, could be read down so as not to infringe the implied limitation on power established earlier in *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188; that is,

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.

1. The actual holding in the *Industrial Relations Act case* thus demonstrates that, in the case of a generally expressed provision, the constitutional limitation itself can supply the standard by which reading down is to be effected. General expressions (such as, in this case, “deal with”, “make available” and “use” in regs 14 and 15) can be read as referring to dealings that may validly be controlled or prohibited but not other dealings. To do so is to apply the constitutional limitation to the law, and does not involve choosing between equally effective modes of limitation. The entrenched jurisdiction under s 75(v), as outlined above, gives rise to a limitation on legislative power whose existence can be described as “clear” and whose boundaries are similarly well-understood to those of the limitation applied in the *Industrial Relations Act* case.
2. *Pape v Federal Commissioner of Taxation* [2009] HCA 23; 238 CLR 1 at [247]-[251] (Gummow, Crennan and Bell JJ), which was relied on by the applicant, is an example of the different considerations that arise where, instead of giving general words a limited meaning, it is suggested that the impugned provision should be saved by inserting some qualifying words so as to create a different, valid, provision. Their Honours concluded at [251] that treating s 15A as permitting the introduction of a “foreign integer” would run the risk of construing it as “impermissibly entrusting legislative power to Ch III courts”.
3. The holding in the *Industrial Relations Act case* also illustrates that reading a provision down to accommodate a constitutional limitation is possible — and thus required — even if the boundaries of the limitation are imprecise or unsettled. Whether particular circumstances come within the legislation as read down may require detailed argument in future cases as those circumstances arise. Gageler J, as his Honour then was, made this point in *Tajjour v New South Wales* [2014] HCA 35; 254 CLR 508 at [171] (***Tajjour***):

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.

(Citations omitted.)

1. This paragraph was cited with apparent approval in *Graham* at [66] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ) in support of a conclusion that the word “court” must be read to exclude the High Court when exercising s 75(v) jurisdiction and this Court when exercising analogous statutory jurisdiction. *Graham* thus furnishes a further example, close to the circumstances of this case, of reading down of the kind contended for by the Minister.
2. The applicant’s fifth argument is not found in the *Industrial Relations Act case*, but draws on the more recent decision in *BHP Group Ltd v Impiombato* [2022] HCA 33; 96 ALJR 956 at [17] (Kiefel CJ and Gageler J). It is that a court should not read down a provision by inserting an exclusion that suffers from “inherent imprecision”. That language was used by Kiefel CJ and Gageler J, but in the context of an argument that the relevant provision should be given a particular construction consistently with the ordinary presumption that statutes are not intended to have extraterritorial effect. “Inherent imprecision” was one reason to reject the proposed reading down, but it is far from clear that it was the principal one. Their Honours also referred, in the same paragraph, to an aspect of the statutory scheme pointing strongly to an intention that the relevant class of persons could include persons overseas. In any event, this was not a case involving the “constructional imperative” (as Gageler J called it in *Tajjour*) of reading a statute down, if possible, to avoid invalidity. As the *Industrial Relations Act case* and his Honour’s reasons in *Tajjour* illustrate, some indeterminacy in the articulation of the relevant constitutional principle is not a barrier to reading down.

#### Conclusion

1. For these reasons, regs 14 and 15 are not to be understood to have applications that would subvert the exercise of jurisdiction under s 75(v) or s 39B(1). The Regulations are therefore not invalid by reason of inconsistency with the constitutional entrenchment of that jurisdiction.
2. This means, at least, that the Regulations 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 Act, in proceedings commenced under s 75(v) or s 39B(1). The scope of the relevant exclusion may go further than that. This does not need to be determined in the present case, as the actual application of regs 14 and 15 is not in issue.

### Other proceedings under s 75(v)

1. Circumstances can be imagined in which a person or entity designated under the Regulations might be affected by a decision of an officer of the Commonwealth made under other legislation (or in the exercise of the non-statutory executive power) and seek to have that decision set aside in proceedings commenced under s 75(v). Regulations 14 and 15, if read according to their terms, would also make it extremely difficult if not practically impossible for those proceedings to be maintained. That would not have the obvious vice of making the designation decision self-insulating. However, there is much to be said for the view that a subversion of s 75(v) would nevertheless occur.
2. That question does not need to be pursued, in the light of the conclusion reached above concerning the construction of regs 14 and 15. Those provisions are inapplicable to the extent required in order to prevent subversion of the proper exercise of the jurisdiction in s 75(v) and its analogues.
3. It does not matter, for present purposes, that this conclusion leaves a wide field for argument in future cases concerning the scope of the constitutional limitation. It is useful to note what Gageler J said in this connection in *Tajjour* at [172]:

It is instructive in this respect to recall that severance clauses were routinely applied by this Court during the period between the *Bank Nationalisation Case* [(1948) 76 CLR 1] and *Cole v Whitfield* [(1988) 165 CLR 360], when the guarantee in s 92 of the *Constitution* that “trade, commerce, and intercourse among the States … shall be absolutely free” was understood to be infringed by a law which “burdened” trade, commerce or intercourse among the States in a manner which was not justified as “reasonable regulation”. Absent a severance clause, a provision of a law which had a distributive application to a range of persons, subject matters or circumstances was invalid in its entirety if the law imposed an unjustifiable burden on trade, commerce or intercourse among the States in any of those applications. The presence of a severance clause produced a markedly different result: such a provision was invalid only “in so far” as it “would apply” to burden conduct or transactions found to be the subject of trade, commerce or intercourse among the States within the meaning of s 92 of the *Constitution*. The imperative to read down the provision in the event of invalidity had the additional salutary consequence of removing the need for a court to consider hypothetical or speculative applications of the provision in order to determine the rights of the parties. Barwick CJ explained that consequence as follows:

“Where [a severance clause] is available, and the statute can be given a distributive operation, its commands or prohibitions will then be held inapplicable to the person whose inter-State trade would thus be impeded or burdened. Of course, the question of validity or applicability will only be dealt with at the instance of a person with a sufficient interest in the matter; and, in my opinion, in general, need only be dealt with to the extent necessary to dispose of the matter as far as the law affects that person.”

In a case where the particular conduct or transaction which the provision burdened was found not itself to be the subject of trade, commerce or intercourse among the States within the meaning of s 92 of the *Constitution*, the availability of severance meant that no further analysis was required in order to dismiss a challenge to the validity of the provision.

(Footnotes omitted.)

### Federal jurisdiction

1. The applicant put a further and much broader argument relating to invalidity arising from Ch III. The argument, briefly stated, had two steps. First, the conferral of federal jurisdiction by s 75, and by statute as authorised by ss 76 and 77 of the Constitution, requires that the courts exercising that jurisdiction be able to do so effectively and fairly. Secondly, legislation which compromises that exercise of jurisdiction, including by preventing a party from using its resources to obtain legal representation, is invalid.
2. The applicant sought support for this argument in statements made by several Justices in *APLA Ltd v Legal Services Commissioner (NSW)* [2005] HCA 44; 224 CLR 322 (***APLA***). *APLA* involved a challenge, on several grounds, to a provision in a New South Wales statute that prevented lawyers from advertising services in relation to recovery of money for personal injury. It did not prevent communication with existing clients. One of the grounds advanced by the plaintiffs was that the law infringed the requirements of Ch III and the principle of the rule of law as given effect by the Constitution. This ground did not succeed.
3. Gleeson CJ and Heydon J said, at [30]:

The rule of law is one of the assumptions upon which the *Constitution* is based. It is an assumption upon which the *Constitution* depends for its efficacy. Chapter III of the *Constitution*, which confers and denies judicial power, in accordance with its express terms and its necessary implications, gives practical effect to that assumption. 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. The regulations in question are not directed towards the providing by lawyers of services to their clients. They are directed towards the marketing of their services by lawyers to people who, by hypothesis, are not their clients.

(Footnotes omitted.)

1. McHugh J said at [84], [87]:

Communications between legal practitioner and client, between legal practitioners, and between judges and practitioners, are critical to the administration of justice in Australia. They 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. And, without communications between legal practitioners and potential litigants, the number of actions brought in federal jurisdiction would be greatly reduced. It is impossible to accept therefore that Ch III raises no barrier to State legislation interfering with or impairing such communications. The argument of New South Wales and others appeared to accept that the States could not interfere with these communications. But they contended that the Regulation operated before any relationship of practitioner and client had formed and Ch III had been engaged.

…

In my opinion, the implications to be drawn from Ch III make it clear that the States have no power to interfere in federal jurisdiction by legislation that has the effect or the object of reducing litigation in that jurisdiction. For these reasons the Regulation cannot constitutionally apply to all advertisements that fall within its terms.

1. Gummow J said at [247]-[248]:

However, the effective exercise of the judicial power of the Commonwealth does not require an immunity of legal practitioners from legislative control (as exemplified in Pt 14) in promoting their availability to perform personal injury legal services. It is to be accepted that a law may not validly require or authorise the courts in which the judicial power of the Commonwealth is 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. The extent to which this prohibition protects aspects of “due process” is a matter of debate. What is presently significant is that involved in these aspects of “due process” is the actual exercise of federal jurisdiction.

It is neither of the essential nature of a court nor an essential incident of the judicial process that lawyers advertise. Part 14 operates well in advance of the invocation of jurisdiction. It does not prevent prospective litigants from retaining lawyers, nor prevent lawyers or others from publishing information relating to personal injury legal services and the rights and benefits conferred by federal law.

1. Hayne J said at [390], [393]-[394]:

The implication alleged in this case concerns what is said to be a *freedom* to *receive* advice or information about the *possible* exercise of the judicial power of the Commonwealth; it is not an implication concerned with the invocation or exercise of that judicial power.

…

The plaintiffs point only to matters that may make the asserted freedom desirable. They point to no matter making it a necessary consequence of constitutional text or structure.

That is most easily demonstrated by pointing to what the impugned regulations do *not* do. The impugned regulations do not preclude the seeking of advice or information about whether to invoke the judicial power of the Commonwealth. They concern only a prior step of conveying information (which is either unsolicited or not addressed to any particular recipient) which may provoke a recipient to seek advice or information.

(Original emphasis.)

1. With the exception of McHugh J these statements are concerned with explaining what the impugned law did not do, and thus pointing to a constitutional issue that did not arise. They do not provide authority for a proposition that Ch III gives constitutional force to any general concept of the rule of law. Nor do they support the applicant’s argument that a law which compromises the exercise of federal jurisdiction, by impairing the procurement of legal advice and representation by a party or potential party to proceedings, is for that reason unconstitutional.
2. An argument in the broad terms put by the applicant (which is the only argument that can be canvassed, given the somewhat hypothetical nature of the point in the present proceeding) cannot be accepted. The following points should be noted in that regard.
3. In *Graham*, the arguments for the plaintiff as to why the impugned provision was invalid included one relying on the proposition (drawn from *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (***Chu Kheng Lim***)) that courts in which the judicial power of the Commonwealth is invested cannot be required to act inconsistently with the essential nature of a court (see 263 CLR 1 at 4-5). The majority evidently did not accept that argument. It held that the impugned provision could be read down so as to operate validly other than in proceedings under s 75(v) and its analogues (at [66]), and was on that basis valid.
4. As noted earlier, s 75(v) stands in a special position among the heads of federal jurisdiction. That is so in two respects. One is the centrality, in the constitutional sense, of judicial review of the legality of things done by Commonwealth officers in purported exercise of their powers. The other is that the s 75(v) jurisdiction is conferred directly by the Constitution (and so cannot be abrogated) and brings with it a body of legal principle. While federal jurisdiction across the whole range of matters described in ss 75 and 76 has been part of Australia’s legal landscape since the enactment of the Judiciary Act in 1903, the existence of that jurisdiction (other than in s 75 matters) is not dictated by the Constitution. Thus, the federal jurisdiction exercised (for example) by the District Court of New South Wales in a contract case involving residents of different states can rightly be said not to be constitutionally entrenched. Federal jurisdiction may be (and in fact very often is) exercised by State courts, which as a general rule Parliament must take as it finds them (see, eg, *Forge v Australian Securities and Investments Commission* [2006] HCA 44; 228 CLR 45 at [61] (Gummow, Hayne and Crennan JJ)). The fact that litigation (or potential litigation) is heard (or would be heard) in the exercise of federal jurisdiction is thus a problematic starting point for an implication, drawn from constitutional text or structure, protecting a person from the effect of financial sanctions on the ground that those sanctions inhibit the ability to obtain legal advice and representation.
5. These considerations do not deny that the principle drawn from *Chu Kheng Lim* (referred to above), that courts exercising federal jurisdiction cannot be required to act inconsistently with the essential character of a court, may have work to do in limiting the extent to which a litigant’s access to legal assistance can be foreclosed by statute. However, I do not accept the argument in the broad terms put by the applicant, and therefore do not accept that the Regulations are invalid in their application to the acquisition of legal services for the purpose of conducting litigation in federal jurisdiction.
6. In any event, the principles of construction discussed above are also an answer to this argument. The extent to which those principles require the general expressions in regs 14 and 15 to be confined in their denotation is directly related to the breadth of the relevant constitutional limitation. For reasons outlined above, the fact that the breadth of that limitation has not yet been fully articulated in the case law is not a barrier to accepting that the provisions can and must be read down to accommodate it. That full articulation is not necessary and would not be appropriate in this case, because the applicant does not claim that the operation of the Regulations in relation to him breaches any constitutional limit.

## The implied freedom of political communication

1. The discussion in *Wotton* and *Palmer*, referred to above at [54], is also relevant to the frame of reference within which the issues concerning the implied freedom should be addressed. *Wotton* itself was a case concerning the implied freedom. For the reasons outlined above, the issue is best approached by way of the “composite hypothetical question” framed by GagelerJ in *Palmer* at [122]-[124]: whether, if the regulations had been enacted as primary legislation, they would have been compliant with the relevant constitutional limitation.

### Burden on political communications

1. The parties agreed that the operation of regs 14 and 15 burdens the implied freedom, but differed as to how it does so. The nature and scope of that burden is relevant to whether it is “justified” (*LibertyWorks Inc v Commonwealth* [2021] HCA 18; 274 CLR 1 at [63] (Kiefel CJ, Keane and Gleeson JJ), [194] (Edelman J) (***LibertyWorks***)).
2. The applicant’s submissions focused on communications by lawyers. It was submitted that lawyers’ ability to communicate “meaningful advice or representations” concerning a designated person or entity was curtailed or eliminated, and that a lawyer could not communicate in written form to, or on behalf of, a designated person or entity. These submissions were based on the inhibitions, referred to briefly above, on lawyers being remunerated by a designated person or entity or having any dealings with their assets (including documents).
3. The applicant relied on *Cunliffe v Commonwealth* (1994) 182 CLR 272 (***Cunliffe***), where four members of the Court regarded laws regulating the provision of migration advice and assistance as placing a burden on political communication.
4. Mason CJ observed that the freedom “necessarily extends to the working of the courts and tribunals which administer and enforce the laws of this country”, and hence that the “provision of advice and information, particularly by lawyers, to, and the receipt of that advice and information by, aliens in relation to matters and issues arising under the Act clearly falls within the potential scope of the freedom” (at 298-299).
5. Deane J (with whom Gaudron J agreed on this point) noted that the provision of immigration assistance involved both communication between clients and advisers and representations to the relevant Minister, their staff and Department, and said that these activities “constitute communication and discussion about matters relating to the government of the Commonwealth, that is to say, political communication and discussion” (at 340-341).
6. Toohey J (who ultimately held that the law did not place an undue restriction on the freedom) said that the freedom “must include the communication of information and the expression of opinions regarding matters that involve a minister of the Government” (at 380).
7. Of these formulations, it is only that of Mason CJ that contains any suggestion that communications involved in the presentation of arguments to a court are *ipso facto* political. What brought the provision of immigration advice and assistance within the scope of the freedom, in their Honours’ view, appears to be the direct connection between the relevant communications and the exercise of powers by an officer of the executive government.
8. *Cunliffe* therefore does not support a proposition that advancing a case to a court constitutes communication on government or political matters within the scope of the implied freedom, except possibly where the subject matter of the case is an exercise of power by an officer of the executive government of the Commonwealth, a State or Territory. So far as exercises of power by Commonwealth officers are concerned, there is a significant if not complete overlap with matters that come within the s 75(v) jurisdiction and its analogues, which, for reasons outlined above, are not caught by regs 14 and 15.
9. Further, their Honours did not speak with one voice. Mason CJ referred to advice or information passing between an adviser and an alien (who might or might not be one of the “people of the Commonwealth” referred to in s 24 of the Constitution) in relation to issues arising under the Migration Act. Deane J referred to that kind of communication and to representations made (on behalf of a client) to executive decision-makers. Toohey J referred in very general terms to communications in matters “regarding” a Minister. The only point of unanimity appears to be that communications between adviser and client, which concern a decision made (or to be made) by a Minister or other officer, are a form of political communication.
10. It should also be observed that, while this aspect of *Cunliffe* has not been revisited by the High Court, there was not majority support in that case for the view that the impugned law infringed the implied freedom. The statements referred to above sit somewhat uneasily with the explanation of the implied freedom and its foundations given in the unanimous judgment of the whole Court in *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 at 559-562. That explanation emphasises the importance of communications concerning “political or government matters” between electors and the elected representatives, between electors and candidates for election and between electors themselves to a system of representative government, and holds that “ss 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors” (at 560). The nature and foundation of the implied freedom was described in similar terms much more recently in *Libertyworks* at [44] (Kiefel CJ, Keane and Gleeson JJ). In the same case, referring to *Cunliffe* (but not to specific passages), Gageler J said (at [120]):

Conformably with the implied freedom’s centrally informing concern to protect the integrity of the processes of representative and responsible government, the permissible incidents of a scheme of registration directed to persons representing others in dealing with government can be expected to be more burdensome in practice than the permissible incidents of a scheme of registration directed to persons engaging in political communication with the public.

1. For these reasons, I do not think *Cunliffe* can be treated as authority that the making of representations *to* an executive decision-maker about an individual case (on one’s own behalf or on behalf of a client) is a form of political communication. Some communications in this class may be protected by a different principle (cf *Cunliffe* at 328 (Brennan J)), but that has not been raised here. However, statements by a majority of Justices in that case (which have not been disapproved) do support the view that discussions between an adviser and their client, which have as their subject matter actual or potential exercises of power by officers of the executive government, are a form of political communication. The operation of regs 14 and 15 with respect to a designated person or entity may be said to affect such communication, in that it makes it difficult if not impossible for the designated person or entity to pay for advice from a professional adviser. The restriction on an adviser dealing with the assets of a designated person or entity, including its documents, may also hamper such communications.
2. In addition, the Minister accepted that the Regulations burden the implied freedom in that they “prevent a designated person from hiring a lawyer (or any other person) to perform other activities which constitute communication on political topics, such as issuing of press releases, giving interviews or lobbying MPs”.
3. Of course, this identification of burdens on the implied freedom assumes that none of the effects of regs 14 and 15 have been mitigated by the grant of authorisations under reg 18. In fact, as things presently stand, the effect of the Regulations on the provision of legal services (and services ancillary thereto) is significantly reduced by the terms of the permit. It is therefore more accurate to describe the burden imposed on the implied freedom by the Regulations as making the ability to communicate freely with legal advisers, or obtain professional services for the purpose of engaging with the Australian public, contingent on a favourable exercise of discretion by the Minister.
4. Justification of a burden on the communications subject to the implied freedom depends on the relevant law having a legitimate purpose and being proportionate to the achievement of that purpose. The requirement of proportionality is satisfied if the law is “suitable, necessary and adequate in its balance”: *LibertyWorks* at [45]-[46] (Kiefel CJ, Keane and Gleeson JJ).

### Legitimate purpose

1. The Minister submits, and the applicant does not appear to deny, that the Regulations serve a legitimate purpose. They allow the Australian government to pursue its foreign policy objectives by aiming sanctions at governments, individuals and entities who are considered to be responsible for or linked to matters of international concern. The “situations” referred to in the Replacement Explanatory Memorandum for the Autonomous Sanctions Bill 2010 (Cth) (the Bill for the Act) as matters to which sanctions might be directed were:

the grave repression of the human rights or democratic freedoms of a population by a government, or the proliferation of weapons of mass destruction (WMD) or their means of delivery, or internal or international armed conflict.

1. To the extent that the legitimacy of objectives pursued by the executive government in the conduct of Australia’s foreign relations is a proper matter for determination by the courts (see, eg, Brodie v Singleton Shire Council [2001] HCA 29; 206 CLR 512 at [92] (Gaudron, McHugh and Gummow JJ) and *XYZ v Commonwealth* [2006] HCA 25; 227 CLR 532 at [135] (Kirby J)), I am satisfied that the imposition of sanctions on individuals and entities, directed at discouraging conduct of the kind referred to, is a legitimate objective. An alternative and perhaps more traditional understanding of the position is that, the conduct of foreign relations being a matter exclusively for the executive, the objective of facilitating the conduct of those relations by the executive is necessarily a legitimate one.

### Proportionality

#### Suitability

1. Suitability entails a rational connection between the purpose of the statute in question and the measures that it adopts to achieve that purpose: *LibertyWorks* at [76]. The connection between the objective sought to be pursued by the Regulations and the measures that it adopts is manifest. No submission was made to the contrary.

#### Necessity

1. The issue of necessity involves consideration of whether there is an alternative measure available that is equally practicable but less restrictive of the freedom, and which is “obvious and compelling”: *LibertyWorks* at [78].
2. The applicant submits that the terms of a suitable alternative measure can be seen in the permit, with one section removed from it.
3. The permit authorises:
4. “Class (a) Permit Holders” (being “Australian persons”) to make assets available to or for the benefit of a designated person or entity, or use or deal with (or facilitate the use or dealing with) controlled assets, “to the extent doing so isrequired to provide, to Class (b) or (c) Permit Holders, legal advice, legal representation, and Ancillary Services, in relation to matters arising under or related to Australian law”;
5. “Class (b) Permit Holders” (being designated persons and entities) to use or deal with any assets that a Class (a) Permit Holder makes available to them (either directly or through a Class (d) Permit Holder), or use or deal with foreign assets which are “controlled assets”, “to the extent doing so isrequired to receive legal advice, legal representation, and Ancillary Services, in relation to matters arising under or related to Australian law”;
6. “Class (c) Permit Holders” (being persons acting for or on behalf of designated persons or entities) to use or deal with any assets that a class (a) Permit Holder makes available to them (either directly or through a Class (d) Permit Holder, or use or deal with foreign assets which are “controlled assets”, “to the extent doing so isrequired to receive, in their capacity acting for, or on behalf of, a Class (b) Permit Holder, legal advice, legal representation, and Ancillary Services, in relation to matters arising under or related to Australian law”; and
7. “Class (d) permit holders” (being any person who is not a Class (a), (b) or (c) Permit Holder) to make assets available to or for the benefit of a designated person or entity, or use or deal with (or facilitate the use or dealing with) controlled assets, to the extent required to facilitate the actions authorised by the earlier clauses.
8. The permit then lists two “Restrictions to Authorised Actions”, which exclude from the authorisations above:
9. providing to a designated person or entity assets to which they become entitled as a result of a legal proceeding; and
10. actions for the purpose of legal advice, representation and ancillary services “intended to circumvent Australian laws, including [the Act] and [the Regulations]”.
11. The first point to note is that, while an alternative measure along these lines would be less restrictive of the implied freedom than the full operation of regs 14 and 15, it would only eliminate part of the burden identified above. Being limited to legal advice and representation, it would not ameliorate the burden that is placed on the ability of designated persons or entities to communicate with the Australian public on political matters (such as, for example, the merits of the sanctions regime itself).
12. The second point that should be noted is the applicant’s submission that the permit provides a suitable alternative measure only if the “Restrictions to Authorised Actions” are omitted. On that footing, the proposed alternative measure would:
13. allow a designated person or entity to receive the fruits of success in an Australian legal proceeding (a minor but not insignificant relaxation of the effect of financial sanctions, which would seem to have nothing to do with freedom of political communication); and
14. relax the effect of financial sanctions in order to allow legal advice and representation for the purpose of “circumventing” Australian laws, including the sanctions regime itself.
15. Self-evidently, then, the applicant’s proposed “alternative measure” would be less effective than the current regs 14 and 15 in achieving the purpose of the Regulations.
16. Considering the matter in a more general way, it is apparent that what the Regulations seek to do is to prevent designated persons and entities, to the extent possible, from being active in the Australian economy. They are in part symbolic (in that, for the purpose of advancing Australia’s foreign policy, they freeze assets and exclude participation even if Australian economic interests might thereby be harmed), and they are designedly draconian. Any relaxation of the regime, to allow controlled assets to be used or to allow dealings with a designated person or entity, reduces to some extent the effectiveness with which the Regulations pursue their purpose.

### Adequacy of balance

1. The burden on the implied freedom is indirect, in that no form of political communication is precluded or expressly regulated; rather, the effective prosecution of such communication by designated persons is hampered by the impediments to obtaining professional assistance. The burden is also modest.
2. The restrictions placed on the ability to communicate with advisers in relation to legal proceedings, for reasons explained above, do not apply to many if not all proceedings in which the validity of exercises of public power by officers of the Commonwealth is directly in issue. The class of matters whose subject matter involves government or political matters, and where communication is burdened, is therefore a narrow one.
3. While communication by a designated entity with the Australian public may well be made more effective by the recruitment of professionals in Australia, it is clearly not impossible without their assistance. Persons and entities who are subject to sanctions will at least ordinarily have access to social media platforms with global coverage, to journalists whose work is published in Australia, and to professional advisers in other countries who are beyond the reach of Australia’s criminal laws.
4. These burdens on the implied freedom do not “manifestly outweigh” the benefit sought to be achieved by the Regulations (cf *LibertyWorks* at [85]).
5. The Regulations are therefore not invalid by reason of infringement of the implied freedom.

## Fundamental common law rights

1. The right to be represented by a lawyer of one’s own choice, subject to the lawyer’s availability, has been recognised as an important common law right: eg *Hamzy v Commissioner of Corrective Services (NSW)* [2022] NSWCA 16; 107 NSWLR 544 at [199]-[200] (Leeming JA, Bathurst CJ agreeing) (***Hamzy***). The applicant relies on the principle that a general regulation making power is not to be construed as authorising the making of subordinate legislation that infringes fundamental common law rights: *Attorney-General (SA) v Adelaide City Corporation* [2013] HCA 3; 249 CLR 1 at [42]-[46] (French CJ), [145]-[152] (Heydon J) (a principle which was applied, in relation to the right to a lawyer of one’s choice, by the Court of Appeal in *Hamzy*).
2. The short answer to this submission is that the principle referred to in the previous paragraph is one of statutory construction. To the extent that rights (or more accurately freedoms) exist only as a matter of common law, there is no barrier to legislation interfering with them. The regulation making power in question here (s 10(1) of the Act) expressly includes a power to make regulations in relation to “proscription of persons or entities”, as well as “restriction or prevention” of the supply or procurement of goods or services. “Proscribing” a person, according to its ordinary meaning, includes “to put outside the protection of the law; to outlaw” (*Macquarie Dictionary* (8th ed, Macquarie Dictionary Publishers, 2020) vol L-Z, 1223). Reading the expression in that way is in keeping with statements in the Replacement Explanatory Memorandum that autonomous sanctions are “punitive measures”. The Act thus evinces, tolerably clearly, an intention to authorise the making of regulations that interfere with common law rights of all kinds.

# the judicial review grounds

## Did the Minister actually “designate” and “declare” the applicant by making the Amending Instrument?

1. The applicant submits that the method chosen by the Minister to give effect to her decision failed to achieve the result of designating and declaring him for the purposes of reg 6. The Amending Instrument did not use the language of designation or declaration at all. All that it purported to do was to insert the applicant’s name into the list contained in Part 1 of Schedule 2 to the 2014 Instrument.
2. The approach taken by the Amending Instrument is, of course, a very common and useful drafting technique. It avoids the need for a multiplicity of instruments saying the same thing, and allows the names of all of the people or entities who are subject to a particular sanction or afforded a particular status to be found in a single list. It works because legislative instruments are, by force of s 13(1) of the Legislation Act, to be construed in accordance with s 11B(1) of the Acts Interpretation Act. Section 11B(1) provides:

(1) Every Act amending another Act must be construed with the other Act as part of the other Act.

1. Construing the Amending Instrument “with” and “as part of” the 2014 Instrument means that the applicant is included among the persons who, by operation of s 3A of the 2014 Instrument, are designated for the purposes of reg 6(a) and declared for the purposes of reg 6(b).
2. The applicant contends for a different result, relying on *Disorganized Developments Pty Ltd v South Australia* [2023] HCA 22; 97 ALJR 575 (***Disorganised Developments***). That case concerned the declaration of premises as “prescribed places” for the purposes of provisions of the *Criminal Law Consolidation Act 1935* (SA). Provisions inserted into that Act in 2015 made it an offence for certain persons to enter a “prescribed place” and provided for regulations to declare places to be “prescribed” for this purpose. The Act also provided that each regulation required to be laid before the Parliament could declare only one place (s 83GA(2)). The 2015 amendments also enacted provisions declaring a list of specified parcels of land to be “prescribed places” and deemed those provisions to be regulations (**the 2015 Regulations**). Having been enacted directly by the Parliament, the 2015 Regulations as made were not subject to the requirement in s 83GA(2).
3. Two later regulations were challenged by the appellant in *Disorganized Developments*. Each referred only to one parcel of land. However, each purported to amend the 2015 Regulations (by adding the relevant parcel of land to the pre-existing list) rather than declaring the specified parcel by way of a freestanding provision. This had the result that the 2015 Regulations, as purportedly amended, would infringe s 83GA(2). So much was effectively conceded in the Court of Appeal (*Disorganized Developments Pty Ltd v South Australia* [2022] SASCA 6; 140 SASR 206 at [22]-[24], [30]), and the State was driven to argue that a declaration of the relevant premises was to be found by implication in the language of the impugned regulations themselves. The Court of Appeal accepted that argument (at [41]-[49]) but the High Court, on appeal, did not (at [23]-[24]).
4. The feature of the statutory scheme in *Disorganized Developments* that made amendment of the pre-existing regulations ineffective as a means of declaring the relevant premises is not present here. If the Amending Instrument is otherwise valid there is no reason why the 2014 Instrument, as amended by it, is not effective to designate and declare the applicant for the purposes of reg 6.

## Did the Minister misunderstand the nature of the power?

1. The applicant submits that the Minister misunderstood the nature of the power she was exercising, in that she did not appreciate that she had a discretion to exercise if satisfied that the applicant met one of the criteria in item 6A of the table in reg 6 or did not understand the scope of that discretion.
2. Two arguments are advanced. The **broader argument** is that the Minister did not realise that she had a discretion at all; that is, she proceeded on the basis that, if satisfied that the applicant met the criteria, she was required to designate and declare him under reg 6. The **narrower argument** is that the Minister did not appreciate that she had power to take one or other of the measures authorised by reg 6; that is, she proceeded on the understanding that her choices were limited to taking both or neither. As counsel for the Minister submitted, the second of these arguments presupposes the failure of the first, in that it only arises if the Minister did understand herself to have some element of discretion.
3. Either argument, if made out, would establish that the Minister had “misunder[stood] the nature of [her] jurisdiction … or misconceive[d] [her] duty” and lead to the invalidity of the Amending Instrument: *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420 (Jordan CJ), cited in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; 203 CLR 194 at [31] (Gleeson CJ, Gaudron and Hayne JJ). As it was put by Gageler J in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4; 264 CLR 1 at [75], there is in Australia an established presumption of statutory construction that “a statutory conferral of decision-making authority on a person or body other than a court is conditioned by an implied statutory requirement that the person or body can validly exercise that authority only on a correct understanding of the law applicable to the decision to be made”.
4. Before turning to the substance of the arguments, two points should be noted.
5. First, it was common ground that the Minister was not under any obligation to give reasons for her decision. The inferences that may arise from the failure to mention a matter in written reasons, when the decision-maker is under a duty to give reasons that comply with (eg) s 25D of the Acts Interpretation Act, therefore do not apply (cf eg *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; 206 CLR 323 at [35] (Gaudron J)). Nor did the Minister provide a statement of reasons that was so comprehensive as to give rise to an inference that any matters not referred to were not considered (cf eg *ETA067 v Republic of Nauru* [2018] HCA 46; 92 ALJR 1003 at [24] (Bell, Keane and Gordon JJ); *Minister for Immigration and Border Protection v SZSRS* [2014] FCAFC 16 at [34] (Katzmann, Griffiths and Wigney JJ)). The Minister recorded that she agreed with the draft Explanatory Statement, but that does not purport to be a comprehensive account of the issues considered in deciding to designate and declare the applicant under reg 6.
6. Secondly, it was also uncontroversial that the applicant bears the onus of proving that the alleged error occurred; that is, that the Minister proceeded on a misunderstanding as to the existence or scope of her discretion. The only evidence relevant to that topic is the documents that were before the Minister (and one other document issued under the Minister’s authority a few weeks earlier, which is mentioned below). The applicant therefore needed to show that these documents demonstrated, to the ordinary civil standard, that the Minister proceeded on a wrong understanding.
7. In this connection it was submitted that an inference that the Minister proceeded on a wrong understanding could more comfortably be drawn by reason of Ms Payne (who, as Minister at the time, made the decision) not having been called to give evidence (citing *Jones v Dunkel* (1959) 101 CLR 298). It was suggested that the reasons to hesitate in applying the principle in *Jones v Dunkel* where the witness not called is a busy Minister (as to which see eg *Minster for Aboriginal and Torres Strait Islander Affairs v Western Australia* (1996) 67 FCR 40 at 61-62 (Black CJ, Burchett and Kiefel JJ); *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; 205 CLR 507 at [316]-[317] (Callinan J)) no longer apply when the particular Minister is no longer in office.
8. There has never been a hard and fast rule concerning the application of *Jones v Dunkel* to evidence that might be given personally by a minister. No reservation was expressed about doing that in *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107; 252 FCR 352 at [130] (Griffiths, White and Bromwich JJ). The strength with which the principle applies must depend on the circumstances of the case. Here, the impugned decision was made more than 18 months ago and in circumstances where, less than a month earlier, Ms Payne as Minister had made similar decisions in relation to more than 300 other Russian business people (in the course of making the No 4 Instrument). A brief search of the Federal Register of Legislative Instruments reveals that the Minister made 18 Instruments amending the 2014 List between the beginning of 2022 and 1 July of that year. Given the volume of material requiring decisions that commonly crosses the desk of a senior minister, the prospects of Ms Payne having any independent recollection of her reasoning process in relation to the applicant are not strong. There is no convincing basis for any inference that the failure to call Ms Payne as a witness means anything.
9. There is a further and perhaps shorter answer to the *Jones v Dunkel* submission. Because Ms Payne is no longer a Minister or a Commonwealth officer, she is not a person who the Minister, rather than the applicant, would be expected to call: *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2013] FCAFC 8 at [102]-[103] (Besanko and Perram JJ) (Bromberg J agreeing at [136]).

### The broader argument

1. The only direct evidence of the Minister’s thought process is the Explanatory Statement for the Amending Instrument (Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Russia and Ukraine) Amendment (No. 7) Instrument 2022 (Cth), Explanatory Statement), which was before the Minister in draft form and approved by her. That is an imperfect record, as it is clear that the Minister did not draft it (or amend the draft that she was given), but the Minister approved the text and must therefore be taken to have been comfortable with its contents. The Explanatory Statement does not give any indication that the Minister regarded designation and/or declaration under reg 6 as flowing automatically from a conclusion that the applicant met the criteria in item 6A of that regulation. Rather, it provides an indication to the contrary. Describing the effect of reg 6, the draft Explanatory Statement says:

Regulation 6 of the Regulations *enables* the Minister for Foreign Affairs (the Minister) to *designate* a person or entity for targeted financial sanctions, *and/or declare* a person for a travel ban, including if [the Minister is satisfied as to para (a) of item 6A].

(Emphasis added.)

1. This framing of the power that was being exercised properly reflects the discretionary element of the power.
2. It is true that the Explanatory Statement does not include any explanation of why the Minister decided to designate and declare the applicant, other than recording the Minister’s satisfaction that the relevant criterion in item 6A was met. That, however, does not take matters very far. The Explanatory Statement does not purport to be a statement of reasons. Its role is to explain the legal basis for, and intended effect of, the legislative instrument to which it relates.
3. Inferences about a decision-maker’s reasoning process may properly be drawn from the briefing material that the decision-maker was given. In some cases, particularly where the decision-maker does not give reasons, the briefing materials may be the best or even the only evidence on the issue.
4. The Ministerial Submission in the present case did not tell the Minister in express terms that the decision she was being asked to make involved a discretion. However, that is merely a starting point in circumstances where the applicant bears the onus of proof.
5. It is submitted that the terms of the Recommendation, which have been set out at [25] above, set the Minister on the wrong path by indicating that she would necessarily designate and declare the applicant if satisfied that he met the criteria in item 6A of reg 6. The terms of the Recommendation are somewhat convoluted (a point which arises again in relation to the narrower argument), and it is important to keep in mind that the Minister probably did not read it with the forensic attention that counsel have brought to bear. Rather than identifying the “correct” construction of the Recommendation, it is necessary to consider what impression it would have conveyed to a busy decision-maker.
6. Sub-paragraph (a)(i) of the recommendation, read in isolation, might well be taken to be telling the Minister that she must designate and declare the applicant if she was satisfied that he met the relevant criteria. That would provide significant support for the applicant’s broader argument.
7. However, sub-paragraph (a)(i) needs to be read (and the Minister would likely have read it) with what comes before and after it.
8. It was part of what was expressed (in bold text) to be a “recommendation”. In that context, it is to be understood as a suggested course of action, not as an instruction or as a piece of legal advice telling the Minister that she was obliged to take particular action if satisfied of a particular matter. If the position being conveyed was that the Minister had no choice once she was satisfied as to the applicant meeting the criteria, the only possible “recommendation” would have been that she should reach (or not reach) that state of satisfaction.
9. Sub-paragraph (a)(ii) of the recommendation suggested an action “if you do not agree to a designation or declaration”, while para (b) suggested actions to be taken “if you agree” to designate and declare the applicant. That form of words was a further indication that the Minister had a decision to make about whether it was appropriate to take these actions or not. These options would be expected to be described differently if the position were thought to be that the only issue was whether the Minister was satisfied that the applicant met the relevant criteria.
10. The statement of “background” that followed (set out above at [26]), contained observations that had no place in a briefing note if the issue for the Minister’s consideration was limited to whether or not the applicant met the criteria in item 6A. Those criteria, it will be recalled, called for consideration only of: (a) the significance of the applicant’s activities to Russia; (b) whether he was an official of the Russian government; and whether he was a relative of somebody who met the test in (a) or (b). However, the Ministerial Submission directed the Minister’s attention to:
11. the effect that imposing sanctions on the applicant would have on Australian business interests, with particular relevance to an interest held by United Company Rusal in Queensland Alumina Limited (**QAL**);
12. the issue of alignment with “like-minded partners”, noting that the applicant had been listed for sanctions by several other countries, and the virtue of demonstrating “our commitment to strong sanctions against Russia”;
13. the prospect that not imposing sanctions on the applicant would attract domestic criticism; and
14. the Department’s conclusion as to where, “on balance”, “our prevailing interest” lay.
15. These aspects of the briefing (which were also present in distilled form as “key issues” on the first page of the Ministerial Submission) were apt to convey to the Minister that, if satisfied that the applicant met the relevant criteria, she would have a choice to make — involving domestic economic interests and issues of foreign policy — as to whether to impose sanctions on him.
16. Counsel for the Minister referred to a further contextual factor which was said to weigh against a conclusion that the Minister did not understand the decision she was making to involve the exercise of discretion. Less than a month earlier, on 24 February 2022, the Governor-General made the Russia Regulations. Of course the Governor-General acts on ministerial advice, and the Minister countersigned the Russia Regulations (having, presumably, been responsible for taking them to the Executive Council). The Explanatory Statement to the Russia Regulations was issued by the authority of the Minister, who should therefore be assumed to have had some familiarity with what it said. That Explanatory Statement referred to sanctions as a “discretionary tool” and noted that the existing Regulations “enabled” the Minister to designate or declare a person.
17. The Minister’s involvement in this process may suggest that she would have had some understanding of the scheme of the Regulations — in particular reg 6 — when she came to consider the case of the applicant. However, without any evidence of the Minister’s actual level of engagement, and bearing in mind the multitude of issues that ministers commonly have to deal with, this suggestion is speculative. It is, in any event, unnecessary. The evidence in this case does not establish that the Minister, in making the decision under review, failed to understand that she had a discretion.
18. The finding that I have made is the opposite of that made by Kenny J, on very similar evidence, in *Abramov v Minister for Foreign Affairs (No 2)* [2023] FCA 1099 at [111]-[124] (***Abramov***) (and see at [24]-[27] where relevant parts of the briefing materials in that case were set out). However, the question what inference should be drawn from evidence is a factual one. Findings of fact in one case do not bind a court in a subsequent case: *Vairy v Wyong Shire Council* [2005] HCA 62; 223 CLR 422 at [3] (Gleeson CJ and Kirby J), [30] (McHugh J). The Court in each case must consider for itself the evidence adduced in the particular case. There is therefore no need to consider whether the findings made by Kenny J on the evidence in *Abramov* were “clearly wrong” (cf eg *Australian Securities and Investments Commission v BHF Solutions Pty Ltd* [2021] FCA 684 at [106] (Halley J)) and it would be inappropriate to express any view on that question. It will be apparent that I have come to a different conclusion, in the context of this case, about what the somewhat convoluted language of the Recommendation would have conveyed to the Minister (cf *Abramov* at [112]) and the significance of the Ministerial Submission having included discussion of matters that were irrelevant to whether the applicant met the criteria in item 6A (cf *Abramov* at [120]).
19. As to the latter point, Kenny J understood the reference to other countries’ listings and the effect of Australia imposing sanctions on the persons covered by the briefing note in that case as “intended to contextualise the Departmental recommendations”. The Ministerial Submission in the present case included more extensive reference to those matters than the briefing in *Abramov* seems to have done (see at [27]). For my own part, I doubt whether it is relevant to try to divine the intentions of the officers who drafted the Ministerial Submission. The key point is what this material would have led the Minister to understand to be the issues for her consideration. In the present case my view, as outlined above, is that the discussion of sanctions imposed by other countries and potential effects on Australian business interests must have directed the Minister’s mind to the pluses and minuses of listing the applicant and suggested that these were among the issues for her consideration.
20. The broader argument is therefore rejected.

### The narrower argument

1. It is appropriate, again, to begin with the draft Explanatory Statement (this being a document with whose contents the Minister expressed agreement).
2. The critical sentence of the Explanatory Statement, set out above at [131], captured both the fact that discretion was involved and (by the expression “and/or”) that it was open to the Minister to designate a person for targeted financial sanctions, to declare the person for a travel ban, or to do both or neither. The next two paragraphs outlined the purposes of designation and declaration, separately, as follows.

The purpose of a designation is to subject the designated person or entity to targeted financial sanctions. …

The purpose of a declaration is to prevent a person from travelling to, entering or remaining in Australia.

1. Coming immediately after the sentence quoted above, these passages should be understood as an acknowledgement that the purposes of the two measures are distinct. It necessarily follows that the considerations that might be relevant to whether to impose them are not necessarily the same.
2. The Compatibility Statement (which, as noted above, was before the Minister as part of the draft Explanatory Statement) said:

The designations and declarations contained in the Instrument were made pursuant to [reg 6 of the Regulations], which provides that the Minister *may*, by legislative instrument, *designate and/or declare* a person for *targeted financial sanctions and/or travel bans*.

…

In designating an individual under the Regulations for targeted financial sanctions *and/or* travel bans, the Minister uses predictable, publicly available criteria.

(Emphasis added.)

1. The Recommendation contained in the Ministerial Submission presents somewhat more difficulty in relation to this argument, largely because its terms are convoluted. The steps in the Recommendation (set out in full at [25] above) appear to be as follows:
2. *“if you are satisfied that Deripaska [meets] the criteria,”*
   * Whether the Minister ought to be satisfied as to this issue appears to be left completely open, although the text that follows (particularly the “Statement of Case”) advocates a conclusion that the applicant does satisfy para (a) of item 6A.
3. *“designate [him] for targeted financial sanctions and declare [him] for travel bans by signing Part A”*
   * Strictly speaking, it was signing the Amending Instrument that would effect the designation and the declaration. This becomes confusing at step (d) below, although this may not matter.
   * Both steps (designating and declaring) were clearly being advocated. As I have concluded above in dealing with the broader argument, this should be (and would have been) understood as a recommended action rather than something inevitably following from a conclusion that the applicant met relevant criteria.
4. *“if you do not agree to a designation or declaration, you should indicate this by initialling the ‘Do Not List’ column”*
   * The conditional part of this clause is ambiguous. It could mean “if you disagree with either” or “if you disagree with both”. The ambiguity is not necessarily resolved by referring to the second part, because the only action suggested was not to “list” the applicant.
   * That suggestion was consistent with the documentation that had been prepared for the Minister, in that the making of the Amending Instrument in the form provided would result in the applicant being both designated and declared. Any different decision would require redrafting.
   * The Minister’s written submissions included a proposition that “[the] instruction was not to initial the ‘Do Not List’ column if she was not satisfied the criteria are met”. This caused some confusion at the hearing. I understand the point to be that this aspect of the recommendation did not ask the Minister to initial the “Do Not List” column *only* if she was not satisfied that the criteria were met; that is, she would also select that option if not persuaded that listing was appropriate as a matter of discretion.
5. *“if you agree to designate Deripaska for targeted financial sanctions and declare [him] for travel bans”, sign and date the legislative instrument and agree to the draft Explanatory Statement*.
   * Fairly clearly, the Minister was being asked to execute the draft Amending Instrument if she agreed with the outcome that Instrument would achieve — ie, both designating and declaring the applicant under reg 6.
   * One thing that is unclear — although it may not matter — is how this was intended to relate to step (b) above. Steps (b) and (d) seem to respond to the same (recommended) conclusion (ie, the Minister agreeing that the criteria are met and that designation and declaration should follow), but one suggests signing the Decision Record and the other suggests signing the actual statutory instrument.
6. The difficulty, emphasised by the applicant, is that the Recommendation did not provide in any clearly identified way what should happen if the Minister considered that the applicant should be designated but not declared, or *vice versa*. The Minister clearly would not have signed Part A of the Decision Record, or signed the draft Amending Instrument she had been given, if she had come to either of those conclusions. The result, it was submitted, was that the Minister was channelled into regarding the discretionary aspect of the power she was exercising as a simple binary choice: list (ie, designate and declare) or do not list (ie, do neither).
7. The Minister submitted that the recommendation provided for a conclusion that one measure or the other (but not both) should be imposed, at step (c) above. If not persuaded that both measures were appropriate, the Minister would initial the “Do Not List” column in the table. That would be the appropriate response because “listing” the applicant (as the draft Amending Instrument would do) would result in the imposition of both measures. A differently drafted instrument would be needed to impose only one.
8. This submission has two difficulties. First, it assumes a solution to the ambiguity in step (c) noted above; that is, it treats “if you do not agree to a designation or declaration” as meaning “if you disagree with either” when there is no clear textual indication that that is the correct reading. Secondly, it leads the Minister to the same end-point (initialling “Do Not List”) whether she: (a) does not accept that the applicant meets the criteria in item 6A; (b) accepts that the criteria are met but does not consider any measures are warranted; or (c) accepts that the criteria are met and considers that one measure or the other (but not both) is warranted. This is at least confusing, and could have led the Minister to wonder whether she had power to impose only one of the available measures under reg 6.
9. Fine-grained analysis of the terms of the Recommendation does not resolve these problems, because the issue is not what I think it means but what it would have led the Minister to understand. The answer to the latter question is far from obvious. What is reasonably clear from the Recommendation, at least when read in context, is that, if the Minister concluded that one measure but not both was appropriate, she would have to send the matter back to the Department and ask for the documents to be redrafted.
10. On one view, urged by the applicant, that means that the Minister was not being offered the option of imposing one measure or the other and was therefore being led to ignore that option or think (erroneously) that that was not possible.
11. The other view, urged by the Minister, is that Ministers routinely instruct their Departments to redraft documents and should not be assumed to be shy about doing so. The recommendations in the Ministerial Submission (which, it should be recalled, proposed measures against two people) necessarily had a number of possible outcomes and it was not realistic to provide the Minister with documents, ready to sign, to give effect to every one of them. The prospect of further work being needed in order to give effect to the Minister’s preference was thus inherent in the exercise.
12. I have concluded that the Recommendation in itself is not sufficient to sustain a finding that the Minister was led into the error of acting on the understanding that her options were limited to imposing both measures (designation and declaration) or neither. If she was not convinced of the appropriateness of one of the proposed measures, the Minister might well have found the terms of the Recommendation confusing. However, that does not mean that she was led into error by it, especially in circumstances where it was not the only thing that she looked at.
13. The case that was made for “listing” the applicant in the remainder of the Ministerial Submission did not distinguish between designation and declaration. However, that is not significant in itself. It is not apparent that there were different arguments to be made for one measure compared to the other. The main reason advanced for “listing” the applicant — alignment and solidarity with like minded countries — was one that clearly favoured both financial sanctions and a travel ban.
14. There is thus no persuasive evidence of the Minister having been led into error. The observations in the draft Explanatory Statement and the Compatibility Statement should therefore be taken to represent the Minister’s understanding. The narrower argument is therefore also rejected.

### Materiality

1. Had I accepted the applicant’s narrower argument, I would not have accepted the Minister’s submission that the error was immaterial and therefore did not vitiate her decision.
2. That submission accepted that cases might arise where the Minister would find it appropriate to impose financial sanctions on a person but would not resist (or might even encourage) that person travelling to Australia, but argued that there was no realistic possibility of the Minister coming to that view in the present case. The applicant’s company held a 20 percent stake in QAL, but the material indicated that the other shareholder had already put arrangements in place to deal with the effects of the applicant being designated under reg 6. In other words, nobody needed him to come to Australia. The factors which the Minister evidently accepted as favouring the listing of the applicant concerned the advancement of Australia’s foreign policy and supported both designation and declaration.
3. In *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; 273 CLR 506 at [31] (***MZAPC***), the majority (Kiefel CJ, Gageler, Keane and Gleeson JJ) referred to the earlier case of *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; 264 CLR 123 (***Hossain***) as enunciating a principle that:

… a statute conferring decision-making authority is not ordinarily to be interpreted as denying legal force to every decision made in breach of a condition which the statute expressly or impliedly requires to be observed in the course of a decision-making process. The statute is instead “ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance”.

1. The principle, as their Honours put it in *MZAPC* at [32]:

… accommodates determination of the limits of decision-making authority conferred by statute to the reality that “[d]ecision-making is a function of the real world” by distinguishing the express and implied statutory conditions of the conferral from the statutory consequences of breach and by recognising that the legislature is not likely to have intended that a breach that occasions no “practical injustice” will deprive a decision of statutory force. Having been enunciated, and subject always to being revisited, the principle can be treated as “a working hypothesis … upon which statutory language will be interpreted”.

(Citations omitted.)

1. In between *Hossain* and *MZAPC*, the majority in *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; 264 CLR 421 (Bell, Gageler and Keane JJ) (***SZMTA***) held that a breach is “material” in this sense “only if compliance could realistically have resulted in a different decision” (at [45]) and that materiality was an ordinary question of fact as to which the applicant bore the onus of proof (at [46]). These propositions were referred to in *MZAPC* at [34].
2. The question of onus was explored further in *MZAPC* at [36]-[60]. The majority rejected a submission that the onus at some stage shifted to the respondent. Their Honours affirmed that the onus lies on the applicant for relief, but that what must be proved on the balance of probabilities is no more than a realistic possibility (at [60]):

the onus of proving by admissible evidence on the balance of probabilities historical facts necessary to satisfy the court that the decision could realistically have been different had the breach not occurred lies unwaveringly on the plaintiff.

1. *MZAPC* also established that the proof of this matter necessarily involves two stages. First, there is the “basal factual question of how the decision that was in fact made was in fact made”. Then,

… like other counterfactual questions in civil proceedings as to what could have occurred—as distinct from what would have occurred—had there been compliance with a legal obligation that was in fact breached, whether the decision that was in fact made could have been different had the condition been complied with falls to be determined as a matter of reasonable conjecture within the parameters set by the historical facts that have been determined on the balance of probabilities.

(Citations omitted.)

1. These features of the reasoning in *MZAPC* were noted by the plurality in *Nathanson v Minister for Home Affairs* [2022] HCA 26; 96 ALJR 737(Kiefel CJ, Keane and Gleeson JJ) (***Nathanson***), who observed at [33] that “[the] standard of ‘reasonable conjecture’ is undemanding”. Gageler J, agreeing in the result, said (at [46]-[47]):

The onus which the applicant bears to establish materiality is no greater than to show that, as a matter of reasonable conjecture within the parameters set by the historical facts established on the balance of probabilities, the decision *could* have been different had a fair opportunity to be heard been afforded.

Establishing that threshold of materiality is not onerous. The explanations in *MZAPC* of the materiality of the denials of procedural fairness which had been found in *Stead v State Government Insurance Commission* and in *Re Refugee Review Tribunal; Ex parte Aala* are consistent with the observation that “[i]t is no easy task for a court … to satisfy itself that what appears on its face to have been a denial of natural justice could have had no bearing on the outcome”.

[Citations omitted.]

1. It is useful to recall the facts of some of the leading cases on materiality, in order to calibrate the inquiry as to whether the “decision could realistically have been different had the breach not occurred”.
2. *Hossain* concerned a Tribunal decision, affirming the refusal of a visa under the Migration Act. The Tribunal found that the applicant failed to meet two quite separate criteria for grant of the visa. Error attended one of these conclusions but not the other. Either conclusion, on its own, required the visa to be refused.
3. *SZMTA* involved three cases in which the Secretary had erroneously certified that s 438 of the Migration Act applied to certain documents provided to the Administrative Appeals Tribunal (**AAT**) (which affected the review applicant’s right to see the documents). That was held to amount in itself to a breach of a condition on the performance of the Tribunal’s function; and in addition, procedural fairness had not been given in relation to how the documents should be treated. In two of the cases, these errors were held not to be material by reference to the contents of the documents concerned. In one case, they related only to a previous review application and had no relevance. In the other, a letter of support which the Tribunal possibly excluded from consideration had the same characteristics as other such letters which the Tribunal had considered and discounted for coherent reasons. (The other case involved only an interlocutory issue as to whether evidence showing the nature of the documents was admissible to show a lack of materiality.)
4. *MZAPC* also involved non-disclosure of documents to a review applicant as a result of s 438. The contents of the documents were potentially adverse to the review applicant. The error was that the applicant was not afforded procedural fairness in relation to how those documents should be treated. However, it was not established that the Tribunal had had any regard to the documents. Accordingly, provision of an opportunity to try to persuade the Tribunal that the documents should be released to the applicant, or should not be taken into account against him, could not have made a difference.
5. *Nathanson* was a procedural fairness case of a more usual kind. In closing submissions before the Tribunal, the Minister’s representative relied on part of the evidence for an additional purpose. The appellant had already responded to the material, but was given no further opportunity as a result of the additional reliance placed on it. The circumstances suggested that there was little if anything more that the appellant could say, but it was accepted that he would have put on further evidence and submissions if given the opportunity. The Full Court of this Court held that materiality had not been established. Five Justices of the High Court held that it had. (The other, Gordon J, did not regard proof of materiality as necessary to establish jurisdictional error.)
6. In *Mackie v Minister for Home Affairs* [2021] FCA 1326 (***Mackie FCA***), an error was made with respect to a piece of evidence that supported a finding, where that finding was otherwise supported by strong evidence. Besanko J accepted an argument that there was no realistic possibility of the decision having been different if the error had not been made (at [55]). This aspect of the reasoning was upheld on appeal: *Mackie v Minister for Home Affairs* [2022] FCAFC 120 at [62] (Rares, Mortimer and O’Sullivan JJ) (***Mackie FCAFC***).
7. *Mackie* was cited in *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCAFC 64; 297 FCR 1, which involved a decision of the AAT refusing to revoke the automatic cancellation of a visa on character grounds. The Full Court held that the Tribunal had erred in finding that a particular paragraph of the relevant ministerial direction strongly supported a finding that the appellant’s offending was “very serious”. However, the Court was not persuaded of a “realistic possibility” that, absent that error, the appellant would have achieved a favourable result in the Tribunal (at [94]). That was in circumstances where their Honours did not see a “clear causal link” between the error and the decision, and it was clear that the Tribunal considered the appellant’s conduct to be very serious quite independently of the erroneous aspect of its reasoning (at [96]-[97]).
8. In the present case, the material presented to the Minister did not suggest any line of reasoning that would have led to a decision to impose targeted financial sanctions on the applicant but not declare him for a travel ban, or *vice versa*. Thus, if it were the case (contrary to my conclusion above) that the Minister did not understand that such a decision was open to her, the prospect of the ultimate decision being different if that misapprehension had been corrected is small.
9. However, I do not think it follows that it has not been shown that, as a matter of “reasonable conjecture” the decision “could realistically have been different”. As emphasised in *Nathanson*, that test sets a low bar. Although the Full Court in *Mackie FCAFC* at [62] referred to the issue as evaluative, that evaluation should not stray into speculation. The cases in which errors have been found to be immaterial have involved situations where a different result was impossible (or practically so) as a result of clearly expressed findings untainted by error (*Hossain*, *Mackie*, *LPDT*) or the error concerned the treatment of documents that were clearly irrelevant (*SZMTA*, *MZAPC*). The question is ultimately (as explained in *MZAPC*) one of statutory construction. Parliament should not be presumed to have intended that a decision made in contravention of an express or implied condition was nevertheless to be valid if there is a plausible hypothesis that, absent that contravention, the decision could have turned out differently. Here, the Minister did not express any conclusions that ruled out a decision, in the exercise of discretion, to impose one form of measure against the applicant but not both. While it is very likely that she would have followed the recommendation of the Department in this regard, that should not be assumed. If the applicant had established error, I think that he would have also established a realistic possibility of a different decision in the sense demanded by the authorities.

## Did the Minister’s satisfaction that the applicant met the criteria in item 6A lack a rational foundation?

1. The applicant relies on the long line of authority establishing that, where a decision-making power arises only upon the decision-maker holding a particular state of satisfaction, the statute is to be understood as requiring that state of satisfaction to be supported by probative material or logical grounds. It is not necessary to explore the difficult question whether an illogical finding as to a specific fact, which does not make the decision-maker’s ultimate conclusion insupportable, is sufficient to vitiate the relevant state of satisfaction (as to which see eg *Masi-Haini v Minister for Home Affairs*[2023] FCAFC 126; 298 FCR 277 at [49]-[54]). The applicant submits that there was no probative basis, in the material before the Minister, for her conclusion that he came within para (a) of item 6A: that is, that he was a person who “is, or has been, engaging in an activity or performing a function that is of economic or strategic significance to Russia”.
2. As noted above, the Minister had before her only the Ministerial Submission containing assertions of fact by officers in her Department. Those assertions were supported by references to various reports, but it is not suggested that the Minister had any of those reports or was intimately familiar with their contents. In signing Part A of the Decision Record (affirming that she had considered the “statements of case”), and agreeing with what was said in the draft Explanatory Statement, the Minister must be taken to have been trusting the correctness of what she was told by her departmental officers. Properly, no complaint was made about this. The Minister was not under a duty (for example) to consider representations or submissions, and was entitled to inform herself by making use of the knowledge and research capacities of her officers.
3. The applicant submits that, for the power to impose measures under reg 6 to be enlivened, the Minister needed to be satisfied that: (a) the applicant was engaged in an *identified* *activity* or performing an *identified* *function*; and (b) that identified activity or function was, at the time of the decision, of economic or strategic significance to Russia. If that is correct, it follows that the material before the Minister would be sufficient to provide a rational basis for the necessary state of satisfaction only if it identified (or “specified”, as it was put) an activity that the applicant was engaged in and provided a basis to be satisfied that that activity was of economic or strategic significance to Russia.
4. This submission attributes to the criterion more particularity than its words, read in context, convey. As was observed by senior counsel for the Minister, reg 6 was intended to enable decisions to be made concerning persons or entities operating in a range of countries which may have totalitarian regimes and little or no transparency as to the ownership of commercial interests or the performance of functions within, in the name of or connected to, government. Item 6A itself does not refer to an “identified” or “specified” activity or function, or require that activity or function to have any particular characteristics other than economic or strategic significance. Thus, while the Minister must reach the view (upon some rational basis) that a person is engaged in an activity or performing a function that has that significance, it does not follow that in every case it is necessary to be able to specify (for example) the shareholdings or board memberships that a person has, or the government offices that they hold.
5. The material before the Minister provided a basis for her to conclude that:
6. the applicant was the “founder” of United Company Rusal (which was at least a large enough concern to have acquired a 20 percent stake in QAL);
7. the applicant was and had been involved in “carrying on business in, and owning or controlling and working as a director or equivalent in the Russian extractives and energy sectors”;
8. the applicant was a “prominent” businessman and an “oligarch” (a term which ordinarily connotes membership of a ruling elite, and is often used in the context of Russia to refer to persons with close ties to the government who own or control significant businesses);
9. the “extractives and energy sectors” (in which the applicant owned and controlled businesses) were of strategic significance to the government of Russia;
10. the applicant had close personal links with President Putin, regarded himself as very close to the Russian state, said that he possessed a diplomatic passport and claimed to have represented the Russian government; and
11. the applicant was sufficiently prominent or significant to have been sanctioned by the US, the UK and Canada.
12. The second and fourth of these conclusions were specifically endorsed by the draft Explanatory Statement, which the Minister adopted, in its reference to the applicant and the other person being considered “play key roles in Russian entities with interests in the energy sector and support the Russian Government in furtherance of its economic and strategic priorities”. All but the last can be found in the “statement of case”, which the Minister affirmed that she had considered by signing Part A of the Decision Record.
13. As noted above, no particular complaint was made about the Minister having accepted what she was told by her Department. It is true that the advice on which she relied was stated at a fairly high level of generality. It can be accepted that it is not open to a decision-maker simply to be advised that the relevant statutory criterion is met and act on that advice. Some form of intellectual process is required. However, here, the advice that the Minister received involved a series of factual propositions, with citations to source material, from which the Minister could (and seemingly did) draw the conclusion that the applicant’s business activities were appropriately characterised in the terms set out in para (a) of item 6A. No principle of law required the Minister to receive raw data at a granular level and reason from there.
14. The Ministerial Submission provided a rational foundation for the Minister’s conclusion that the applicant met the broadly expressed criterion in para (a) of item 6A.

# disposition

1. The originating application must be dismissed.
2. The Minister sought her costs of the proceeding.
3. The applicant sought his costs, on an indemnity basis, of a claim for public interest immunity that was initially raised in correspondence by the Minister (and involved certain redactions from the documents initially provided) but was later abandoned. The issue was resolved following correspondence between the parties’ solicitors and did not require any application to be made to the Court. The initial position of the Minister’s solicitors, that disclosure of the material in question could prejudice Australia’s international relations, might well be one that the Court would have rejected. However, it is by no means clear that it was improperly asserted. The exchange of views between the parties’ solicitors that ended with the redactions being removed was, in my view, an ordinary incident of the preparation of a case which, by its nature, involved evidence of the counsels of the Commonwealth concerning Australia’s relations with other countries. It is not appropriate to single out this aspect of the case for a separate costs order, let alone on an indemnity basis.
4. The originating application will therefore be dismissed with costs.

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| I certify that the preceding one hundred and eighty (180) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Kennett. |

Associate:

Dated: 8 February 2024