Federal Court of Australia

Deripaska v Minister for Foreign Affairs [2025] FCAFC 36

|  |  |
| --- | --- |
| Appeal from: |  |
|  |  |
| File number: |  |
|  |  |
| Judgment of: | **WIGNEY, STEWART AND NESKOVCIN JJ** |
|  |  |
| Date of judgment: | 27 March 2025 |
|  |  |
| Catchwords: | **STATUTORY INTERPRETATION** – where the *Autonomous Sanctions Act 2011* (Cth) and *Autonomous Sanctions* ***Regulations*** *2011* (Cth) impose restrictions on designated persons or entities – where it was common ground that regs 14 and 15 would impinge on the entrenched jurisdiction under s 75(v) of the *Constitution* – where the primary judge read down regs 14 and 15 as not applying to actions taken for the objective purpose of challenging the validity of decisions or actions taken under s 75(v) of the *Constitution* or s 39B(1) of the *Judiciary Act* *1903* (Cth) – whether primary judge erred – no error in primary judge’s conclusions – appeal dismissed**CONSTITUTIONAL LAW** – where primary judge held that regs 14 and 15 do not have applications that would subvert the exercise of jurisdiction under s 75(v) or s 39B(1) – where primary judge held that regs 14 and 15 when read down were not inconsistent with the principles established by Ch III of the *Constitution* – whether primary judge erred – no error in primary judge’s conclusions**ADMINISTRATIVE LAW** – judicial review of Instruments made by the Minister designating and declaring the appellant pursuant to reg 6(a) and (b) of the Regulations – where primary judge held that the Minister did not misapprehend her power when purporting to designate and declare the appellant – whether the primary judge erred – no error in primary judge’s conclusions demonstrated – Minister’s decision would nonetheless be valid by reason of item 5 of Sch 1 of the *Autonomous Sanctions Amendment Act 2024* (Cth) |
|  |  |
| Legislation: | *Constitution* ss 75(iii), (v)*Acts Interpretation Act 1901* (Cth) ss 15A, 15AA*Autonomous Sanctions Act 2011* (Cth) ss 3(1)–(3), 4, 6(1), 9, 10, 12, 14, 16*Autonomous Sanctions Amendment Act 2024* (Cth) Sch 1 item 5*Federal Court of Australia Act* *1976* (Cth) s 43*Judiciary Act 1903* (Cth) s 39B(1)*Legislation Act 2003* (Cth) s 13(2)*Autonomous Sanctions Regulations 2011* (Cth) regs 3, 6, 9(1)–(3), 14, 15, 18*Autonomous Sanctions Amendment (Russia) Regulations 2022* (Cth)*Migration Regulations 1994* (Cth) reg 2.43(1)(aa)(i)*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)*Autonomous Sanctions (Sanction Law) Declaration 2012* (Cth)Explanatory Memorandum, *Autonomous Sanctions Amendment Bill 2024* (Cth) |
|  |  |
| Cases cited: | *Abramov v Minister for Foreign Affairs (No 2)* [2023] FCA 1099*APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322; [2005] HCA 44*Australian Coarse Grains Pool Pty Ltd v Barley Marketing Board* (1985) 157 CLR 605; [1985] HCA 38*Australian Education Union v General Manager, Fair Work Australia* (2012) 246 CLR 117; [2012] HCA 19*Australian Securities and Investments Commission v BHF Solutions Pty Ltd* (2021) 153 ACSR 469; [2021] FCA 684*Automotive Invest Pty Limited v Commissioner of Taxation* (2024) 98 ALJR 1245; [2024] HCA 36*BHP Group Ltd v Impiombato* (2022) 276 CLR 611; [2022] HCA 33*Bourke v State Bank of New South Wales* (1990) 170 CLR 276; [1990] HCA 29*Chetcuti v Minister for Immigration and Border Protection* (2019) 270 FCR 335; [2019] FCAFC 112*Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; [1992] HCA 64*Claremont Petroleum NL v Cummings* (1992) 110 ALR 239*Clubb v Edwards* (2019) 267 CLR 171; [2019] HCA 11*CMU16 v Minister for Immigration and Border Protection* (2020) 277 FCR 201; [2020] FCAFC 104*Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 1; [2023] HCA 10*Deripaska v Minister for Foreign Affairs* [2024] FCA 62*Dietrich v The Queen* (1992) 177 CLR 292; [1992] HCA 57*Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (2013) 209 FCR 297; [2013] FCAFC 34*Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83; [2015] HCA 32*EWV20 as litigation representative for AFF20 v Minister for Home Affairs (No 3)* [2021] FCA 866*Graham* *v Minister for Immigration and Border Protection* (2017) 263 CLR 1; [2017] HCA 33*Hicks v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 757*Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123; [2018] HCA 34*Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8*Knight v Victoria* (2017) 261 CLR 306; [2017] HCA 29[*Kuhl v Zurich Financial Services Australia Ltd*](https://jade.io/article/216440) (2011) 243 CLR 361; [2011] HCA 11*Maxwell v Murphy* (1957) 96 CLR 261; [1957] HCA 7*Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19* (2021) 287 FCR 181; [2021] FCAFC 153*Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155; [1994] HCA 9*Pidoto v Victoria* (1943) 68 CLR 87; [1943] HCA 37*Pitman v Commissioner of Taxation* (2021) 289 FCR 287; [2021] FCAFC 230*Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; [2003] HCA 2*R S Howard & Sons Ltd v Brunton*(1916) 21 CLR 366; [1916] HCA 21*Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188; [1995] HCA 71*Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323; [1995] HCA 16*Re Nolan; Ex parte Young* (1991) 172 CLR 460; [1991] HCA 29*Roberts-Smith v Fairfax Media Publications Pty Limited (No 41)* [2023] FCA 555*Stephens v The Queen* (2022) 273 CLR 635; [2022] HCA 31*Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468; [1971] HCA 40*SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362; [2017] HCA 34*Tajjour v New South Wales* (2014) 254 CLR 508; [2014] HCA 35*Vairy v Wyong Shire Council* (2005) 223 CLR 422; [2005] HCA 62*Victoria v Commonwealth (Industrial Relations Act case)* (1996) 187 CLR 416; [1996] HCA 56*Western Australia v Ward* (1997) 76 FCR 492*YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1; [2024] HCA 40 |
|  |  |
| Division: | General Division |
|  |  |
| Registry: | Western Australia |
|  |  |
| National Practice Area: |  |
|  |  |
| Number of paragraphs: | 156 |
|  |  |
| Date of hearing: | 18–19 November 2024 |
|  |  |
| Counsel for the Appellant: | S B Lloyd SC, C C Porter, and D A Ward |
|  |  |
| Solicitor for the Appellant: | Pragma Lawyers |
|  |  |
| Counsel for the Respondent: | P Herzfeld SC, B Lim, and E Dunlop |
|  |  |
| Solicitor for the Respondent: | Australian Government Solicitor |

ORDERS

|  |  |
| --- | --- |
|  | WAD 41 of 2024 |
|   |
| BETWEEN: | OLEG VLADIMIROVICH DERIPASKAAppellant |
| AND: | MINISTER FOR FOREIGN AFFAIRSRespondent |

|  |  |
| --- | --- |
| order made by: | WIGNEY, STEWART AND NESKOVCIN JJ |
| DATE OF ORDER: | 27 march 2025 |

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. The appellant pay the respondent’s costs of and incidental to the appeal.

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

|  |  |
| --- | --- |
| The statutory regime | [4] |
| The Act | [4] |
| The Regulations | [10] |
| Instruments of designation and declaration | [20] |
| Permits | [28] |
| Common ground | [32] |
| THE REASONS OF THE PRIMARY JUDGE | [37] |
| “Reading down” | [39] |
| Federal jurisdiction | [51] |
| Judicial review grounds | [53] |
| The broader argument | [56] |
| The narrower argument | [59] |
| Determination | [63] |
| “Reading down” | [63] |
| The broader Ch III argument [ANOA Grounds 1, 4, 5 and 6] | [93] |
| Misapprehension of the Minister’s powers [ANOA Ground 7] | [106] |
| First limb – Minister’s alleged misunderstanding of her powers | [107] |
| Second limb – Minister’s alleged misunderstanding of her powers | [119] |
| The broader argument | [120] |
| The narrower argument | [134] |
| The 2024 Amendment Act (Notice of contention) | [141] |
| Costs | [153] |
| CONCLUSION | [156] |

REASONS FOR JUDGMENT

THE COURT:

1. The appellant challenges a decision made by the then **Minister** for Foreign Affairs on 17 March 2022 to designate him for targeted financial sanctions and declare him for travel bans under the *Autonomous Sanctions* ***Act*** *2011* (Cth) and the *Autonomous Sanctions* ***Regulations*** *2011* (Cth). The primary judge dismissed the appellant’s challenge to the Minister’s decision and the appellant’s challenge to the validity of the Regulations: ***Deripaska*** *v Minister for Foreign Affairs* [2024] FCA 62 (**J**).
2. The appellant appeals from the whole of the judgment of the primary judge. The grounds of appeal, set out in the Amended Notice of Appeal (**ANOA**), were grouped under the following five headings:

***“Reading down”* [ANOA Grounds 2 and 3]**

2. The PJ erred in holding that regs 14 and 15 of the Regulations are to be construed:

a. As not applying to actions taken for the objective purpose of challenging the validity of decisions or actions under the [Act], pursuant to s 75(v) of the Constitution or s 39B(1) of the *Judiciary Act 1903* (Cth) (possibly held at [62], [66]); or

b. As not having any “applications” that would “subvert” the “exercise of jurisdiction under s 75(v) [of the Constitution] or s 39B(1) [of the Judiciary Act]” (at [73]); or

c. As being “inapplicable” to the extent “required” in order “to prevent subversion” of the “proper exercise” of the jurisdiction in s 75(v) of the Constitution and its analogues (at [76]).

3. The PJ erred in failing to hold that regs 14 and 15 could not be “read down” in any of the ways identified at Ground 2 above.

***Chapter III* [ANOA Grounds 1, 4 and 5]**

1. The primary judge (PJ) erred in finding that Deripaska “is not relevantly affected in his acquisition of legal services by regs 14-15” of the *Autonomous Sanctions Regulations 2011* (Cth) (**Regulations**), and hence that Deripaska’s case “relies on [those regulations’] potential effect in other cases and on other people” (at [58]).

4. The PJ erred in holding that if regs 14 and 15 of the Regulations were construed in any of the ways identified in Ground 2 above, then those regulations were not inconsistent with the principles established by Chapter III of the Constitution (at [86]-[87]).

5. Further or in the alternative, the PJ erred by failing to hold that s 10(1)(a) of the *Autonomous Sanctions Act 2011* (Cth) is invalid, by virtue of the way in which his Honour construed that provision at [115].

***Invalidity of the Regulations* [ANOA Ground 6]**

6. The PJ erred by failing to hold that regs 6(b), 14 and 15 of the Regulations are invalid.

***Misunderstanding of the nature of the Minister’s powers* [ANOA Ground 7]**

7. The PJ erred in finding that the Minister had not misunderstood her powers when purporting to designate and declare Deripaska under reg 6 (at [145], [155]-[157]).

***Costs* [ANOA Ground 8]**

8. The PJ erred in ordering Deripaska to pay the Minister’s costs (irrespective of whether the PJ’s decision was otherwise correct).

1. The issues central to this appeal are:
2. whether the Act and the Regulationscan be read down;
3. whether the Regulations remain valid if they are inconsistent with Ch III of the *Constitution*; and
4. whether the Minister misapprehended her powers.

# The statutory regime

## The Act

1. As the long title to the Act suggests, its objects are to make provision relating to sanctions to facilitate the conduct of Australia’s external affairs. Such sanctions may be country-specific or thematic, that is, directed towards issues of international concern such as threats to international peace and security: ss 3(1)–(3).
2. “Autonomous sanctions” are defined broadly, in s 4 of the Act, to mean sanctions that:
3. are intended to influence foreign governments, persons or entities outside Australia in accordance with Australian Government policy; or
4. 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.
5. For the purpose of furthering the main objects of the Act, the Minister may, by legislative instrument, specify a provision of a law of the Commonwealth as a “sanction law”: s 6(1). The Act does not limit the operation of other laws of the Commonwealth so far as they operate to provide for, or operate in relation to, autonomous sanctions: s 9.
6. The Act operates principally by authorising the making of regulations which impose sanctions of the kinds contemplated. Section 10 expressly provides for the making of sanctions by regulations, as follows:

**Part 2—Regulations to provide for sanctions**

**Division 1—Making and effect of regulations**

**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.

(3) Despite subsection 14(2) of the *Legislation Act 2003*, regulations made for the purposes of subsection (1) may make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

1. Section 12 deals with the effect of regulations and provides:

**12 Effect of regulations on earlier Commonwealth Acts and on State and Territory laws**

The regulations have effect despite:

(a) an Act enacted before the commencement of this section; or

(b) an instrument made under such an Act (including such an instrument made at or after that commencement); or

(c) a law of a State or Territory; or

(d) an instrument made under such a law.

1. Part 3 of the Act concerns offences relating to sanctions. Section 16 of the Act makes it an offence for individuals or bodies corporate to contravene a sanction law. Contraventions of the regulations may also be an offence against s 16 of the Act.

## The Regulations

1. Part 2 of the Regulations provide for the imposition of sanctions by reference to various criteria. The instruments designating and declaring the appellant were made under reg 6, which provides:

**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.

**Countries, persons and entities**

|  |  |  |
| --- | --- | --- |
| **Item** | **Country** | **Activity** |
| 6A | Russia | (a) 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.(b) A current or former Minister or senior official of the Russian Government.(c) 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), which commenced on 25 February 2022 (shortly before the Minister’s decision in the present case was made).
2. Where a person is declared for a travel ban under reg 6(b), provisions in the ***Migration Regulations*** *1994* (Cth) make that declaration a ground for refusal of a visa (‘PIC’ 4003 in Sch 4) or for cancellation of an existing visa (reg 2.43(1)(aa)(i)).
3. A designation under reg 6(a) and a declaration under reg 6(b) is effective for three years: regs 9(1)–(2). The Minister may, by legislative instrument, declare that a designation or declaration continues to have effect for a further three years: regs 9(1)(b), (2)(b) and (3).
4. Where a person or an entity is designated under reg 6(a), later provisions of the Regulations dealing with prohibitions become relevant. Part 3 of the Regulations contains provisions prohibiting certain conduct to ensure that sanctions imposed under the autonomous sanctions regime are effective. Relevantly for present purposes, reg 14 prohibits dealing with designated persons or entities, and provides:

**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.

1. Reg 15 prohibits using or dealing with controlled assets and provides:

**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 broadly 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. 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). A contravention of regs 14 or 15 is (subject to proof of the relevant fault elements) an offence under s 16 of the Act.
2. The effect of regs 14 and 15 can be mitigated by the grant of a permit by the Minister under reg 18. Under reg 18, the Minister may, by their own initiative or on application by a person, grant a permit to a person authorising conduct that would otherwise contravene regs 14 and 15. However, the Minister must not grant a permit unless they are satisfied it would be in the national interest to do so and they have considered any circumstance or matter required by Part 4 of the Regulations for a particular kind of permit: reg 18(3).
3. A permit under reg 18(1) may authorise the making available of an asset that would otherwise contravene reg 14, or the use of, or a dealing with, a controlled asset: reg 18(1)(e) and (f). A permit may be granted subject to conditions: reg 18(4). We will return to the grant of permits relevant to the appellant.

## Instruments of designation and declaration

1. In 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) (**2014 Instrument**).
2. The 2014 Instrument was the means by which the Minister listed “designated” persons and entities and “declared” persons from Russia and Ukraine under regs 6(a) and (b) of the Regulations.
3. In February 2022, the Minister made the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) Amendment (No 4) Instrument 2022* (Cth) (**First** **2022 Instrument**).
4. The First 2022 Instrument inserted paragraph 3A into the 2014 Instrument:

**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. The First 2022 Instrument included persons from Russia and Ukraine in the list of “designated” persons and entities and “declared” persons under regs 6(a) and 6(b) of the Regulations.
2. In March 2022, the Minister made the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Russia and Ukraine) Amendment (No 7) Instrument 2022* (Cth) (**Second 2022 Instrument**).
3. The Second 2022 Instrument named two more persons from Russia and Ukraine in the list of “designated” persons and entities and “declared” persons under regs 6(a) and (b) of the Regulations, one of whom was the appellant: see item 63 of Sch 1.
4. This enlivened regs 14 and 15 which prohibited a person from dealing with the appellant or his controlled assets and made it an offence under s 16 of the Act for the appellant or his bodies corporate to engage in conduct that contravenes a sanction law.

## Permits

1. As mentioned above, the effect of regs 14 and 15 can be mitigated by the grant of a permit by the Minister under reg 18.
2. On 7 November 2022, the Minister issued Permit SAN-2022-00079 which authorised making assets available to persons or entities designated under the Regulations, and the use of, or dealing with “controlled assets”, where doing so is associated with the provision of legal and ancillary services.
3. In January 2023, the appellant filed the originating application and concise statement challenging the Minister’s decision and claiming the Regulations under which the instruments were made were invalid.
4. On 30 October 2024, the Minister revoked Permit SAN-2022-00079 and issued Permit SAN-2024-00138 which authorised making assets available to persons or entities designated under the Regulations, and the use of, or dealing with controlled assets, in connection with legal services, settlement of legal proceedings, and payment of legal costs.

# Common ground

1. It was common ground between the parties that the practical effect of a “designation” is to impose serious restrictions on a designated person. The appellant submitted that the practical effect of a designation is that, under regs 14 and 15, an Australian lawyer commits an offence if they advise or represent the designated person or entity unless the Minister grants a permit under reg 18. The respondent submitted that the restrictions are not as “swingeing” as the appellant suggests.
2. It is clear, however, that a designated person or entity is prevented from remunerating an Australian lawyer from “controlled assets” (being assets owned or controlled by the designated person or entity) and, therefore, the practical effect of designation would be that a designated person or entity would be unlikely to be able to retain an Australian lawyer to advise or represent them unless the Minister granted a permit under reg 18. Furthermore, an Australian lawyer would commit an offence under reg 14 if any “asset” (which includes intellectual property) was made available to or for the benefit of the designated person or entity who was the lawyer’s client.
3. It was also common ground that the practical effect of a “declaration” is that a Commonwealth Minister or delegate either would or could refuse the declared person a visa to enter Australia.
4. Finally, it was not in dispute that regs 14 and 15 are invalid to the extent that they impinge on the entrenched jurisdiction under s 75(v) of the *Constitution*. More accurately, the empowering provision, s 10(1) of the Act, cannot empower regulations that would have that effect. The question is therefore whether regs 14 and 15 can be read down so as not to 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).
5. Section 75 of the *Constitution*, which it is convenient to set out in full, provides:

**75. Original jurisdiction of High Court.**

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.

# THE REASONS OF THE PRIMARY JUDGE

1. The appellant challenged the validity of the designating instruments made by the Minister by challenging the Regulations under which they were made. The appellant challenged the validity of the Regulations on the grounds that regs 14 and 15:
2. are inconsistent with the principles entrenched in Ch III of the *Constitution*;
3. infringe the implied freedom of political communication; and
4. are inconsistent with fundamental human rights.
5. The second and third grounds are not relevant to this appeal.

## “Reading down”

1. As already noted, it was common ground that regs 14 and 15 could not apply according to their terms because they would impinge on the entrenched jurisdiction under s 75(v) of the *Constitution*. The Minister’s position, which was accepted by the primary judge at J [51], was 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.

1. The issue joined between the parties, as noted by the primary judge at J [52], was the Minister’s submission that the relevant expressions in regs 14 and 15 (“deal with”, “make available” and “use”) could, and therefore should, be read as excluding actions taken for the purpose of challenging the validity of decisions or actions under the Act pursuant to s 75(v) of the *Constitution* or s 39B(1) of the Judiciary Act. The appellant submitted that such an exercise in reading down was not permissible.
2. As the analysis was to be undertaken at the level of the Regulations, the primary judge proceeded by formulating a “composite hypothetical question”, that is: whether, if the Regulations had been enacted as primary legislation, they would have been compliant with the relevant constitutional limitation: J [55]. The Minister had invoked s 15A of the ***Acts Interpretation Act*** *1901* (Cth), which is made applicable to subordinate legislation by s 13(1) of the ***Legislation Act*** *2003* (Cth). Section 13(2) of the Legislation Act substantially reproduces, as a rule of construction for all legislative instruments, the terms of s 15A.
3. Section 15A of the Acts Interpretation Act provides:

**15A Construction of Acts to be subject to Constitution**

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

1. References in these reasons to s 15A are references to s 15A of the Acts Interpretation Act.
2. As the primary judge noted at J [60], the appellant had invoked the three considerations identified by the High Court in *Victoria v Commonwealth (****Industrial Relations Act case****)* (1996) 187 CLR 416; [1996] HCA 56 that may prevent s 15A (or an analogous provision) being applied so as to give a provision a valid partial operation and made four points, which the primary judge dealt with sequentially.
3. First, the appellant submitted that s 15A cannot be applied to effect a partial validation unless “the operation of the remaining parts of the law remain unchanged”: ***Pidoto*** *v Victoria* (1943) 68 CLR 87; [1943] HCA 37at 108 (Latham CJ) and *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323; [1995] HCA 16 at 347–348 (Dawson J). The primary judge considered that this consideration did not arise because the operation of the Regulations would not be markedly different on the Minister’s proposed construction of regs 14 and 15, although there would be circumstances in which the prohibitions in regs 14 and 15 did not apply: J [62].
4. Secondly, the appellant submitted that 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’”: *Pidoto* at 108 (Latham CJ). The primary judge did not discern an intention in the Regulations that they are not to have any operation at all if the prohibitions in regs 14 and 15 cannot apply to the full extent, for the following reasons, at J [64]:
5. the carving out of cases in which the prohibitions cannot apply did not compromise the policy rationale for the scheme of designating persons and entities;
6. the provision for declaring a person for travel bans in reg 6(b) was separate, and had consequences under other legislation, and there was no reason to think that the provision for travel bans was not intended to operate if part of the designation regime could not validly be put into effect; and
7. 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.
8. Thirdly, the appellant submitted that 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”: *Pidoto* at 111 (Latham CJ). The primary judge noted at J [65], “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. The primary judge considered that this point fell away when it was confirmed, by the reference to “purpose” in the Minister’s submission, that the Minister was not invoking a person’s subjective purpose as a limiting factor: J [66].
9. The primary judge then referred, at J [67], to the *Industrial Relations Act case*,where the majority 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”: *Industrial Relations Act case* at 502–503 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). His Honour continued, at J [68]:

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.

1. Fourthly, the appellant submitted that a court should not read down a provision by inserting an exclusion that suffers from “inherent imprecision”, to use the language of Kiefel CJ and Gageler J (as his Honour then was) in *BHP Group Ltd v Impiombato* (2022) 276 CLR 611; [2022] HCA 33 at [17]. However, the primary judge considered that the *Industrial Relations Act case* and Gageler J’s reasons in ***Tajjour*** *v New South Wales* (2014) 254 CLR 508; [2014] HCA 35 illustrate that some indeterminacy in the articulation of the relevant constitutional principle is not a barrier to reading down: J [72].
2. The primary judge concluded, at J [73], that 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), and the Regulations are therefore not invalid by reason of inconsistency with the constitutional entrenchment of that jurisdiction. His Honour stated at J [74], that this meant that the Regulations do not prevent a designated person or entity 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). His Honour added that the scope of the relevant exclusion may go further than that, but considered that this question did not need to be determined in the present case, as the actual application of regs 14 and 15 was not in issue: J [74].

### Federal jurisdiction

1. The primary judge noted at J [78] that the appellant put a further and much broader argument relating to invalidity arising from Ch III, by reference to ss 75, 76 and 77 of the *Constitution* and the right to obtain legal representation.
2. The primary judge did not accept the additional argument, in the broad terms put by the appellant, that legislation which compromises the exercise of federal jurisdiction, including by preventing a party from using its resources to obtain legal representation, was invalid: J [85]. His Honour stated at J [87] that, in any event, the principles of construction previously discussed were also an answer to this argument. His Honour considered that the extent to which those principles require the general expressions in regs 14 and 15 to be confined in their denotation was directly related to the breadth of the relevant constitutional limitation. His Honour considered, however, that it was neither necessary nor appropriate to answer that issue because the appellant did not claim that the operation of the Regulations in relation to him breached any constitutional limit.

### Judicial review grounds

1. Before the primary judge, the appellant submitted that the then Minister misunderstood the nature of the power she was exercising. In describing the Minister’s decision to designate and declare the appellant, it is important to bear in mind that the decision was made by the then Minister, Ms Marise **Payne**, who was not called to give evidence at the hearing. The appellant made two arguments:
2. first, the Minister did not realise that she had a discretion at all; that is, she proceeded on the basis that, if satisfied that the appellant met the criteria, she was required to designate and declare him under reg 6 (the **broader argument**); and
3. alternatively, 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 (the **narrower argument**).
4. Before turning to the substance of the two arguments, the primary judge noted, at J [126], that it was common ground that the Minister was not under any obligation to give reasons for her decision and had not provided a statement of reasons. It was also uncontroversial that the appellant bore the onus of proving that the alleged error occurred: J [127]. Relatedly, the appellant submitted that an inference that the Minister proceeded on a wrong understanding could more comfortably be drawn because Ms Payne had not been called to give evidence, citing *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8.
5. The primary judge noted at J [129], that there is no hard and fast rule concerning the application of *Jones v Dunkel* to evidence that might be given personally by a Minister and the strength with which the principle applies must depend on the circumstances of the case. His Honour considered that the prospects of Ms Payne having any independent recollection of her reasoning process in relation to the appellant were not strong and there was no convincing basis for any inference that the failure to call her as a witness meant anything: J [129]. Furthermore, his Honour considered that Ms Payne was not a person whom the Minister, rather than the appellant, would be expected to call: ***Director, Fair Work*** *Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (2013) 209 FCR 297; [2013] FCAFC 34 at [102]–[103] (Besanko and Perram JJ, Bromberg J agreeing at [136]): J [130].

#### The broader argument

1. The primary judge, at J [145], rejected the appellant’s broader argument.
2. The primary judge noted, at J [131], that the only direct evidence of the Minister’s thought process was the draft **Explanatory Statement** for the Amending Instrument (Explanatory Statement, *Autonomous* *Sanctions (Designated Persons and Entities and Declared Persons – Russia and Ukraine) Amendment (No 7) Instrument 2022* (Cth)). After observing that the Minister had approved the text and must therefore be taken to have been comfortable with its contents, his Honour stated that the Explanatory Statement did 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: J [131]. Rather, his Honour continued, the Explanatory Statement provided an indication to the contrary, in stating that reg 6 “enables” the Minister to “designate … and/or declare” a person. His Honour held that this framing of the power that was being exercised properly reflected the discretionary element of the power: J [132].
3. The primary judge stated at J [134], that inferences about a decision-maker’s reasoning process may properly be drawn from the briefing material that the decision-maker was given. The appellant had submitted that the terms of the “Recommendation” contained in the Ministerial Submission would have set the Minister on the wrong path, by indicating that she would necessarily designate and declare the appellant if satisfied he met the criteria in reg 6. His Honour considered that it was necessary to consider what “impression” the briefing material would have conveyed to the Minister, being a busy decision maker: J [136]. After referring to certain passages, his Honour held that the briefing included in the Ministerial Submission was apt to convey to the Minister that, if satisfied that the appellant met the criteria, she had a choice to make as to whether to impose sanctions on him: J [140].

#### The narrower argument

1. The primary judge, at J [157], also rejected the appellant’s narrower argument.
2. The primary judge considered that the terms of the Explanatory Statement and draft **Statement of Compatibility** with Human Rights (by the expressions “and/or” and “may”) captured both the fact that discretion was involved and that it was open to the Minister to designate a person, declare a person, or to do both or neither: J [147]–[149]. His Honour noted the Recommendation contained in the Ministerial Submission presented somewhat more difficulty in relation to this argument, for the reasons explained at J [150]–[153]. His Honour considered, however, that the key part of the Ministerial Submission was not sufficient in itself 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: J [155].
3. His Honour held that there was thus no persuasive evidence of the Minister having been led into error, and the observations in the Explanatory Statement and the Statement of Compatibility should be taken to represent the Minister’s understanding: J [157].
4. The primary judge therefore dismissed the originating application, with costs: J [180].

# Determination

## “Reading down” [ANOA Grounds 2 and 3]

1. As already noted, it was common ground that regs 14 and 15 are invalid to the extent that they impinge on the entrenched jurisdiction under s 75(v) of the *Constitution*. More accurately, the empowering provision, s 10(1) of the Act, cannot empower regulations that would have that effect. The question is therefore whether the regs 14 and 15 can be read down so as to preserve them to the extent that they do not impinge on that jurisdiction.
2. The appellant’s preliminary submission that the primary judge did not make a positive finding, or that the primary judge’s finding on the reading down was unclear, is rejected. The findings are set out at J [51] and [73]–[74]. His Honour held that the regs 14 and 15 are to be read down so as to exclude actions taken for the purpose of challenging the validity of decisions or actions under the Act pursuant to s 75(v) of the *Constitution* or s 39B(1) of the Judiciary Act. “Purpose” was used “in an objective sense, to describe the end served by the actions referred to rather than the subjective intentions of the people involved”: J [51] and [73]–[74].
3. In our view, the primary judge’s reasoning to the conclusion on reading down regs 14 and 15 is unimpeachable. It recognises the various limiting principles from the authorities and explains why they support a reading down of regs 14 and 15. The appellant’s principal challenges to that reasoning are dealt with sequentially and rejected for the reasons set out below.
4. First, the appellant submitted that by invoking s 15A to disapply regs 14 and 15, the primary judge ignored or failed to give effect to s 12 of the Act. The appellant submitted that his Honour did not give effect to the parliamentary instruction in s 12 of the Act, which is that regs 14 and 15 are to “have *effect* despite” other laws, including s 15A and s 13 of the Legislation Act.
5. Section 12 of the Act is a conflict resolution clause which would be engaged if another law seemed to permit something which the Regulations prohibited. It does not seek to prohibit the application of the ordinary rules of construction applicable to legislation. Section 12 of the Act would apply if, after construing the Regulations, there was a conflict between the Regulations and another law or statutory instrument. There is no conflict or inconsistency between s 12 of the Act and s 15A, which is a rule of construction that must be brought to account in construing the Regulations. That it affects the construction of the Regulations does not mean there is an “inconsistency” between the two provisions that would engage s 12 of the Act.
6. Secondly, the appellant submitted that the Minister’s reading down ofregs 14 and 15, which the primary judge accepted, impermissibly altered the policy that the primary judge discerned in the Act, J [115], which was to “put [a person] outside the protection of the law”. This submission mischaracterises the primary judge’s reasons. The reference in J [115] to “proscription” was in the context of the principle of legality and fundamental common law rights, to show that the policy of the Act is to limit common law rights, not that it is to place a designated person beyond the protection of the law for all purposes. Contrary to the appellant’s submission, his Honour did not conclude that the policy of the Act is to put a person outside the protection of the law, including the protection of s 75(v). In our view, the relatively minor limitation on the reach of the Regulations with reference to s 75(v) retains the essential policy of the Act and is not inconsistent with it.
7. Thirdly*,* the appellant submitted that the Minister’s reading down ofregs 14 and 15, which the primary judge accepted, amounted to a legislative choice (and hence not a permissible exercise of judicial power), contrary to *Pidoto* at 111 (Latham CJ) and *Industrial Relations Act case* at 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). The appellant submitted that the primary judge did not identify why “objective purpose” was selected as the criterion marking the boundary between the application and disapplication of regs 14 and 15. Moreover, the concept of “objective purpose” is a limitation that does not appear from the terms of the Act or its subject matter: *Industrial Relations case* at 502. His Honour therefore might have drawn the boundary by reference to a number of matters or limitations, which amounted to a legislative choice.
8. This argument was the appellant’s most substantive argument and requires close analysis of primary judge’s reasons and the authorities relied upon by both parties.
9. The primary judge approached the task as a question of construction involving the application of s 15A, which is made applicable to the Regulations by s 13 of the Legislation Act: J [56], [60]. His Honour correctly identified, at J [56], that the Regulations must be construed (as if they were an Act) subject to s 15A, stating “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))”.
10. As mentioned in paragraphs 44–47 above, the primary judge considered that the three limitations identified by the majority in the *Industrial Relations Act case* at 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ), that may prevent s 15A (or an analogous provision) being applied so as to give a provision a valid operation, did not arise in the present case. In our view, there was no error in his Honour’s conclusions in that regard.
11. The majority in the *Industrial Relations Act case* said that the limitation by reference to which a law is to be read down may appear from the terms of the law or from its subject matter: at 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ), citing *Pidoto* at 109 (Latham CJ). Similarly, the majority continued, “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. And so, their Honours held, the provision that was under consideration could be read down so as not to infringe the limitation on power established in ***Re Australian Education Union****; Ex parte Victoria* (1995) 184 CLR 188; [1995] HCA 71 at 231 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ). The relevant “limitation” imposed by *Re Australian Education Union* was “the prohibition against laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments”: at 231. As a result, the provision of the legislation under consideration in the *Industrial Relations Act case* was held to bind the States to the extent that the provisions of the legislation do not prevent the States 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.
12. The High Court came to a similar result in the earlier decision in ***Bourke*** *v State Bank of New South Wales* (1990) 170 CLR 276; [1990] HCA 29, where the Court held that the substantive provisions of the *Trade Practices Act 1974* (Cth)could be read down so as not to apply to the conduct of financial corporations to the extent that they are engaged in State banking not extending beyond the limits of the State concerned, thus giving the provisions validity within the constitutionally supported field of operation: at 291 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
13. Subsequent to *Bourke*, the High Court in *Re* ***Nolan****; Ex parte Young* (1991) 172 CLR 460; [1991] HCA 29 considered whether the provisions of the *Defence Force* ***Discipline Act*** *1982* (Cth) that subjected defence force members to the jurisdiction of a military tribunal were supported by the defence power in s 51(vi) of the *Constitution*. A member of the defence forces was charged with a “service offence” and challenged the military tribunal’s jurisdiction to try the charges, arguing that the alleged offence was contrary to comparable provisions of the *Crimes Act 1914* (Cth) and should have been tried under civilian law. The majority held that the military tribunal had jurisdiction to hear the charges: at 475 (Mason CJ and Dawson J) and 489 (Brennan and Toohey JJ).
14. Mason CJ and Dawson J, at 474–475, considered that, provided the proscribed conduct was sufficiently connected with the regulation of the defence forces and good order and discipline of members, it was open to Parliament to provide that any conduct that constitutes a civil offence shall constitute a service offence and such a law would be valid and triable by a service tribunal.
15. Brennan and Toohey JJ, at 485–486, considered that where a law operates distributively, on a literal construction, and embraces cases which are beyond legislative power, s 15A can restrict its operation to cases which are within power provided certain conditions are met. First, it is necessary that “the law itself indicates a standard or test which may be applied for the purpose of limiting, and thereby preserving the validity of, the law”: *Pidoto* at 109 (Latham CJ). Secondly, it is necessary that the operation of the law upon the subjects within power is not changed by placing a limited construction upon the law: *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468; [1971] HCA 40 at 493(Barwick CJ). Their Honours held that the relevant provisions of the Discipline Act could be read down by resort to s 15A so that the powers conferred by them were able to be exercised only for the purpose of maintaining and enforcing military discipline: at 487 (Brennan and Toohey JJ).
16. More recently in *Tajjour*, the appellants had brought proceedings challenging the validity of s 93X(1) of the *Crimes Act 1900* (NSW), which concerned the offence of consorting. The appellants contended that s 93X was invalid because it impermissibly burdened the implied freedom of communication on governmental and political matters, contrary to the *Constitution*. The majority held that s 93X did not infringe the implied freedom of political communication: at 566–567 (Hayne J), 575 (Crennan, Kiefel and Bell JJ) and 604–605 (Keane J). Their Honours reached that conclusion as a matter of statutory construction and did not consider the validity of the provision as a process of reading down the provision.
17. French CJ, who was in the minority, at [52], stated that the State’s equivalent of s 15A could not be used to read down s 93X so as to exclude political communications because that reading down could be done in a number of ways, contrary to *Pidoto* at 111 (Latham CJ). Gageler J, who was also in the minority, held to the contrary, at [178], stating that the provision could be read down as having no application insofar as the section would apply to consorting which is or forms part of an association for a purpose of engaging in communication on governmental or political matters. Gageler J’s reasoning in *Tajjour* at [171] is significant and warrants closer analysis, having been cited with apparent approval in ***Graham*** *v Minister for Immigration and Border Protection* (2017) 263 CLR 1; [2017] HCA 33 at [66] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
18. In *Tajjour*, Gageler J stated at [171] that a severance clause such as the State’s equivalent of s 15A can operate 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, referring to the *Industrial Relations Act case* at 502–503 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). The relevant passage from *Tajjour* was cited by the primary judge at J [70], and is reproduced below:

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 [*Industrial Relations Act case* at 502-503]. Such reading down can occur even if the constitutional limitation is incapable of precise definition[*Industrial Relations Act case* at 503; *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272; [2009] HCA 33 at [66] (Gummow, Heydon, Kiefel and Bell JJ)], 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 [*Bourke* at 291-292; *Nolan* at 487-488 (Brennan and Toohey JJ)]. Where reading down can occur, the constructional imperative of a severance clause is that reading down must occur.

[Footnotes included]

1. As demonstrated by the authorities mentioned, reading down is not limited to cases where the limitation by which a provision is to be read down may be found in the terms of the law itself or its subject matter, as was mentioned in *Pidoto*. A provision expressed in general words that operates, on its terms, in an area which is subject to a clear constitutional limitation can be read down as subject to that limitation: *Industrial Relations Act case* at 502–503 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Tajjour* at [171] (Gageler J).
2. Further, the limitation by which a provision is to be read down may be supplied by the *Constitution*. It has long been recognised that s 75(v) introduces into the *Constitution* an entrenched minimum provision of judicial review: see for example ***Plaintiff S157/2002*** *v Commonwealth* (2003) 211 CLR 476; [2003] HCA 2 at [5] (Gleeson CJ); [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ)*.* In *Plaintiff S157/2002* the provision in issue was read so as not to subvert the jurisdiction under s 75(v) and was held to be valid: at [74]–[76]. Similarly, in *Graham,* the word “court” was read to exclude the High Court when exercising s 75(v) jurisdiction, and this court when exercising analogous statutory jurisdiction, to review a purported exercise of power by the relevant Minister under certain provisions of the ***Migration Act*** *1958* (Cth)under consideration in that case, and the provisions were held to be valid when read subject to that limitation: *Graham* at [66] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). Thus *Graham* furnishes an example, close to the present circumstances, of a reading down of the kind contended for by the Minister. Similarly, in *Tajjour*,Gageler J had no difficulty reading in the limitation, which was supplied by the *Constitution*, even though it would turn on the purpose of the association, which would involve questions of fact and evaluation.
3. As the primary judge observed at J [70], a general provision can be read down to have no application within an area in which legislative power is subject to a clear constitutional limitation. Further, it did not matter if the boundaries of the limitation are imprecise or unsettled, referring to *Tajjour* at [171]. The applicable constitutional limitation, as his Honour found, was the jurisdiction entrenched under s 75(v) of the *Constitution* or s 39B of the Judiciary Act: at J [73]. For the reasons set out above, there was no error in his Honour’s conclusions.
4. Contrary to the appellant’s submissions, the limitation by which the Regulations are to be read down and rendered valid is clear and does not involve a choice. The question is how best to express it. The precise reading down, so as not to be inconsistent with the constitutional limitation, is a question of judgment and degree. Whilst there may be other ways of expressing the limitation, we would adopt the Minister’s expression of it, which the primary judge accepted, that regs 14 and 15 do not apply to actions taken for the purpose, in an objective sense, of challenging the validity of decisions or actions under the Act pursuant to s 75(v) of the *Constitution* or s 39B(1) of the Judiciary Act.
5. Fourthly, the appellant submitted that the primary judge was wrong to adopt the Minister’s reading down because s 15A and its analogues permit partial disapplication only when an impugned provision is capable of operating in a distributive manner in respect of each and every part of the subject matter, and its operation can be confined to those parts which are within power. It was submitted, however, that partial disapplication (i.e., reading down) could not be done in the manner suggested because people do things for many different purposes, with the result that the provision is not capable of operating in a distributive manner in respect of each and every part of the subject matter.
6. That point is met by the Minister’s reliance on, and explanation of, “purpose” in an objective sense and taken as meaning the ultimate end, object or goal the person seeks to achieve: *Automotive Invest Pty Limited v Commissioner of Taxation* (2024) 98 ALJR 1245; [2024] HCA 36at [110] (Edelman, Steward and Gleeson JJ). Moreover, there are numerous examples of reading down that turn on the object of a person’s actions or activities, even though that might raise questions of fact and characterisation: *Australian Coarse Grains Pool Pty Ltd v Barley Marketing Board* (1985) 157 CLR 605; [1985] HCA 38 at 648–650 (Brennan J, dissenting on the main point); *Bourke* at 291 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron, and McHugh JJ); *Nolan* at 486 (Brennan and Toohey JJ); *Tajjour* at [171] (Gageler J)*.*
7. Fifthly, the appellant submitted that the Minister’s reading down, adopted by the primary judge, had the effect of prohibiting a designated person from mounting a s 75(v) challenge in relation to any governmental decision made under any law other than the Act itself and his Honour did not deal with the subversion of s 75(v) in cases other than to challenge a decision or action under the Act.
8. This submission does not reflect the primary judge’s reasons. The primary judge noted at J [75] that circumstances could 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). His Honour observed that regs 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. In those circumstances, his Honour observed there was much to be said for the view that a subversion of s 75(v) would occur, even if it would not have the “obvious vice” of making the designation decision self-insulating: J [75].
9. The primary judge did not consider that this issue needed to be further pursued in light of regs 14 and 15 being read down in the manner already discussed. The regulations would be “inapplicable to the extent required in order to prevent subversion of the proper exercise of the jurisdiction in s 75(v) and its analogues”: J [76]. His Honour further noted on this conclusion that it did not matter that a “wide field for argument in future cases” was left open concerning the scope of the constitutional limitation, citing *Tajjour* at [172] (Gageler J): J [77]. It seems to us that the constitutional limitation applies equally whether the invocation of s 75(v) jurisdiction is against a decision or step taken under the Act or some other exercise of statutory or non-statutory power: *Graham* at [66] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). In our view, there was no error in his Honour’s conclusions.
10. Reference was made by the appellant in supplementary submissions to the rejection by Gageler CJ, Gordon, Gleeson and Jagot JJ (at [66]–[76]) of the possibility of reading down cl 070.612A(1) of Sch 2 of the Migration Regulations in ***YBFZ*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1; [2024] HCA 40. However, there is nothing said by the plurality in *YBFZ* which overturns the constructional analysis adopted by the primary judge. The cited passages do not signal a new approach to reading down.
11. As noted by the Minister, there are key differences in the regulations considered in *YBFZ* and those considered here. The plurality’s reasoning concerned statutory construction, rather than reading down by way of s 15A; and in any event, the relevant limitation proposed in *YBFZ* was not derived from the text of the *Constitution*, but instead derived from the text of the Migration Regulations and the statutory scheme. By contrast, it is s 75(v) which supplies the applicable standard here. Further, the plurality in *YBFZ* noted the inconsistency between the proposed limitation and its surrounding context and “multiplicity of purposes”: at [67]. That is not the case here, for the policy of the Act was not to put a person outside the protection of the law for all purposes; rather it was to limit common law rights (see paragraph 68 above). A limitation preserving the reach of s 75(v) would be consistent with such a purpose.
12. For those reasons, ANOA Grounds 2 and 3 fail.

## The broader Ch III argument [ANOA Grounds 1, 4, 5 and 6]

1. Before the primary judge, the appellant had put a much broader argument relating to invalidity arising from Ch III, raising arguments in relation to ss 75, 76 and 77 of the *Constitution*: J [78]. The appellant’s arguments in the appeal were much narrower. The appellant made two principal arguments. First, that regs 6(b), 14 and 15 are invalid because they prohibit the appellant from being heard at all by a court exercising the federal jurisdiction that is entrenched by s 75, and in particular s 75(iii). Secondly, that regs 6(b), 14 and 15 are invalid because they prohibit the appellant from being legally represented in that jurisdiction.
2. As to the first argument, the appellant focussed on s 75(iii) and submitted that regs 6(b), 14 and 15 purport to render the Commonwealth immune from jurisdiction, inconsistently with the jurisdiction entrenched by s 75(iii) to which the Commonwealth is always subject, relying on ***Davis*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 1; [2023] HCA 10 at [85] (Gordon J).
3. Support for the proposition regarding the entrenched jurisdiction of federal courts under ss 75(iii) and (v) is found in *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155; [1994] HCA 9 at 216 (McHugh J) and *Davis* at [85] (Gordon J). As the Minister submitted, however, the extent to which jurisdiction conferred by s 75(iii) is entrenched is far from settled.
4. In our view, it is unnecessary and inappropriate, in the circumstances of this case, for this court to decide the constitutional issues about the entrenchment of s 75(iii): *CMU16 v Minister for Immigration and Border Protection* (2020) 277 FCR 201; [2020] FCAFC 104 at [65] (Jagot, Yates and Stewart JJ), citing ***Knight v Victoria***(2017) 261 CLR 306; [2017] HCA 29 at [32] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
5. The appellant’s proceedings are within s 75(v). No issue arises in the present proceeding about the precise extent to which jurisdiction to seek relief against the Commonwealth is entrenched by s 75(iii) because the appellant does not seek to invoke s 75(iii) alone, or at all. The examples relied upon to advance this particular argument were hypotheticals.
6. In *Knight v Victoria*, the Court stated at [33]:

That approach to the determination of constitutional questions means that it is ordinarily inappropriate for the Court to be drawn into a consideration of whether a legislative provision would have an invalid operation in circumstances which have not arisen and which may never arise if the provision, if invalid in that operation, would be severable and otherwise valid.  That is so even where the validity of the provision is challenged by a party sufficiently affected by the provision to have standing:  a party will not be permitted to “roam at large” but will be confined to advancing those grounds of challenge which bear on the validity of the provision in its application to that party.

[Footnotes omitted]

1. To counter the point that the arguments regarding s 75(iii) were hypothetical, the appellant relied on ***Clubb*** *v Edwards* (2019) 267 CLR 171; [2019] HCA 11at [333], where Gordon J said that the fact that Mrs Clubb did not mount a positive case did not complete the necessary enquiry. Mrs Clubb was found to have contravened a law that prohibited certain behaviour if the prohibition was valid: at [326]. Mrs Clubb contended that the provisions under which she was convicted impermissibly burdened the implied freedom of political communication. Mrs Clubb, however, was not in a position to mount, and did not mount, a positive case that she was engaged in political communication: at [330]. The reading down exercise undertaken by Gordon J, to consider whether the invalid provision was severable, was necessary to consider as a threshold issue because if, following the resolution of that issue, the prohibition was invalid and not severable, then that would have saved Mrs Clubb from being in breach of it: at [330]–[336]. As can be seen, the facts and circumstances in *Clubb* were materially different to the facts and circumstances of this case. It is unnecessary to determine as a threshold issue the extent to which the provisions in question in this case might have to be read down to accommodate s 75(iii). *Clubb* accordinglydoes not assist the appellant.
2. As to the second argument, the appellant submitted that regs 6(b), 14 and 15 effectively “outlaw[] legal representation before a Ch III court”, citing *Western Australia v* ***Ward***(1997) 76 FCR 492*,* and the primary judge erred in treating the appellant’s argument as one of mere “impairment” in the procurement of legal advice and representation: J [84]*.*
3. The appellant’s second argument also fails. The appellant relied on statements in ***APLA*** *Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322; [2005] HCA 44 and *Ward.* As the primary judge observed, however, the statements in *APLA* 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 a contention 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, is for that reason unconstitutional: J [84]. In the appeal, the appellant also referred to *APLA* at [245] (Gummow J), which was not referred to in the primary judge’s reasons. In that passage, Gummow J “conceded, without deciding” the point, and thus it does not cast doubt on the primary judge’s conclusions.
4. The appellant also relied on the following passage in *Ward*, where the majority stated at 497F (Hill and Sundberg JJ):

Were Parliament to pass a law outlawing legal representation before a Ch III court, it may well be that such a law would be held to be invalid as inconsistent with the exercise by Ch III courts of judicial power. Such representation may well be inherent in the obligation of courts to provide procedural fairness.

1. The majority in *Ward*, in the context of considering procedural fairness in the conduct of proceedings before a court, were contemplating a hypothetical law prohibiting parties from being legally represented before a Ch III court. As the Minister submitted, the view expressed in *Ward* was exceedingly tentative and might be doubted in light of *Dietrich v The Queen* (1992) 177 CLR 292; [1992] HCA 57.
2. For those reasons, Grounds 4 and 5 fail. Similarly, Ground 6, which is dependent on the appellant’s arguments in relation to Ground 4, also fails.
3. The appellant also challenged the primary judge’s finding, at J [58], that the appellant “is not relevantly affected in his acquisition of legal services by regs 14–15” and consequently his case “relies on [those regulations’] potential effect in other cases and on other people”: ANOA Ground 1. As the reasoning at J [58] shows, his Honour was recognising that the appellant “[had] the benefit of the permit” which allowed dealings with assets that would otherwise be prohibited by the Regulations for the purpose of providing legal advice, legal representation and ancillary services: J [40]. The appellant therefore relied on possible wider effects of the Regulations, and their potential effect in other cases and on other people, who did not have a permit. There is no error in his Honour’s conclusions at J [58] and Ground 1 also fails.

## Misapprehension of the Minister’s powers [ANOA Ground 7]

1. The appellant’s arguments in relation to ANOA Ground 7 have two limbs. First, the appellant submitted that the Minister exercised her powers under reg 6 “on the understanding that regs 14 and 15 operated more broadly than they in fact do”, and consequently the Minister’s decision was made under a “misconception as to what the exercise of the [reg 6] power entailed” and was therefore invalid: *Graham* at [68] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). Secondly, the appellant submitted that the primary judge erred in finding that the Minister had not misunderstood her powers when purporting to designate and declare the appellant under reg 6 on either of the broad or narrow arguments that were advanced.

### First limb – Minister’s alleged misunderstanding of her powers

1. The first limb regarding the Minister’s alleged misunderstanding of her powers was not raised before the primary judge, although the Minister did not take this point in the appeal. The appellant submitted that the Minister exercised her powers under reg 6 “on the understanding that regs 14 and 15 operated more broadly than they in fact do” and could not be read down in the way found by the primary judge. In oral submissions before us, the appellant submitted that the “natural consequence” of the Minister (mis)understanding that the provisions mean what they say was that she likely thought her decision was immune from judicial review. The appellant submitted that his Honour should have found that the Minister exercised her powers under reg 6 on that misunderstanding, with the consequence that the Minister’s decision was made under a “misconception as to what the exercise of the [reg 6] power entailed”, and the Minister’s decision was therefore invalid, relying on *Graham* at [68]–[69] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
2. In *Graham,* the plaintiff had argued that s 503A(2) of the Migration Actwas invalid under Ch III on the basis that it required a federal court to exercise judicial power in a manner which was inconsistent with the essential character of a court or with the nature of judicial power. The majority rejected that submission, holding that s 503A(2) was valid, except to the extent that s 503(A)(2)(c) operated to prevent the **Minister for Immigration** and Border Protection from being required to divulge or communicate information to the High Court when exercising jurisdiction under s 75(v) of the *Constitution* or to the Federal Court when exercising jurisdiction under ss 476(1)(c) and (2) of the Migration Act: *Graham* at [66] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). The Minister for Immigration’s decision to cancel the plaintiff’s visa was invalid, however, because they had acted on the erroneous understanding that s 503A of the Migration Act was valid in its entirety and operated to prevent them from being required to divulge or communicate information including to a court engaged in judicial review of the decision: *Graham* at [68]–[69].
3. The appellant submitted that the fact that the Minister made the impugned decision under a misapprehension was to be inferred from three circumstances. Those arguments fail for the following reasons.
4. First, the appellant pointed to the extrinsic materials to the impugned decision which, consistently with the Act, repeatedly described the effect of the impugned decision as “proscription”, which is a term used in s 10(1)(a) of the Act. The term was also used by the primary judge, at J [115], referring to the ordinary meaning of “proscription”, being “to put outside the protection of the law”.
5. As the Minister submitted, it is implausible to suggest, on the basis of a non-technical, dictionary definition of the term “proscribe”, that the Minister would have formed the view that the effect of designation was that the appellant would not be able to challenge the designation, effectively rendering the decision immune from the judicial review. Furthermore, the extrinsic materials show that the Minister was told that judicial review of her decision to impose the designation and declare the appellant would be available: Statement of Compatibility, Appeal Book, Pt C, pp 32, 34 and 36.
6. Secondly, the appellant submitted that the extrinsic materials explain the effects of the impugned decision by reference to regs 14 and 15, with no mention of the kind of exceptions discussed in the primary judge’s reading down of regs 14 and 15, from which it may be inferred that the Minister made the impugned decision under a misapprehension of her powers. As the Minister submitted, it does not assist the appellant’s case to merely highlight the absence of any references in the extrinsic materials to the exceptions mentioned in his Honour’s reading down of regs 14 and 15. To establish his case, the appellant must show an affirmative belief by the Minister that regs 14 and 15 mean what they say and could not be read down. In the absence of any instruction given to the former Minister about the matter, it would be surprising if she had an erroneous belief that regs 14 and 15 precluded constitutionally mandated review and there is no basis for such an inference to be made from the extrinsic materials.
7. Thirdly, the appellant submitted that the inference as to the Minister’s misapprehension could more readily be drawn in a context where the Minister failed to call the former Minister, Ms Payne, as a witness, despite the appellant having put the Minister on notice that he sought a finding that she made the impugned decision under a misconception as to what the exercise of the power entailed. This argument rests on the principle in *Jones v Dunkel*.
8. In [*Kuhl v Zurich Financial Services Australia Ltd*](https://jade.io/article/216440) (2011) 243 CLR 361; [2011] HCA 11, the plurality explained at [[63]](https://jade.io/article/216440/section/715) (Heydon, Crennan and Bell JJ):

The rule in [*Jones v Dunkel*](https://jade.io/article/65422) is that the unexplained failure by a party to call a witness may in appropriate circumstances support an inference that the uncalled evidence would not have assisted the party's case. That is particularly so where it is the party which is the uncalled witness. The failure to call a witness may also permit the court to draw, with greater confidence, any inference unfavourable to the party that failed to call the witness, if that uncalled witness appears to be in a position to cast light on whether the inference should be drawn…The rule in [*Jones v Dunkel*](https://jade.io/article/65422)permits an inference, not that evidence not called by a party would have been adverse to the party, but that it would not have assisted the party.

(Citations omitted)

1. The conditions for the operation of the rule in *Jones v Dunkel* are as follows: (a) the absent witness would be expected to be called by one party rather than the other; (b) the witness’ evidence would elucidate a particular matter; and (c) the witness’ absence is unexplained: *Roberts-Smith v Fairfax Media Publications Pty Limited (No 41)* [2023] FCA 555at [178] (Besanko J).
2. There is in our view no basis upon which the appellant can properly invoke *Jones v Dunkel* in aid of its contentions concerning the first limb of his case that the Minister misunderstood her powers. There is no basis for inferring that the Minister would have been expected to call the former Minister, Ms Payne, as a witness to give evidence in respect of the allegation that she had an erroneous understanding that regs 14 and 15 precluded constitutionally mandated review. That is because the appellant’s concise statement did not include any such allegation and the Minister had no other reason to expect or anticipate that it would be alleged that she acted under any such misunderstanding. Indeed, it was not even an argument that was advanced before the primary judge. It is insufficient for the appellant to rely on a generalised bare assertion that the Minister would be expected to call Ms Payne as a witness to defend her decision.
3. The appellant also raised arguments concerning *Jones v Dunkel* in the context of the second limb of his case that the Minister misunderstood her powers. Those arguments are considered later in that context.
4. The Minister submitted that, even if the Court found that Minister exercised her powers under reg 6 on the basis of a material misunderstanding of the scope of regs 14 and 15, that error was not material to the ultimate decision. Given our finding that the Minister did not err as the appellant contended, it is unnecessary to address that submission.

### Second limb – Minister’s alleged misunderstanding of her powers

1. The second limb of the appellant’s argument was that the primary judge erred in finding that the Minister had not misunderstood her powers when purporting to designate and declare the appellant under reg 6 in that she did not appreciate that she had a discretion. This was put below on the basis of the broader and narrower arguments mentioned in paragraph 53 above.

#### The broader argument

1. In our view, no error is disclosed in the primary judge’s reasoning to the conclusion that the appellant had failed to establish that the Minister made her decision under the broader argument regarding the alleged misapprehension of the powers: J [131]–[145].
2. In relation to the broader argument, the primary judge departed from the reasoning of Kenny J in a very similar context in ***Abramov*** *v Minister for Foreign Affairs (No 2)* [2023] FCA 1099 at [111]–[124]. The appellant submitted that the approach of Kenny J in *Abramov* was correct and that his Honour made four errors.
3. First, the appellant submitted that the primary judge reasoned that “[t]he only direct evidence of the former Minister’s thought process is the Explanatory Statement”: J [131]. The appellant submitted that that proposition was unfathomable, and the primary and most direct evidence of the former Minister’s thought process was contained in the Minister’s handwritten response to “Part A” of the “**Decision Record**”.
4. The documents that were before the Minister comprised the Ministerial Submission and the Decision Record, which were part of the same document, the Explanatory Statement and the Statement of Compatibility. It is artificial to treat the Decision Record, as the appellant does, as a separate and distinct document. In any event, the primary judge’s reasons refer to the Decision Record, at J [27]–[31], [35], [150]–[151], and his Honour cannot be said to have overlooked it.
5. The appellant relied upon the contents of the Decision Record to support an inference that the Minister understood her discretion to be limited to deciding whether she was satisfied that the appellant met the criteria for designation and declaration. As the reasons show, his Honour paid careful regard to the Explanatory Statement and Ministerial Submission which were before the Minister in rejecting the broader argument, that the Minister did not realise that she had a discretion at all and merely proceeded on the basis that, if satisfied that the appellant met the criteria, she was required to designate and declare him under reg 6. On the basis of the contents of the Explanatory Statement, which said that “[reg] 6 … *enables* the Minister for Foreign Affairs … to designate … and/or declare a person…” (emphasis added), his Honour held that this framing of the power that was being exercised properly reflected the discretionary element of the power: J [131]–[132]. Further, his Honour held that the briefings contained in the Ministerial Submission “were apt to convey to the Minister that, if satisfied that the [appellant] met the relevant criteria, she would have a choice to make”: J [140]. There was no error in his Honour’s conclusions.
6. Secondly, the appellant submitted that the primary judge’s reasoning was self-contradictory. His Honour reasoned that “it is necessary to consider what impression [the Recommendationon the front page of the Ministerial submission] would have conveyed to a busy decision-maker”, and that “the Minister probably did not read it with the forensic attention that counsel have brought to bear”: J [136]. However, in rejecting the appellant’s submission, his Honour is said to have used precisely the kind of close textual parsing that, on his view, the former Minister would have eschewed. This argument is similarly rejected. His Honour paid appropriate and careful regard to the relevant documents in determining whether the Minister misapprehended her powers.
7. Thirdly, the appellant submitted that the primary judge eschewed “identifying the ‘correct’ construction of the Recommendation”: J [136], yet that was one of the primary tasks that his Honour had to perform. It was a task, the appellant submitted, that Kenny J rightly performed in *Abramov*, which led her Honour to the correct conclusion, at *Abramov* [112]. His Honour did not “eschew” identifying the “correct” construction of the Recommendation in the Ministerial Submission, rather, he did not accept the appellant’s construction of it.
8. Fourthly, the appellant submitted that the primary judge refused to bring the principle in *Jones v Dunkel* to bear upon the process of inferential reasoning that was required: J [129]–[130]. We are not persuaded that the primary judge erred in declining to draw any *Jones v Dunkel* inference in respect of the second limb of his case that the Minister misunderstood her powers.
9. In our view, a *Jones v Dunkel* inference was not available because it could not be said that Ms Payne was a witness whom the Minister was expected to call to give evidence in respect of the allegation that she misunderstood that she had a discretion in respect of the exercise of her powers. It would not have been readily apparent from the appellant’s concise statement that the appellant intended to raise that particular argument. It is difficult to accept that the Minister would be expected to call Ms Payne to address an argument that had not been clearly articulated or particularised. It was also common ground that the appellant first raised the prospect of a *Jones v Dunkel* inference in correspondence which was sent only one week before the hearing was scheduled to commence. By that time, there had been a change of government and Ms Payne was no longer a member of Parliament. It is hard to see why the Minister would be expected to call Ms Payne given that short notice and equally difficult to see why, given that there had been a change in government and Ms Payne was no longer a member of Parliament, Ms Payne could be said to be in the Minister’s “camp”. It might equally be said that it was open to the appellant to call her as a witness in all the circumstances.
10. We are also not persuaded that the primary judge erred in finding, in effect, that there was no convincing basis for inferring that Ms Payne would have been able to give any evidence that would elucidate the matter in issue, being whether she proceeded on the basis that she did not have any discretion. It was open to the primary judge to infer that Ms Payne was unlikely to have had any independent recollection of her reasoning process in the appellant’s case: J [129].
11. Finally, we should note that we doubt that a *Jones v Dunkel* inference would have assisted the appellant’s case even if it was available. The rule in *Jones v Dunkel* has its limits. One is that it cannot be used to fill evidentiary gaps or convert conjecture into inference: ***Chetcuti*** *v Minister for Immigration and Border Protection* (2019) 270 FCR 335; [2019] FCAFC 112 at [91] (Murphy and Rangiah JJ). Further, the facts proved must give rise to a reasonable and definite inference, not merely to conflicting inferences of equal degree of probability so that the choice between them is a mere matter of conjecture: *Chetcuti* at [95]. As noted earlier, the rule in *Jones v Dunkel* also does not permit the drawing of an inference that the absent witness’s evidence would have been adverse to the party who would be expected to call that witness: *Kuhl* at [63] (Heydon, Crennan and Bell JJ).
12. In the circumstances of this case, any *Jones v Dunkel* inference would have been at best very weak and indecisive. Even if it could be inferred from the Minister’s failure to call Ms Payne that her evidence would not have assisted the Minister, it would equally have been open to infer that Ms Payne’s evidence would not have assisted the Minister simply because, for the reasons given by the primary judge, she was unlikely to have had any independent recollection of her reasoning process in relation to the appellant. That would leave the issue to be determined on the basis of the documents that were before the Minister, which, for the reasons given by the primary judge, did not support the inference advanced by the appellant, namely that the Minister misunderstood the nature of her powers. We doubt that that inference could more easily or readily have been drawn simply because Ms Payne was not called by the Minister in all the circumstances. The appellant’s recourse to the rule in *Jones v Dunkel* in our view effectively sought to convert conjecture into inference.
13. The appellant over-stated the significance of Kenny J’s findings in *Abramov.* The primary judge noted at J [143], that the finding he had made was the opposite of that made by Kenny J in *Abramov* at [111]–[124] “on very similar” evidence. His Honour specifically identified, at J [144], that the contents of the Ministerial Submission in the present case included a more extensive discussion of sanctions imposed by other countries and he considered that this must have directed the Minister’s mind to the pluses and minuses of listing the appellant. On the other hand, his Honour noted, Kenny J said that the more limited evidence did not provide a basis to infer that the Minister was made aware of and exercised the discretion conferred on her by reg 6: *Abramov* at [120]. Thus, for the reasons explained, his Honour came to a different conclusion to Kenny J in *Abramov* about what the language of the Recommendation in the Ministerial Submission would have conveyed to the Minister.
14. It was the primary judge’s findings made on “very similar”, but not identical, evidence that led his Honour to observe that the question of what inference should be drawn from evidence is a factual one and that findings of fact in one case do not bind a court in a subsequent case, citing *Vairy v Wyong Shire Council* (2005) 223 CLR 422; [2005] HCA 62 at [3] (Gleeson CJ and Kirby J), [30] (McHugh J). His Honour correctly identified at J [143], that it was therefore unnecessary to consider whether the findings made by Kenny J on the evidence in *Abramov* was “clearly wrong”, citing by way of contrasting example *Australian Securities and Investments Commission v* ***BHF*** *Solutions Pty Ltd* (2021) 153 ACSR 469; [2021] FCA 684 at [106] (Halley J), in turn citing *Hicks v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 757 at [75]–[76] (French J, as his Honour then was). There was no error in his Honour’s conclusions.

#### The narrower argument

1. In relation to the narrower argument (dealt with at J [146]–[157]), the appellant submitted that the primary judge’s errors were fourfold.
2. First, the primary judge confined himself to considering whether “the Recommendation *in itself is … sufficient* to sustain a finding that the Minister was led into error”: J [155] (emphasis added). The appellant submitted that the Minister also directly engaged with the Decision Record, which was phrased in the first person, and signed by the Minister, and his Honour was wrong to limit himself to the Recommendation in the Ministerial Submission. The appellant submitted that the terms of the Decision Record, were consistent only with the Minister making a binary choice between “designation and declaration” and “Do Not List”.
3. It is incorrect to suggest, as the appellant does, that the primary judge confined himself to the Recommendation because, as mentioned above, it is artificial to focus on the Recommendation as if it were separate to the Decision Record. As the primary judge’s reasons show, his Honour had regard to the Decision Record, at J [150]–[151], in addition to the Explanatory Statement, the Statement of Compatibility and the Recommendation contained in the Ministerial Submission: J [147]–[150]. In considering the narrower argument, his Honour commenced with the Explanatory Statement and the Statement of Compatibility, at J [147]–[149], which his Honour considered captured the fact that discretion was involved and that it was open to the Minister to designate or declare a person, or do both or neither. His Honour then observed, at J [150], that the Recommendation contained in the Ministerial Submissions presented somewhat more difficulty in relation to the narrower argument, and then proceeded to note, at J [150]–[153], the competing arguments of the parties and difficulties in resolving the arguments.
4. In the result, his Honour concluded that the Recommendation “in itself” was 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. His Honour reached that result having already concluded, at J [147], that the Explanatory Statement and Statement of Compatibility captured the fact that discretion was involved and that it was open to the Minister to do both or neither. In our view, there was no error in His Honour’s conclusion, at J [157], that there was no persuasive evidence of the Minister having been led into error.
5. Secondly, the appellant submitted that the primary judge was wrong to attribute overwhelming weight to isolated snippets from the Explanatory Statement and Statement of Compatibility that hinted at a non-binary choice: J [147]–[149]. For the reasons mentioned above, it is incorrect to say that his Honour focussed on “isolated snippets” from the Explanatory Statement and Statement of Compatibility.
6. Thirdly, the appellant submitted that the primary judge wrongly avoided the task of deciding what the Recommendation in fact advised the Minister as to the nature of her powers. This was the same argument that the appellant raised as part of the broader argument, in relation to the Minister’s alleged failure to identify the correct construction of the Recommendation, and is similarly rejected for the reasons given above.
7. Fourthly, the appellant submitted that the primary judge erred by refusing to apply *Jones v Dunkel* to the inferential reasoning that was required. This argument is rejected for the reasons given above.

## The 2024 Amendment Act (Notice of contention)

1. The Minister contended that if the primary judge erred in his findings on the broad and narrow arguments, his Honour’s decision should nonetheless be affirmed, and the Court should find that the 2022 Instrument was valid, by reason of item 5 of Sch 1 of the *Autonomous Sanctions Amendment Act 2024* (Cth) (**2024 Amendment Act**). It is unnecessary to decide this issue having regard to our conclusion that there was no error in the primary judge’s reasons. However, in deference to the parties’ submissions, we deal briefly with the matters raised in the notice of contention below.
2. The 2024 Amendment Act came into effect on 9 April 2024. Schedule 1 contains the provisions of the Act that were amended by the 2024 Amendment Act.
3. Item 5(1) of Sch 1, Pt 2 (Validation Provisions), provides:

**5  Pre-commencement of instruments – exercise of discretion**

(1) This item applies to an instrument (whether or not still in force), that was made or purportedly made by the Minister before commencement under regulation 6 or 6A of the *Autonomous Sanctions Regulations 2011* (as in force at the time the instrument was made or purportedly made), if the instrument would, apart from this item, be wholly or partly invalid only because the Minister did not consider whether the Minister should exercise the Minister’s discretion to:

(a)  designate a person or entity; or

(b)  declare a person; or

(c)  designate and declare a person.

1. Item 5(2) is not relevant for present purposes. However, item 5(3) of Sch 1 provides:

The instrument is taken for all purposes to be, and to have always been, valid and effective.

1. Item 5(4) of Sch 1 further provides:

Anything done, or anything purported to have been done, by a person that would have been wholly or partly invalid except for subitem (3) is taken for all purposes to be valid and to have always been valid, despite any effect that may have on the accrued rights of any person.

1. The parties agreed that item 5(3) of Sch 1 of the 2024 Amendment Act only operates to render retrospectively valid and effective an instrument that falls within the scope of item 5(1). The parties were in dispute about the scope of item 5(1) and its application in the present case.
2. The Minister submitted that if, contrary to the findings of primary judge, the 2022 Instrument was invalid because the Minister failed to consider designation and declaration independently as well as cumulatively, item 5(3) of Sch 1 to the 2024 Amendment Act provides that it must be “taken … to be … valid and effective”.
3. The appellant submitted that item 5(1) of Sch 1 to the 2024 Amendment Act is not concerned with misunderstandings of the Minister’s powers, and whether there was a discretion to be exercised in the first place, but is instead directed to curing failures to consider whether to exercise particular discretions.
4. The Explanatory Memorandum to the *Autonomous Sanctions Amendment* ***Bill*** *2024* (Cth)relevantly states:

The Autonomous Sanctions Amendment Bill 2024 (the Bill) amends the *Autonomous Sanctions Act 2011* (the Act) to explicitly confirm that individuals and/or entities can be validly sanctioned based on past conduct or status. The Bill also ensures the validity of sanctions that were made based on past conduct or status. For the avoidance of doubt, the Bill further confirms that sanctions are valid even where it is not explicitly clear that the Minister considered their discretion:

•    to sanction the person/entity at all, where they meet the criteria for imposing sanctions, or

•    to decide whether to only designate a person for targeted financial sanctions or only declare them for travel bans, or both.

[Parliament of the Commonwealth of Australia, House of Representatives, Explanatory Memorandum, Bill*,* p 1–2]

1. The extrinsic materials noted that the Bill appeared to respond to the decisions in *Abramov* and *Deripaska*: Bills Digest No 51, 2023-2024*.*
2. Item 5 of Sch 1 confirms the validity of instruments in relation to which the Minister “did not consider” whether they should exercise their discretion to “designate a person or entity” or “declare a person”, or “designate and declare a person”. It operates if, apart from item 5, the instrument would be wholly or partly invalid “only” because the Minister did not consider whether they should exercise their discretion. Item 5 is not constrained by any ground or circumstance in which the Minister “did not consider” whether they should exercise their discretion. While the wording of item 5 is somewhat awkward, in our view it is nevertheless broad enough to cover the alternate arguments made by the appellant regarding the Minister’s alleged misapprehension of her powers, which can both fairly be characterised as arguments to the effect that “the Minister did not consider whether the Minister should exercise the Minister’s discretion”. This construction of item 5, supported by its context, best achieves the object of the 2024 Amendment Act, which is to validate certain instruments which would otherwise be wholly or partly invalid only because the Minister did not consider whether they should exercise their discretion. The word “only” excludes from the operation of item 5 instruments that would be wholly or partly invalid on some ground other than one concerning the Minister’s failure to consider whether to exercise their discretion.
3. For those reasons, item 5 of Sch 1 of the 2024 Amendment Act would apply to the 2022 Instrument, if it were found to be invalid because the Minister did not appreciate that she had a discretion on either of the narrower or broader arguments regarding the Minister’s alleged misapprehension.

## Costs

1. The appellant contends that, irrespective of whether the primary judge’s decision was otherwise correct, his Honour erred in ordering the appellant to pay the Minister’s costs. The appellant contends that the exercise of discretion miscarried as it involved an order that the appellant do something that is forbidden by reg 15 and is not allowed by the Permit dated 7 November 2022 (which was in force at the time of the primary judge’s orders).
2. Section 43 of the ***Federal Court*** *of Australia* ***Act*** *1976* (Cth) gives this Court a broad, discretionary power to award costs. The making of a costs order is separate to compliance and enforcement of the costs order. The primary judge’s order that the appellant pay the Minister’s costs did not place the appellant in contravention of the Act or the Regulations. The appellant was not, however, able to comply with the costs order under the terms of the Permit dated 7 November 2022 and compliance was further prohibited by reg 15. The prohibition on compliance with a costs order does not, however, curtail the Court’s power under s 43 of the Federal Court Act to make a costs order.
3. A costs order merely establishes a liability for costs still to be quantified. It is not known when that may occur and whether the prohibition caused by reg 15 will still be in place. It may well be that the appellant is not prevented from complying with the costs order at some time in the reasonable or foreseeable future, and there is accordingly nothing futile in making such a costs order. Indeed, that the appellant seeks to set the costs order aside suggests that it is not futile. In our view, there was no miscarriage of the discretion to award costs in this case.

# CONCLUSION

1. For those reasons, we would dismiss the appeal. There is no apparent reason why costs should not follow the event and the Minister should have their costs of and incidental to the appeal.

|  |
| --- |
| I certify that the preceding one hundred and fifty-six (156) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Wigney, Stewart and Neskovcin. |

Associate:

Dated: 27 March 2025