

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 5/05/2021 12:46:35 PM AEST and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged:	Originating Application - Form 15 - Rule 8.01(1)
File Number:	NSD388/2021
File Title:	GARY NEWMAN v MINISTER FOR HEALTH AND AGED CARE
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised



Dated: 5/05/2021 1:48:05 PM AEST

A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Originating application

No. _____ of 20____

Federal Court of Australia
District Registry: New South Wales
Division: General

Gary Newman

Applicant

Minister for Health and Aged Care

Respondent

To the Respondent

The Applicant applies for the relief set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing: [Registry will insert time and date]

Place: [address of Court]

The Court ordered that the time for serving this application be abridged to [Registry will insert date, if applicable].

Date:

Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of (name & role of party) Gary Newman, Applicant
Prepared by (name of person/lawyer) Michael Bradley
Law firm (if applicable) Marque Lawyers
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Address for service Level 4, 343 George Street Sydney NSW 2000
(include state and postcode)



Details of claim

On the grounds set out below and the facts set out in the accompanying affidavit, the Applicant applies for the following relief under section 39B(1A) of the *Judiciary Act 1903* (Cth), or further or alternatively, under section 21 of the *Federal Court of Australia Act 1976* (Cth):

1. A declaration that the whole of, or *alternatively* cl 6 of, the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021* (Cth) (**Determination**), purportedly made pursuant to section 477 of the *Biosecurity Act 2015* (Cth) (**Act**) insofar as it applies to the Applicant, is invalid and of no effect, by reason that:

- (a) the Respondent failed to have regard to or to consider properly the statutory preconditions to the exercise of the power as set out in section 477(4) of the Act; or

Particulars

1. In order to be “*satisfied*” that it was necessary for the Respondent to determine a requirement to prevent or control the entry, emergence, establishment, or spread of a declaration listed human disease under section 447(1), the Respondent was required to be “*satisfied*” of the matters set out in section 477(4) of the Act.
2. The Respondent failed to consider whether the Determination was appropriate and adapted to achieve the purpose for which it is to be determined as required by section 477(4)(a) by failing to take into account the public health concerns arising from the Determination, including the ability of Commonwealth or State governments to manage the risk of infection within prison populations where persons potentially infected by Covid-19 are detained or taken into remand on suspicion of committing an offence pursuant to section 479 of the Act for failure to comply with the Determination.
3. The failure in (2) above is to be inferred from the fact that the Respondent received advice from the Chief Medical Officer by letter dated 30 April 2021, and that advice contains no advice or consideration of that risk.
4. The Respondent failed to consider whether the Determination was no more restrictive or intrusive than is required in the circumstances, as required by section 477(4)(c) by failing to take into account whether



there were less restrictive and onerous means to manage the public health risk, other than prohibiting entry into Australia by Australian citizens who had been in India in the preceding 14 days, and imposing by operation of section 479 of the Act, criminal penalties in respect of any non-compliance with the Determination.

5. The failure in (4) above is to be inferred from the fact that the Respondent received advice from the Chief Medical Officer by letter dated 30 April 2021, and that advice
 - i. notes that *“such a determination, if made, would be the first time that such a determination has been used to prevent Australian citizens and permanent residents entering Australia”* (paragraph 1);
 - ii. does not advise on alternative means;
 - iii. does not advise on the appropriateness of imposing a criminal penalty; and
 - iv. notwithstanding (ii) and (iii) above, states that the Chief Medical Officer was *“satisfied that a determination made under section 477 of the Act to make it an offence for a person to enter Australia if they have been in India in the preceding 14 days is necessary to prevent and control the entry into, or the emergence, establishment or spread of COVID 19 in Australia”* (final paragraph) being the same matters the Respondent is required to be satisfied of before making the Determination.
6. Further particulars will be provided following production by the Respondent.

- (b) the Determination otherwise exceeded the power conferred by the Act in that:
 - (i) it wholly prohibits entry into Australia, rather than imposing requirements upon re-entry as is authorised by section 477(3)(a) of the Act;
 - (ii) insofar as it purports to *“restrict or prevent the movement of persons... in or between specified places”* as authorised by section 477(3)(b) of the Act, the Determination is purporting to operate extraterritorially by restricting international travel between India and Australia, in circumstances where Chapter 8 of the Act does not have any extraterritorial effect.



2. A declaration that the whole of the Determination, or alternatively such parts of sections 477 and 479 of the Act, insofar as they apply to the Applicant, are invalid and of no effect by reason that they offend the principle of legality insofar as they purport to abrogate a fundamental common law right of citizens to re-enter their country of citizenship in circumstances where:
- (a) the Act does not elsewhere, whether by clear words or necessary implication, purport to abrogate such right or to grant the Respondent the power to abrogate such right;
 - (b) section 479 of the Act has the effect of imposing a criminal sanction on Australian citizens for the act of seeking to enter Australia, where:
 - (i) the offence has been created by means of a legislative instrument made under section 477;
 - (ii) section 477(2) of the Act disapplies section 42 of the *Legislation Act 2003* (Cth) such that the Determination is not subject to parliamentary oversight by means of a notice of motion to disallow the legislative instrument.
3. *In the alternative*, a declaration that the whole of, or *alternatively* cl 6 of, the Determination, insofar as it applies to the Applicant, is invalid and of no effect, by reason that it was not within the scope of what the Parliament intended when enacting the Act, nor reasonably proportionate or appropriate and adapted to achieving legitimate legislative ends in circumstances where:
- (a) alternative, less restrictive and intrusive measures were available to the Respondent to manage the public health risk to which the Determination is purportedly addressed;
 - (b) no consideration was given by the Respondent to domestic public health concerns arising from the Determination, including the ability of Commonwealth or State governments to manage the risk of infection within prison populations where persons potentially infected by Covid-19 are detained or taken into remand on suspicion of committing an offence pursuant to section 479 of the Act for failure to comply with the Determination;
 - (c) the Determination has the effect of imposing a criminal sanction on Australian citizens seeking to re-enter Australia; or
 - (d) by reason of section 477(2) of the Act, the Determination was not subject to parliamentary oversight or disallowance pursuant to section 42 of the *Legislation Act 2003* (Cth).



4. *In the alternative*, a declaration that section 477 of the Act, and alternatively the Determination, insofar as either applies to the Applicant, is invalid and of no effect, by reason that:
- (a) the section or the Determination impermissibly burden the implied freedom of citizens to enter Australia granted to all citizens under the Commonwealth Constitution;
 - (b) the section or the Determination exceed the legislative power granted to the Commonwealth Parliament under section 51 of the Commonwealth Constitution in that no head of power, nor any implied source of power, is capable of sustaining section 477 of the Act or the Determination.

Claim for interlocutory relief

The Applicant also claims interlocutory relief.

- 5. An order that the time for service of the originating application filed 5 May 2021 and all affidavits in support thereof be abridged to 6.00pm on 5 May 2021.
- 6. A direction, pursuant to r 5.04 of the *Federal Court Rules 2011* (Cth), that the proceedings be expedited.
- 7. An order that the Respondent produce to the Applicant on or before 4.00pm 6 May 2021, as if under a notice to produce served in accordance with r 30.28 of the *Federal Court Rules 2011* (Cth), all material and guidelines (subject to any claim for legal professional privilege) relied upon by the Respondent in making the Determination and reaching the state of satisfaction as required by section 477(4) of the Act.
- 8. An order, pursuant to r 30.01 of the *Federal Court Rules 2011* (Cth), that prayers 1 and 2 of this Originating Application be heard separately from the other prayers for relief, and be listed for final hearing on a date and time to be fixed by the Duty Judge and no later than 13 May 2021.

Applicant's address

The Applicant's address for service is:

Place: Level 4, 343 George Street, Sydney NSW 2000

Email: michaelb@marquelawyers.com.au; kierap@marquelawyers.com.au



The Applicant's address is Apartment GJ, Orchard Green, Krishna Reddy Layout Domlur, Bangaluru Karnataka 560071.

Service on the Respondent

It is intended to serve this application on all Respondents.

Date: 5 May 2021

A handwritten signature in black ink, appearing to read "M. Bradley".

Signed by Michael David Bradley
Lawyer for the Applicant

This pleading was prepared by C S Ward SC, P F Santucci, and K A Morris.