

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 5/05/2021 2:38:47 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

### Details of Filing

Document Lodged: Affidavit - Form 59 - Rule 29.02(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



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

Dated: 5/05/2021 2:38:55 PM AEST

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 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.



Form 59  
Rule 29.02(1)

### Affidavit

No. \_\_\_\_\_ of 2021

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

**Gary Newman**

Applicant

**Minister for Health and Aged Care**

Respondent

Affidavit of: **Michael David Bradley**  
Address: Level 4, 343 George Street Sydney NSW  
Occupation: Solicitor  
Date: 5 May 2021

#### Contents

Document number	Details	Paragraph	Page
1	Affidavit of Michael David Bradley, dated 5 May 2021		
2	Annexure "MB-1", being a copy of the Applicant's Australian passport.		
3	Annexure "MB-2", being a copy of the Applicant's United Kingdom passport.		
4	Annexure "MB-3", being a copy of the Applicant's visa issued by the Republic of India.		
5	Annexure "MB-4", being a copy of the Applicant's airline ticket stub from his flight from Melbourne to India via Singapore on 6 March 2020.		

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  
 Tel (02) 8216 3000 Fax (02) 8216 3000  
 Email michaelb@marquelawyers.com.au; kierap@marquelawyers.com.au;  
laureng@marquelawyers.com.au  
**Address for service** Level 4, 343 George Street, Sydney NSW 2000  
 (include state and postcode)

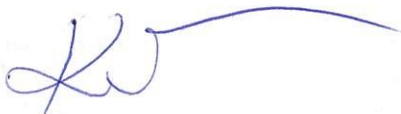
Document number	Details	Paragraph	Page
6	Annexure "MB-5" being a copy of the letter from the CMO to the Minister for Health and Ageing dated 30 April 2021.		
7	Annexure "MB-6" being a copy of the Circular of the Office of the Director General of Civil Aviation, Government of India dated 30 April 2021.		
8	Annexure "MB-7" being a copy of the Circular of the Office of the Director General of Civil Aviation, Government of India dated 26 April 2020.		

I Michael Bradley of Level 4, 343 George Street NSW, say on information and belief:

1. I am the solicitor for the Applicant in these proceedings.
2. I am authorised to make this affidavit on behalf of the Applicant in relation to his Originating Application dated 5 May 2021.
3. I am informed by the Applicant of each of the matters in paragraphs 4 to 22 below and believe them to be true.

**Citizenship and residency**

4. The Applicant is an Australian citizen. He holds a passport from the Commonwealth of Australia, which passport [REDACTED] A copy of his Australian passport [REDACTED] is annexed to this Affidavit and marked "MB-1".
5. The Applicant was born in Melbourne, Australia. His brother, brother's family, ex-wife, ex-partner, step son, paternal relations all reside in Australia as well as his former colleagues and many of his friends.
6. The Applicant is also a citizen of the United Kingdom. He holds a passport from the United Kingdom, which passport [REDACTED] A copy of his United Kingdom passport [REDACTED] is annexed to this Affidavit and marked "MB-2".
7. The Applicant has two sons who live in the United Kingdom and voluntarily acquired his citizenship of the United Kingdom through his maternal ancestry in order to have the ability to visit his sons and their children without visa restrictions. The Applicant has not visited the United Kingdom in over two years and identifies as primarily an Australian citizen.
8. The Applicant holds a visa granted by the Republic of India. A copy of the Applicant's visa is annexed to this Affidavit and marked "MB-3".




**Arrival in India and attempts to depart**

9. In early March 2020 the Applicant flew to India from Melbourne via Singapore, disembarking in Kempegowda International Airport Bengaluru on 6 March 2020. A copy of his airline ticket stub showing his name and date and port of disembarkation is annexed to this Affidavit and marked "MB-4".
10. The purpose of the Applicant's travel to India was to visit friends.
11. At the time the Applicant travelled to India he intended to remain within the Republic of India for the permitted duration of his visa, being 180 days.
12. The Applicant has remained within the Republic of India since his arrival on 6 March 2020 to the present day.
13. The Applicant did not attempt to book a return flight to Australia prior to November 2020, because he understood that airlines were not operating regular scheduled passenger flights from India to Australia.
14. In or around November 2020, the Applicant booked an Etihad flight to Melbourne via Abu Dhabi. At the time of booking, the Applicant understood that airlines had recommenced operating scheduled passenger flights from India.
15. Approximately one week after the Applicant had booked his flight to Melbourne, Etihad cancelled the Applicant's flight. The Applicant currently holds \$1,200 in credit with Etihad as a result of the cancellation of his flight.

**Fear of harm**

16. The Applicant presently resides in the city of Bangaluru in the state of Karnataka.
17. The Applicant is 73 years old and accordingly is at a high risk of suffering severe illness, or death, if he contracts COVID-19.
18. On 3 May 2021, the city of Bangaluru recorded approximately 22,000 new cases of COVID-19.
19. The Applicant has not left his residence in the past 12 days as he is fearful of contracting COVID-19 and suffering severe illness. He would be willing to leave his residence for the purpose of travelling out of India.
20. The Applicant would like to fly home to Australia.
21. On 27 April 2021 the Prime Minister of Australia announced a ban on direct flights from India to Australia. After that announcement, the Applicant considered travelling to Pakistan in order to fly from Pakistan indirectly to Australia.



22. The Applicant is aware that the Determination (as defined in the Originating Application) purports to make it an offence for him to travel from any place, including Pakistan, to Australia, if he has been within the Republic of India within 14 days before the day any flight from that place is due to commence.

**Other matters**

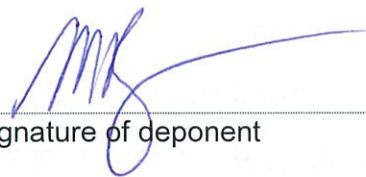
23. I have obtained a letter from Professor Paul Kelly, Chief Medical Officer, to Minister Hunt dated 30 April 2021. A copy of that letter is annexed to this Affidavit and marked "MB-5".

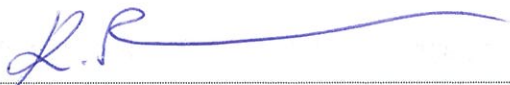
24. I understand that on 30 April 2021 the Office of the Director General of Civil Aviation, Government of India, issued circular whereby it suspended all scheduled international commercial passenger services to and from India, until 11:59pm on 31 May 2021. A copy of the Circular dated 30 April 2021 is annexed and marked "MB-6" and a copy of the earlier circular to which it refers, dated 26 June 2020, is annexed and marked "MB-7".

25. On 5 May 2021 at 12:24 pm Kiera Peacock of Marque Lawyers provided a copy of the unfiled Originating Application dated 5 May 2021 to the Australian Government Solicitor on behalf of the Minister at its address for service, [processservice@ags.gov.au](mailto:processservice@ags.gov.au). In that email Ms Peacock advised that we would be filing the Originating Application today and approaching the Duty Judge of the Federal Court of Australia at 3pm on 5 May 2021 to seek the interlocutory relief in the Originating Application.

Affirmed by the deponent  
at Sydney  
in New South Wales  
on 5 May 2021  
Before me:

)  
)  
)  
)  
)

  
Signature of deponent

  
Signature of witness

Kiera Lee Peacock  
Solicitor  
Level 4, 343 George Street, Sydney NSW.

Rule 29.02(8)

**Certificate identifying annexure**

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

No.        of 2021

**Gary Newman**

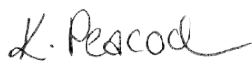
Applicant

**Minister for Health and Aged Care**

Respondent

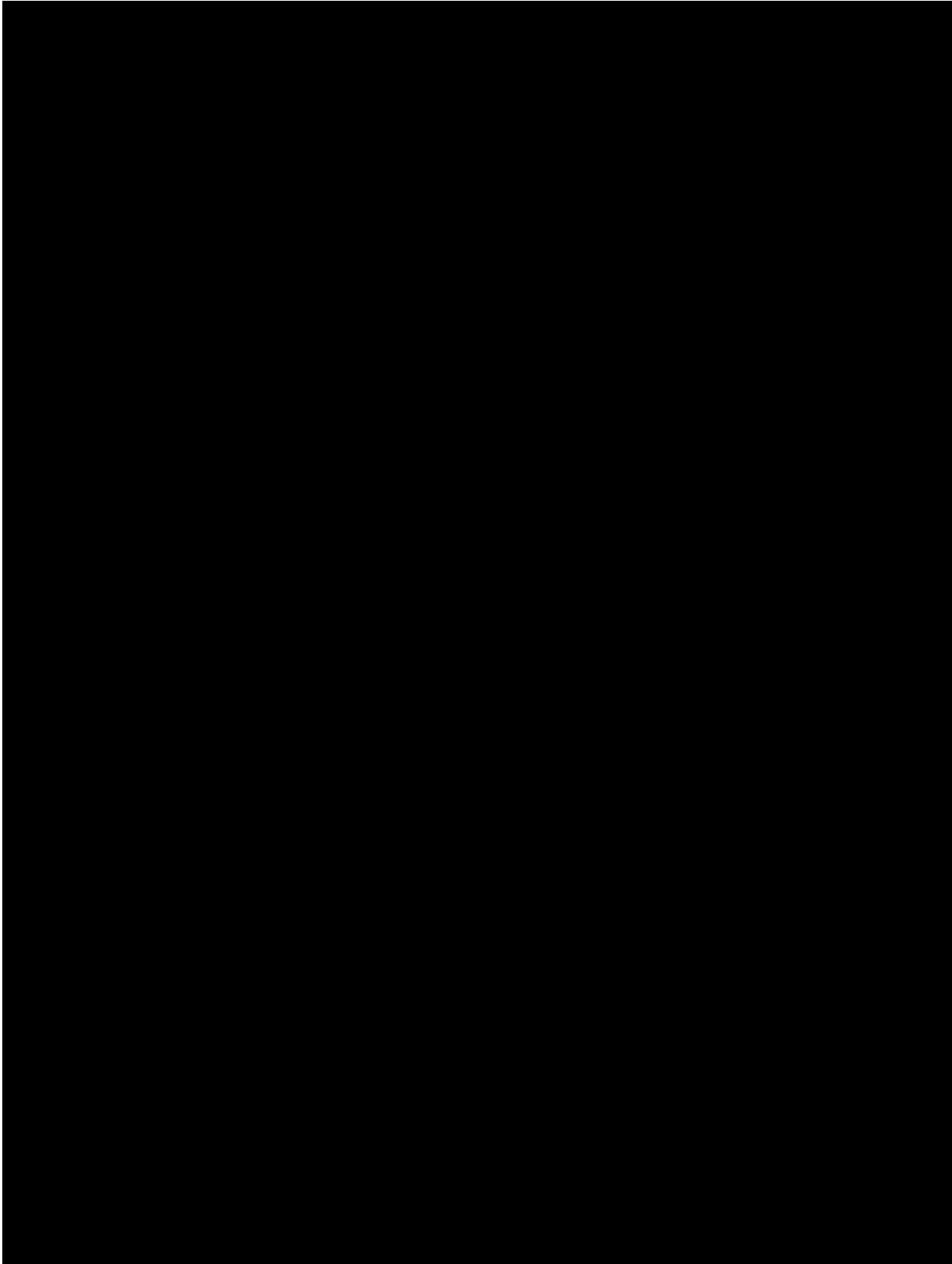
**Annexure "MB-1"**

This is the annexure marked "MB-1" to the affidavit of Michael David Bradley sworn before me on 5 May 2021



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Signature of Witness



Rule 29.02(8)

**Certificate identifying annexure**

Federal Court of Australia  
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**Gary Newman**

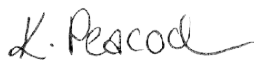
Applicant

**Minister for Health and Aged Care**

Respondent

**Annexure "MB-2"**

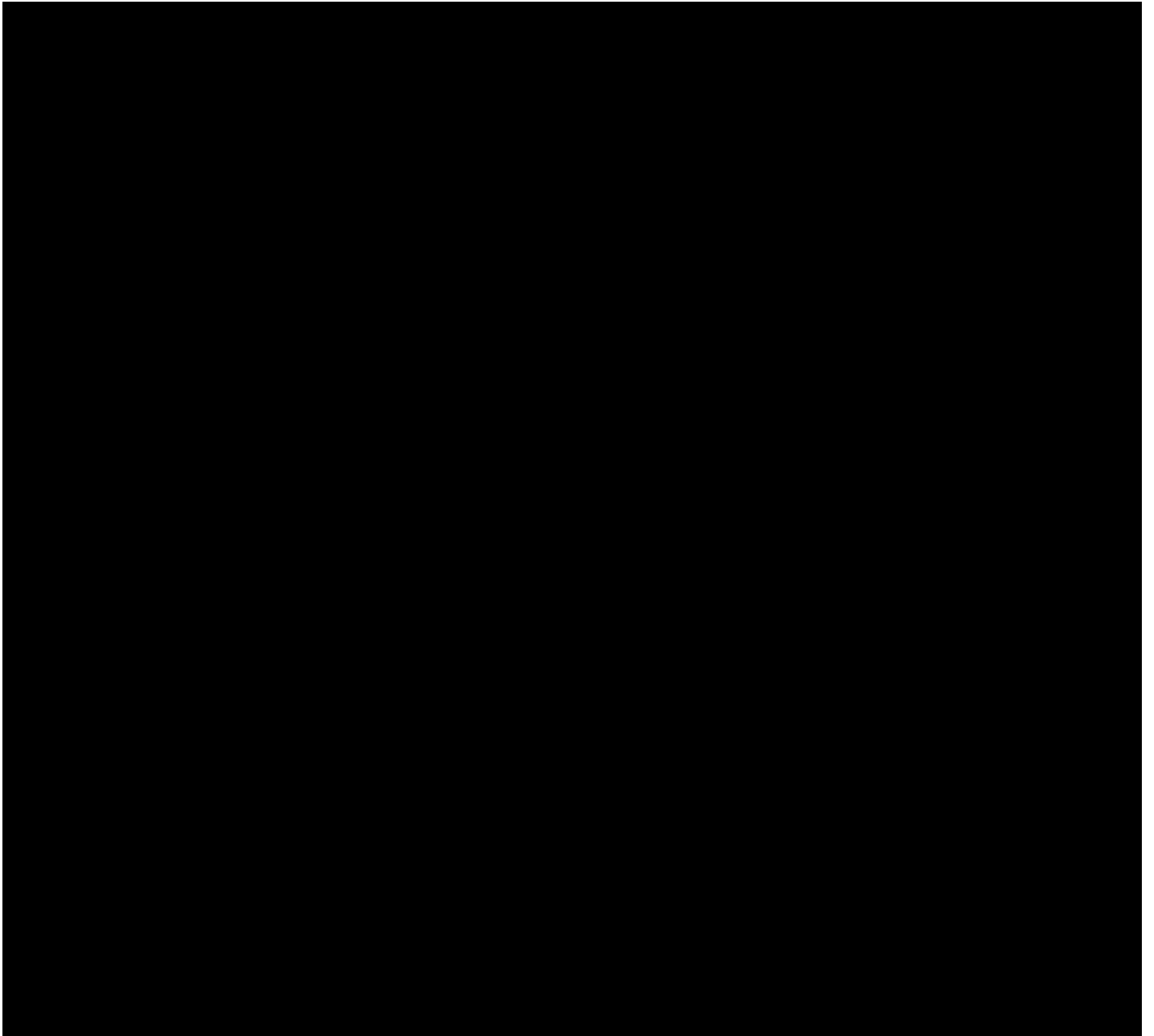
This is the annexure marked "MB-2" to the affidavit of Michael David Bradley sworn before me on 5 May 2021



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**Signature of Witness**





Rule 29.02(8)

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Federal Court of Australia  
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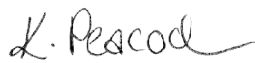
Applicant

**Minister for Health and Aged Care**

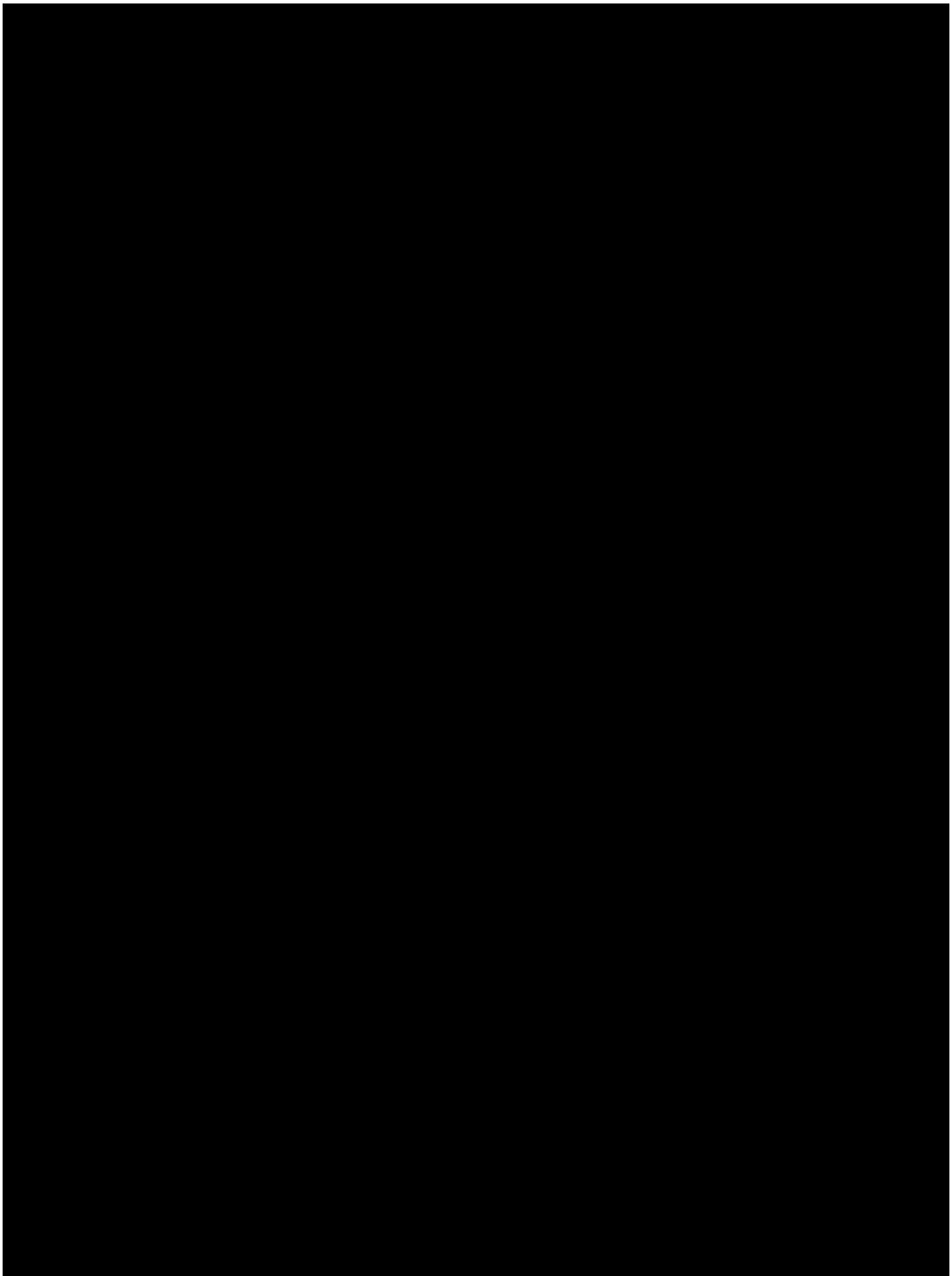
Respondent

**Annexure “MB-3”**

This is the annexure marked “MB-3” to the affidavit of Michael David Bradley sworn before me on 5 May 2021



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**Signature of Witness**



Rule 29.02(8)

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Federal Court of Australia  
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**Gary Newman**

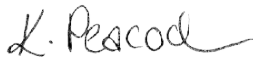
Applicant

**Minister for Health and Aged Care**

Respondent

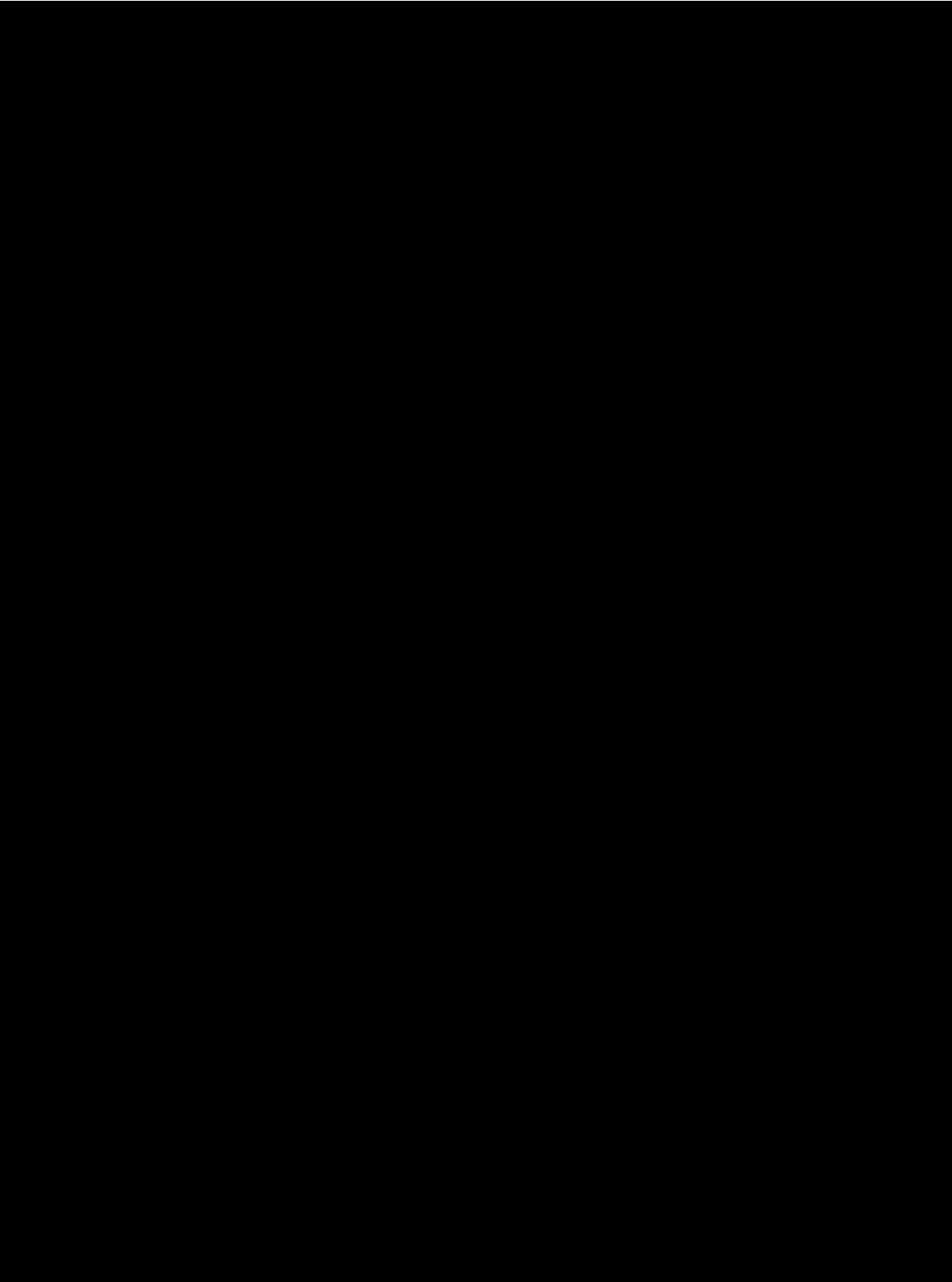
**Annexure “MB-4”**

This is the annexure marked “MB-4” to the affidavit of Michael David Bradley sworn before me on 5 May 2021



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**Signature of Witness**



Rule 29.02(8)

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Federal Court of Australia  
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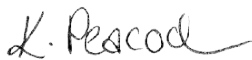
Applicant

**Minister for Health and Aged Care**

Respondent

**Annexure "MB-5"**

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Signature of Witness



**Australian Government**

**Department of Health**

**Chief Medical Officer**

The Hon Greg Hunt MP  
Minister for Health and Aged Care  
PO Box 6022  
Parliament House  
CANBERRA ACT 2600

Dear Minister Hunt

I am writing to provide advice to assist your considerations to make a determination under section 477 of the *Biosecurity Act 2015* (the Act) to make it an offence for a person, including Australian citizens and permanent residents, to enter Australia if they have been in India in the preceding 14 days. I note 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.

Background

On 27 April 2021, the Prime Minister announced new measures in response to the worsening COVID-19 situation in India. The new measures include a temporary pause on all direct flights from India to Australia, which include Australian Government facilitated repatriation flights, until 15 May 2021.

I note that although Australia has already implemented a ban on direct flights from India, flights through transit hubs continue to provide an avenue for individuals who have recently been in India to enter Australia.

It is important in any measures we implement that we balance the burden on our quarantine and health systems and the protection of our community with the need to help Australians to get home, including those currently residing in high risk countries.

*Biosecurity Act 2015*

On 18 March 2020, the Governor-General declared a human biosecurity emergency in relation to the global outbreak of the listed human disease 'human coronavirus with pandemic potential' (COVID-19) under section 475 of the Act.

This declaration enlivens the power for you to determine emergency requirements and directions under the Act that are necessary to prevent or control the entry into, or the

emergence, establishment or spread of COVID-19 in Australian territory or part of Australian territory. The declaration was recently extended by the Governor General until 17 June 2021.

During a human biosecurity emergency period, in accordance with section 477 of the Act, you, as the Health Minister, may determine requirements that you consider are necessary to prevent or control the entry into, or the emergence, establishment or spread of COVID-19 in Australian territory or part of Australian territory.

The Act provides that before determining emergency requirements under subsection 477(1), you must be satisfied that any requirements are necessary to prevent or control the entry into, or the emergence, establishment or spread of COVID-19 in Australian territory or part of Australian territory. The Act also requires that you are satisfied that the requirements are:

- likely to be effective in, or contribute to, achieving its purpose;
- appropriate and adapted to the purpose;
- no more restrictive or intrusive than required in the circumstances;
- are applied in a manner that is no more restrictive or intrusive than required in the circumstances; and
- in place for only as long as necessary.

The penalty for breaching a section 477 determination is 5 years jail or 300 penalty units (\$66,600) or both.

#### Medical advice to support a s477 Determination

COVID-19 continues to represent a severe and immediate threat to human health in Australia. COVID-19 has the ability to cause high levels of morbidity and mortality, and disrupt the Australian community socially and economically. The number of new cases of COVID-19 recorded globally continues to rise at an alarming rate. There are over 149.1 million cases of COVID-19, with over 3.1 million deaths recorded (an approximate crude case fatality rate of 2.1 per cent).

India has been identified as a high-risk country due to the significant increase in COVID-19 positive case numbers in returned travellers from India. India has recorded over 18.3 million positive COVID-19 cases, and over 204,000 deaths, with daily case numbers reached global record levels this week (379,257 new infections and 3,645 deaths on 29 April 2021).

Following the introduction of pre-departure testing and changes to international arrival caps in late January 2021, overseas acquired cases among air arrivals fell from approximately 1.0% to approximately 0.5% in February 2021. This proportion has since increased, with approximately 1.8% of recent air arrivals being identified as cases (19-25 April 2021). Since late March 2021, there has been a sharp increase in the number and proportion of overseas acquired cases that were reported as acquiring their infection in India; over 50% of overseas acquired cases since mid-April 2021 were acquired in India.

There are a range of emerging risks associated with international arrivals, including particularly those who have been in India, arising in the following circumstances:

- The continuing rapid increase and likely under-reporting of the numbers of



COVID-19 cases in India through community transmission.

- Lack of verification mechanisms for negative COVID-19 test results obtained internationally.
- High rates of COVID-19 detected from arrivals from India, with a high proportion of overseas-acquired cases detected in Australia having acquired their infection in India.
- A high proportion of variants of concern and variants of interest amongst those cases and
- Community transmission within hotel quarantine, as seen recently in New South Wales and Western Australia.

Each new case identified in quarantine increases the risk of leakage into the Australian community through transmission to quarantine workers or other quarantined returnees and subsequently into the Australian community more broadly. This quarantine 'leakage' presents a significant risk to the Australian community. Of particular concern, New South Wales and Western Australia have recently seen COVID-19 transmitted in hotel quarantine facilities, as two sets of guests, in rooms opposite each other, had the same sequence of virus, despite arriving from different countries at different times.

Australia's quarantine and health resources needed to prevent and control COVID-19 introduced into Australia from international arrivals are limited. Due to the high proportion of positive cases arising from arrivals from India, I consider a pause until 15 May 2021 on arrivals from India to be an effective and proportionate measure to maintain the integrity of Australia's quarantine system. This measure will likely allow the system to recover capacity, which is a critical intervention in preventing and managing the spread of COVID-19 in Australia.

In line with the Prime Minister's announcement of a temporary pause on all direct flights from India to Australia until at least 15 May 2021, the determination, if made, will be in effect for a limited duration (15 May 2021). Given the proposed limited duration of the determination, I am satisfied this meets the criteria that such an emergency requirement is in place for only as long as necessary.

I wish to note the potential consequences for Australian citizens and permanent residents as a result of this pause on flights and entry into Australia. These include the risk of serious illness without access to health care, the potential for Australians to be stranded in a transit country, and in a worst-case scenario, deaths. I consider that these serious implications can be mitigated through having the restriction only temporarily in place, ie a pause, and by ensuring there are categories of exemptions.

I recommend the determination allows exemptions to the pause on travel for the following classes for persons:

- a member of the crew of an aircraft or vessel;
- a worker associated with the safety or maintenance of an aircraft or vessel;
- a person engaged in the day-to-day conduct of inbound and outbound freight;
- a person (including a member of the Australian Defence Force) who is travelling on official government business on an Australian official or diplomatic passport;

- a person who is an immediate family member of a person mentioned in paragraph above
- a diplomat accredited to Australia;
- a person:
  - who is an immediate family member of a diplomat accredited to Australia; and
  - who holds a subclass 995 (Diplomatic (Temporary)) visa;
- a person:
  - who is an immediate family member of a diplomat accredited to Australia; and
  - who holds a subclass of 995 (Diplomatic (Temporary)) visa;
- a member of an Australian Medical Assistance Team (AUSMAT).

The recommended exemptions above will ensure the determination is appropriate and adapted to the purpose, no more restrictive or intrusive than required in the circumstances, and is applied in a manner that is no more restrictive or intrusive than required in the circumstances.

I am 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. I recommend that you, in your capacity as Minister for Health and Aged Care, agree to make this determination.

Yours sincerely



Professor Paul Kelly  
Chief Medical Officer  
30 April 2021

Rule 29.02(8)

**Certificate identifying annexure**

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

No.        of 2021

**Gary Newman**

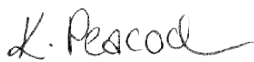
Applicant

**Minister for Health and Aged Care**

Respondent

**Annexure "MB-6"**

This is the annexure marked "MB-6" to the affidavit of Michael David Bradley sworn before me on 5 May 2021



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Signature of Witness

GOVERNMENT OF INDIA  
OFFICE OF THE DIRECTOR GENERAL OF CIVIL AVIATION  
OPPOSITE SAFDARJUNG AIRPORT, NEW DELHI-110003

.....

No. 4/1/2020-IR  
Dated: 30-04-2021

**CIRCULAR**

**Sub: Travel and Visa restrictions related to COVID-19**

In partial modification of circular dated 26-06-2020, the competent authority has further extended the validity of circular issued on the subject cited above regarding Scheduled International commercial passenger services to/from India till 2359 hrs IST of 31<sup>st</sup> May, 2021. This restriction shall not apply to international all-cargo operations and flights specifically approved by DGCA.

2. However, International Scheduled flights may be allowed on selected routes by the competent authority on case to case basis.
3. Please acknowledge the receipt and ensure strict compliance.

  
(Sunil Kumar)  
Joint Director General

To

1. All Foreign and Domestic Scheduled Airlines operating flights to/from India;
2. The Chairman, Airport Authority of India;
3. All Airport Operators in India;
4. The Commissioner, Bureau of Immigration.

Rule 29.02(8)

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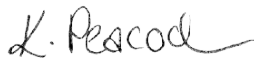
Applicant

**Minister for Health and Aged Care**

Respondent

**Annexure "MB-7"**

This is the annexure marked "MB-7" to the affidavit of Michael David Bradley sworn before me on 5 May 2021



.....  
Signature of Witness

GOVERNMENT OF INDIA  
OFFICE OF THE DIRECTOR GENERAL OF CIVIL AVIATION  
OPPOSITE SAFDARJUNG AIRPORT, NEW DELHI-110003

.....

No. 4/1/2020-IR  
Dated: 26-06-2020

**CIRCULAR**

**Sub: Travel and Visa restrictions related to COVID-19**

In continuation of the circular dated 30.05.2020 on the subject cited above, the competent authority has decided that Scheduled International commercial passenger services to/from India shall remain suspended till 2359 hrs IST of 15<sup>th</sup> July, 2020. This restriction shall not apply to international all-cargo operations and flights specifically approved by DGCA.

2. However, International Scheduled flights may be allowed on selected routes by the competent authority on case to case basis.
3. Please acknowledge the receipt and ensure strict compliance.

  
(Sunil Kumar)

Deputy Director General

To

1. All Foreign and Domestic Scheduled Airlines operating flights to/from India;
2. The Chairman, Airport Authority of India;
3. All Airport Operators in India;
4. The Commissioner, Bureau of Immigration.