



Form 59
Rule 29.02(1)

Affidavit

No. 388 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: 7 May 2021

Contents

Document number	Details	Paragraph	Page
1	Affidavit of Michael David Bradley in support of the Applicant's Originating Application dated 5 May 2021, affirmed on 7 May 2021.		
2	Annexure "MB-8", being copy of the Bundle of documents before the Minister for Health and Aged Care when making the <i>Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements— High Risk Country Travel Pause) Determination 2021</i>		
3	Annexure "MB-9", being copy of letter from Ms Kiera Peacock to Mr Jonathon Hutton dated 6 May 2021.		
4	Annexure "MB-10", being a signed copy of the Ministerial Submission dated 30 April 2021.		

I Michael David Bradley of Level 4, 343 George Street NSW affirm:

1. I am the solicitor for the Applicant in these proceedings.

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;
Address for service Level 4, 343 George Street,
(include state and postcode) Sydney NSW 2000

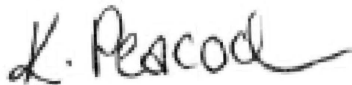
[Version 3 form approved 02/05/2019]

K. Peacock

MRB

2. I am authorised to make this affidavit on the Applicant's behalf in relation to his Originating Application dated 5 May 2021.
3. Except where I otherwise indicate, I make this affidavit based on my own knowledge and belief.
4. I have previously affirmed one other affidavit in these proceedings.
5. At 4:22pm on 6 May 2021, the solicitor for the Respondent, Mr Jonathon Hutton, provided me with a bundle of documents labelled 'Bundle of documents before the Minister for Health and Aged Care when making the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements— High Risk Country Travel Pause) Determination 2021*' (**Bundle**). A copy of the Bundle is annexed to this affidavit and marked "MB-8".
6. At 6:34pm on 6 May 2021, Ms Kiera Peacock of Marque Lawyers emailed a letter to Mr Hutton. A copy of this letter is annexed to this affidavit and marked "MB-9".
7. On 7 May 2021, Mr Hutton sent an email to Ms Peacock, attaching a signed copy of the Ministerial Submission dated 30 April 2021. A copy of Mr Hutton's email and attachment are annexed to this affidavit and marked "MB-10".
8. Due to the present working conditions resulting from COVID-19, this affidavit has been ~~signed~~ ~~and~~ witnessed electronically.

Affirmed by the deponent
at Sydney
in New South Wales
on 7 May 2021
Before me:



Signature of witness
Kiera Peacock
Solicitor

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)
)
)


Signature of deponent

Rule 29.02(8)

Certificate identifying annexure

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

No. 388 of 2021

Gary Newman

Applicant

Minister for Health and Aged Care

Respondent

Annexure “MB-8”

This is the annexure marked “Annexure MB-8” to the affidavit of Michael David Bradley sworn before me on 7 May 2021



.....
Signature of Witness

GARY NEWMAN

Applicant

MINISTER FOR HEALTH AND AGED CARE

Respondent

**BUNDLE OF DOCUMENTS BEFORE THE MINISTER FOR HEALTH AND AGED CARE
WHEN MAKING THE BIOSECURITY (HUMAN BIOSECURITY EMERGENCY) (HUMAN
CORONAVIRUS WITH PANDEMIC POTENTIAL) (EMERGENCY REQUIREMENTS –
HIGH RISK COUNTRY TRAVEL PAUSE) DETERMINATION 2021**

NO.	DOCUMENT	DATE	PAGE
1.	Ministerial submission	30 April 2021	1
2.	Attachment A – Chief Medical Officer letter	30 April 2021	8
3.	Attachment B – Instrument	30 April 2021	12
4.	Attachment C – Explanatory Statement		19
5.	Draft Media Release		22
6.	SG No. 6 of 2020 [Not reproduced - claim of client legal privilege over entirety of document]	14 March 2020	NR
7.	SG No. 38 of 2020 [Not reproduced - claim of client legal privilege over entirety of document]	26 November 2020	NR



Australian Government
Department of Health

Ministerial Submission – Standard
MS21-900189
Version (1)
Date sent to MO: 30 April 2021

To: Minister Hunt

Subject: Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements – High Risk Country Travel Pause) Determination 2021

Critical date: 2 May 2021 to manage people travelling into Australia who have been in India in the previous 14 days.

Recommendations:

1. NOTE the advice from the Chief Medical Officer (CMO) (at Attachment A).
2. INDICATE by circling whether you are satisfied (based on the advice provided by the CMO) of the matters necessary in order for you to make emergency requirements that a person who has been in India within 14 days must not enter Australian territory at a landing place.

Those matters are:

- (a) the requirements are necessary to prevent or control the entry into, or the emergence, establishment and spread of COVID-19 in Australian territory or a part of Australian territory, or to prevent and control the spread of COVID-19 to another country, and
- (b) the requirements are likely to be effective in, or to contribute to, achieving the purpose for which they are to be determined, and
- (c) the requirements are appropriate and adapted to achieve the purpose for which they are to be determined, and

1. Noted

2. Are you satisfied of the matters in 2(a); and 2(b); and 2(c); and 2(d); and 2(e); and 2(f) Yes / No

- (d) the requirements are no more restrictive or intrusive than is required in the circumstances, and
- (e) the manner in which the requirements are to be applied is no more restrictive or intrusive than is required in the circumstances, and
- (f) the period during which the requirements are to apply is only as long as is necessary.

3. INDICATE whether you are satisfied that the requirement for a person who has been in India within 14 days not to enter Australian territory at a landing place is necessary to prevent or control COVID-19 from entering, or establishing itself or spreading in, Australian territory or a part of Australian territory.

3. Yes / No / Please discuss

If YES to recommendation 2 and 3 above:

- i) SIGN & DATE the Determination (at Attachment B).
- ii) APPROVE the Explanatory Statement for the Determination (at Attachment C).

4. Signed and dated / Not Signed / Please discuss

5. Approved / Not Approved

Signature

Date: / /

Media Release required? YES/ NO

Comments:

Contact Officer:	Stephen Bouwhuis	General Counsel, Legal Advice and Legislation Branch, Legal and Assurance Division	Ph: (02) 6289 7803 Mobile: [REDACTED]
Clearance Officer:	Caroline Edwards	Associate Secretary, Department of Health	Ph: (02) 6289 9100 Mobile: [REDACTED]

Summary:

1. This submission seeks your agreement to determine an emergency requirement that a person must not enter Australian territory if they had been in India within 14 days before the day their scheduled flight commenced, subject to limited exemptions. The emergency requirement, if made, will be temporary, and will commence on 3 May 2021 and be automatically repealed on 15 May 2021.
2. If made, this requirement will be the first time that the *Biosecurity Act 2015* (the Act) has been used to prevent Australian citizens and permanent residents from entering Australia. This may result in hardship for Australian citizens and permanent residents living in India including difficulties in accessing life saving medical care through travel to Australia.

3. Legal Professional Privilege

[REDACTED]

Issues:

4. The Chief Medical Officer (CMO) has designated India as a high-risk country. This submission seeks that you exercise your power under section 477 of the Act to determine an emergency requirement that a person not enter Australian territory if they has been in India within 14 days before the day their scheduled flight commenced, subject to limited exemptions.
5. Noting that many of the connecting international airline services to Australia from India have already been paused, commencing the requirements from 12.01am 3 May is appropriate and provides for adequate messaging around the new requirements. This view is supported by the CMO.

Section 477 Emergency Requirements

Matters to be satisfied of before determining an emergency requirement

6. You may determine a requirement that you consider is necessary to prevent or control the entry of COVID-19 into, or its emergence, establishment or spread in Australian territory or a part of Australian territory (subparagraphs 477(1)(a)(i) and (ii) of the Act) or to prevent or control the spread of COVID-19 to another country (paragraph 477(1)(b) of the Act).
7. Before determining a requirement, you must be satisfied of all of the following (subsection 477(4)):
 - (a) the requirement is likely to be effective in, or to contribute to, achieving the purpose for which it is to be determined; and
 - (b) the requirement is appropriate and adapted to achieve the purpose for which it is to be determined; and
 - (c) the requirement is no more restrictive or intrusive than is required in the circumstances; and
 - (d) the manner in which the requirement is to be applied is no more restrictive or intrusive than is required in the circumstances; and
 - (e) the period during which the requirement is to apply is only as long as is necessary.

8. The *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021* (Determination) would require a person not enter Australian territory at a landing place if the person had been in India within 14 days before the day their scheduled flight commenced.
9. For the reasons explained below, we consider it open to you to be satisfied that the Determination is necessary to prevent or control the entry into, or the emergence, establishment and spread of COVID-19 in Australian territory or a part of Australian territory (subparagraphs 477(1)(a)(i) and (ii)), and of each of the matters set out in subsection 477(4) in relation to the proposed requirements).

The high risk country incoming travel pause requirements are necessary to prevent or control the entry into, or the emergence, establishment and spread of COVID-19 in Australian territory or a part of Australian territory

10. There have been high COVID-19 positivity rates in persons returning to Australia from India. 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.
11. The integrity of hotel quarantine arrangements are put under strain as the number of overseas acquired cases in quarantine increases. The potential for local transmission of COVID-19 (within the facility and to the community) increases with higher case rates among international arrivals managed in mandatory quarantine settings. The Determination will also act as a deterrent to limit the number of people in hotel quarantine.
12. The CMO in his letter to you dated 30 April 2021 advises that there are “a range of emerging risks associated with international arrivals who have been in India”. The CMO states that “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.” The CMO also stated that he is satisfied the requirement “is necessary to prevent and control the entry into, or the emergence, establishment or spread of COVID-19 in Australia”.
13. On the basis of the above, we consider it is open to you to be satisfied of this matter (paragraph 477(1)(a)) in respect of the Determination.

The high risk country incoming travel pause emergency requirements are likely to be effective in, or to contribute to, achieving the purpose for which they are to be determined

The high risk country incoming travel pause emergency requirements are appropriate and adapted to achieve the purpose for which they are to be determined

14. The CMO in his letter to you dated 30 April 2021 states that “India has been identified as a high risk country due to the significant increase in positive case numbers in returned travellers from India”. Aircraft passengers who have been in India in the 14 preceding days preceding their flight, present a high risk of incubating COVID-19 while in hotel quarantine upon return to Australia, even when they have returned a negative COVID-19 test 72 hours prior to their scheduled departure to Australia. The CMO advises that he considers “a pause on arrivals from India to be an effective and proportionate measures to maintain the

integrity of Australia's quarantine system and will likely allow the system to recover capacity, which is a critical intervention in preventing and managing the spread of COVID-19 in Australia."

15. Based on the above, it is open to you to be satisfied the proposed requirement that a person is not to enter Australian territory at a landing place when they have been in India in the previous 14 days is appropriate and adapted to ensure the hotel quarantine arrangements are not overwhelmed and that COVID-19 does not enter the broader Australian community.
16. The CMO in his letter to you dated 30 April 2021 states that "India has been identified as a high risk country due to the significant increase in positive case numbers in returned travellers from India" and that he is satisfied that the requirements will "contribute significantly to protecting the Australian community and health system".
17. On the basis of this, we consider it is open to you to be satisfied of these matters (paragraphs 477(4)(a) and (b) of the Act).

The high risk country incoming travel pause emergency requirements are no more restrictive or intrusive than is required in the circumstances

The manner in which the high risk country incoming travel pause emergency requirements are to be applied is no more restrictive or intrusive than is required in the circumstances

18. The proposed Determination is based on an assessment of India's COVID-19 risk profile. The measures are limited to the identified high risk country for a limited period of time (until the start of 15 May 2021), and that risk assessment will continue to be assessed to ensure the requirements are no more restrictive than is required in the circumstances.
19. The CMO in his letter to you dated 30 April 2021 recommends that the proposed measures provides exemptions from the travel ban for limited groups of persons. The CMO considers that the implications of imposing the travel pause "can be mitigated through having the restrictions only temporarily in place ... and by ensuring there are categories of exemptions." The inclusion of exemptions and the short period of time in which the requirement applies ensures that the requirements are applied in a manner that is no more restrictive than is required in the circumstances. The exemptions will provide for aircraft or vessel crew and workers 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 travelling on official government business and diplomats and their immediate family members, and a member of an Australian Medical Assistance Team to travel back from India to Australia. In addition, the requirements do not apply to emergency medical evacuation flights.
20. On the basis of the above, we consider it is open to you to be satisfied of these matters (paragraphs 477(4)(c) and (d) of the Act).

The period during which the high risk country incoming travel pause emergency requirements are to apply is only as long as is necessary

21. The requirements are proposed to be in force until the start of 15 May 2021. The CMO in his letter to you dated 30 April 2021 recommends that the travel restrictions be in place

only for a limited duration. A review of whether the requirements continue to be necessary will take place before the requirements are repealed. This will ensure that the pause only applies as long as necessary.

22. For this reason, we consider it is open to you to be satisfied of this matter (paragraph 477(4)(e) of the Act).

Background to emergency requirements:

Public Interest Immunity

23. **Public Interest Immunity**

Public Interest Immunity

Legislative instruments

24. If you make the Determination (at [Attachment B](#)), it will be a legislative instrument and will be registered on the Federal Register of Legislation (along with the accompanying Explanatory Statement). The Determination is not disallowable under the *Legislation Act 2003*.

Attachments:

Attachment A	Letter from the Chief Medical Officer dated 30 April 2021
Attachment B	Determination
Attachment C	Explanatory Statement for the Determination

Consultations:

25. The Determination is supported by the CMO. Consultation has also occurred with the Australian Border Force, the Department of Foreign Affairs and Trade, the Department of Prime Minister and Cabinet, the Office of Parliamentary Counsel, and the Australian Government Solicitor.

Cover Page for Ministers' Offices

Minister	Minister Hunt
PDR Number	MS21- 900189
Subject	Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements – High Risk Country Travel Pause) Determination 2021
Critical Date	2 May 2021
Quality Assurance Check (completed by line area)	Jackie Davis [REDACTED] (02) 6289 9815
Contact Officer	Stephen Bouwhuis ((02) 6289 7803 [REDACTED])
Clearance Officer	Caroline Edwards (02) 6289 9100 [REDACTED]
Division/Branch	Legal and Assurance
Has Budget Branch been consulted if there are financial implications?	Not Applicable

<p>Adviser/DLO Comments:</p> <div style="text-align: right;"> <p>Return to Dept for:</p> <p>Redraft <input type="checkbox"/></p> </div>
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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



Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021

I, Greg Hunt, Minister for Health and Aged Care, make the following determination.

Dated 2021

Greg Hunt
Minister for Health and Aged Care

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Part 1—Preliminary

1 Name

This instrument is the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021*.

2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this instrument	3 May 2021.	3 May 2021

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

This instrument is made under subsection 477(1) of the *Biosecurity Act 2015*.

4 Definitions

Note: A number of expressions used in this instrument are defined in the Act, including the following:

- (a) Australian territory;
- (b) landing place;
- (c) passenger.

In this instrument:

Act means the *Biosecurity Act 2015*.

Australian Defence Force has the same meaning as in the *Defence Act 1903*.

member has the same meaning as in the *Defence Act 1903*.

relevant international flight means a flight:

- (a) that commences outside Australian territory and is intended to arrive at a landing place in Australian territory; and

Section 5

- (b) for which the scheduled departure time is at or after 12.01 am on 3 May 2021 in the place where the flight commences; and
- (c) that is not an Australian Government facilitated flight; and
- (d) that is not an emergency medical evacuation flight.

5 Repeal

This instrument is repealed at the start of 15 May 2021.

Part 2—Requirements

6 Requirement not to enter Australian territory

A person who is a passenger of an aircraft on a relevant international flight must not enter Australian territory at a landing place if the person had been in India within 14 days before the day the flight was scheduled to commence, unless an exemption set out in section 7 applies to the person.

Note: A person who fails to comply with a requirement that applies to the person under this instrument may commit an offence (see section 479 of the Act). For generally available defences to offences, see Part 2.3 of the *Criminal Code*.

7 Exemptions

An exemption from the requirement in section 6 applies to the following persons:

- (a) a member of the crew of an aircraft or vessel;
- (b) a worker associated with the safety or maintenance of an aircraft or vessel;
- (c) a person engaged in the day-to-day conduct of inbound and outbound freight;
- (d) a person (including a member of the Australian Defence Force) who is travelling on official government business on an Australian official or diplomatic passport;
- (e) a person who is an immediate family member of a person mentioned in paragraph (d);
- (f) a diplomatic, consular or other foreign official accredited to Australia;
- (g) a person:
 - (i) who is an immediate family member of a person mentioned in paragraph (f); and
 - (ii) who holds a Subclass 995 (Diplomatic (Temporary)) visa;
- (h) a member of an Australian Medical Assistance Team (AUSMAT).

EXPLANATORY STATEMENT

Biosecurity Act 2015

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021

Subsection 477(1) of the *Biosecurity Act 2015* (the Act) provides that during a human biosecurity emergency period the Minister for Health may determine any requirement that he or she is satisfied is necessary:

- to prevent or control the entry into, or the emergence, establishment or spread of a listed human disease in Australian territory or a part of Australian territory;
- to prevent or control the spread of the listed human disease to another country; or
- to give effect to a recommendation made to the Health Minister by the World Health Organization (WHO) under Part III of the International Health Regulations in relation to the listed human disease.

On 18 March 2020, the Governor-General declared that a human biosecurity emergency exists regarding the listed human disease ‘human coronavirus with pandemic potential’ (COVID-19) (section 475 of the Act).

Purpose

The *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021* (the Determination) requires passengers on a relevant international flight not to enter Australian territory at a landing place if the person has been in India within 14 days of the day the flight was scheduled to commence.

The Determination to temporarily restrict entry to Australia for people who have been in India in the last 14 days reflects the latest health advice that there is a high likelihood of COVID-19 cases arriving in Australia via a person travelling from India, or who has been in India in the last 14 days.

India has been identified as a high risk country due to the significant increase in COVID-19 positive case numbers in travellers to Australia from India. The Determination protects the quarantine and health resources needed to prevent and control the entry, and the emergence, establishment or spread of COVID-19 into Australian territory or a part of Australian territory. The measures maintain the integrity of Australia’s quarantine system and allow the system to recover capacity, which is a critical intervention in preventing and managing the spread of COVID-19.

The Determination commences on 3 May 2021. The Determination remains in force until the start of 15 May 2021, unless it is revoked earlier.

On the basis of the above, the Minister for Health is satisfied that the Determination is necessary to prevent or control the further entry into, or the emergence, establishment or spread of COVID-19 into Australian territory or a part of Australian territory.

Background

On 5 January 2020, the WHO notified Member States under the *International Health Regulations (2005)* (IHR) of an outbreak of pneumonia of unknown cause in Wuhan city, China. On 21 January 2020 ‘human coronavirus with pandemic potential’ became a ‘listed human disease’ by legislative instrument made by the Director of Human Biosecurity.

On 30 January 2020, the outbreak was declared by the WHO International Regulations Emergency Committee to constitute a Public Health Emergency of International Concern.

On 11 February 2020, the WHO announced that the International Committee on Taxonomy of Viruses named the pathogen virus ‘severe acute respiratory syndrome coronavirus (SARS-CoV-2)’. The international name given by WHO to the disease caused by SARS-CoV-2 is Coronavirus disease 2019 (COVID-19). On 11 March 2020, the WHO declared the outbreak of COVID-19 a pandemic.

Emergency requirements and directions

An emergency requirement is a non-disallowable legislative instrument (subsection 477(2)). The Act provides for the Determination to be non-disallowable to ensure that the Commonwealth is able to take the urgent action necessary to manage a nationally significant threat or harm to Australia’s human health. The Minister for Health makes emergency requirements or gives directions personally (section 474).

The requirements that the Minister for Health may determine under section 477 of the Act include, but are not limited to: requirements that apply to persons, goods or conveyances when entering or leaving specified places; requirements that restrict or prevent the movement of persons, goods or conveyances in or between specified places; and requirements for specified places to be evacuated (subsection 477(3)).

Requirements determined under subsection 477(1) apply despite any provision of any other Australian law (subsection 477(5)), with the potential consequence that a person who acts in accordance with a requirement may be protected from criminal liability that would otherwise attach to a person’s required actions under State, Territory or Commonwealth law.

The Australian Government has established protocols for the exercise of emergency powers under the Act to ensure that the emergency powers are only used where necessary to protect the health of Australians, based on expert advice and following appropriate consultation.

A provision-by-provision description of the Determination is contained in the Attachment.

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021

Part 1 - Preliminary

1 Name

Section 1 provides that the instrument is the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021*.

2 Commencement

Section 2 provides that the instrument commences 3 May 2021.

3 Authority

Section 3 provides that the instrument is made under subsection 477(1) of the *Biosecurity Act 2015*.

4 Definitions

Section 4 provides that a number of expressions used in this instrument are defined in the *Biosecurity Act 2015*. Section 4 also provides definitions for a number of terms used in the instrument.

5 Repeal

Section 5 provides that this instrument is repealed at the start of 15 May 2021.

Part 2 – Requirements

6 Requirements not to enter Australian territory

Section 6 provides that a person who is a passenger on a relevant international flight must not enter Australian territory at a landing place if the person has been in India within 14 days before the day the flight was scheduled to commence, unless an exemption set out in section 7 applies to the person.

7 Exemptions – general

Section 7 provides exemptions from the requirements not to enter Australian territory. Limited exemptions are provided for: crew of an aircraft or vessel, safety and maintenance workers; persons engaged in the day-to-day conduct of inbound and outbound freight; persons travelling on official government business, diplomats and their families; and members of an Australia Medical Assistance Team.



The Hon. Greg Hunt MP
Minister for Health

DRAFT MEDIA RELEASE

30 April 2021

Travel arrangements to be strengthened for people who have been in India

The Government will implement a temporary pause on travellers from India entering Australian territory if the passenger has been in India within 14 days of the person's intended arrival date in Australia.

The temporary pause follows today's meeting of National Cabinet and was based on advice about the worsening COVID-19 situation in India. The pause will come into effect at 12.01am on Monday the 3rd of May.

The risk assessment that informed the decision was based on the proportion of overseas travellers in quarantine in Australia who have acquired a COVID-19 infection in India.

Failure to comply with an emergency determination under the *Biosecurity Act 2015* may incur a civil penalty of 300 penalty units, five years' imprisonment, or both.

The pause on people who have been in India arriving in Australia will be reconsidered by the Chief Medical Officer on 15 May. The CMO will consider the epidemiology in India and likely impacts on Australia's quarantine capacity, and provide a further expert assessment of the public health risk to Australia to inform a proportionate response.

The Government does not make these decisions lightly. However, it is critical the integrity of the Australian public health and quarantine systems is protected and the number of COVID-19 cases in quarantine facilities is reduced to a manageable level.

India has been reporting more than 300,000 new cases of COVID-19 every day for the past week. The total number of cases in India is now close to 19 million and more than 200,000 people have died.

Our hearts go out to the people of India – and our Indian-Australian community. The friends and family of those in Australia are in extreme risk. Tragically, many are contracting COVID-19 and many, sadly, are dying every day.

Following consultation with the Indian Government, Australia has agreed to provide emergency medical supplies.

The initial package of support includes more than 1,000 non-invasive ventilators, with capacity to deploy up to a total of 3,000 ventilators.

The Government has offered to supply a significant package of personal protective equipment (PPE), including one million surgical masks, 500,000 P2/N95 masks, 100,000 surgical gowns, 100,000 goggles, 100,000 pairs of gloves and 20,000 face shields.

Rule 29.02(8)

Certificate identifying annexure

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

No. 388 of 2021

Gary Newman

Applicant

Minister for Health and Aged Care

Respondent

Annexure “MB-9”

This is the annexure marked “Annexure MB-9” to the affidavit of Michael David Bradley
sworn before me on 7 May 2021



.....
Signature of Witness

Our reference KP/13326
Phone +612 8216 3021
Email kierap@marquelawyers.com.au

6 May 2021

Jonathon Hutton
A/g Senior Executive Lawyer
Australian Government Solicitor

By email: Jonathon.Hutton@ags.gov.au

Dear Mr Hutton

**Gary Newman v Minister for Health and Aged Care
Federal Court Proceedings NSD 388 of 2021**

We refer to the bundle of documents served at 4:22pm today, 6 May 2021 and labelled 'Bundle of documents before the Minister for Health and Aged Care when making the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021*' (**Bundle**).

The Bundle contains a ministerial submission dated 30 April 2021 (**Submission**), three attachments to that submission, a draft media release and two advices which appear to be from the Solicitor-General (which are not produced due to a claim of client legal privilege).

There are no signatures or other annotations on the Submission or any produced documents in the Bundle which would indicate they were before and considered by the Minister when he made the Determination (as defined in the Originating Application dated 5 May 2021).

We ask that you please confirm as soon as possible but by no later than 10am tomorrow that the Minister has no further documents to produce to the Applicant which record or demonstrate that the Minister:

- (a) had the Bundle before him when he made the Determination;
- (b) gave consideration to, or was satisfied with, the matters enumerated at paragraphs 2 to 3 of the recommendations beginning on the first page of the Submission; or
- (c) approved the draft determination at Annexure B to the Submission.

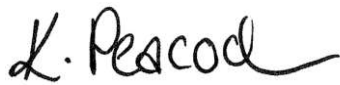
If there are further documents which respond to any of these categories then we seek informal production of them on the same terms agreed at 12:39pm today, being that our client undertakes to

receive them in line with the usual Harman undertaking as if they were produced under compulsion. We ask that the documents be provided as soon as possible but again, by no later than 10am tomorrow.

We appreciate that this is a short period of time to respond however it is necessary due to the small window available to the Applicant to prepare his submissions. We anticipate that the Minister will be able to answer these questions and produce any documents quickly, in light of their scope and the work undertaken today to produce the Bundle.

Our client reserves his right to relist on one hour's notice, if necessary.

Yours sincerely



Kiera Peacock
Partner

Rule 29.02(8)

Certificate identifying annexure

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

No. 388 of 2021

Gary Newman

Applicant

Minister for Health and Aged Care

Respondent

Annexure “MB-10”

This is the annexure marked “Annexure MB-10” to the affidavit of Michael David Bradley sworn before me on 7 May 2021



.....
Signature of Witness

Andrea Farrugia

From: Hutton, Jonathon <Jonathon.Hutton@ags.gov.au>
Sent: Friday, 7 May 2021 10:07 AM
To: Kiera Peacock
Cc: Michael Bradley; Andrea Farrugia; Gatehouse, Danielle; Thornton, Simon; Lewis, Charlotte
Subject: RE: Gary Newman v Minister for Health and Aged Care [ML-Documents.FID1695343] [SEC=OFFICIAL] [AGSDMS-DMS.FID4357913]
Attachments: MS21-900189 Signed.pdf

Dear Kiera

I attach a signed version of the Ministerial Submission. I am instructed that the Minister for Health and Ageing's practice is to consider electronic versions of submissions and to only annotate the signature pages (here this is the first 2 pages of the submission).

I am further instructed that the Minister did not make any notations on the submissions beyond those contained on the first 2 pages.

Kind regards

Jonathon.

Jonathon Hutton

A/g Senior Executive Lawyer
Australian Government Solicitor
T 02 9581 7408 F 02 9581 7650
jonathon.hutton@ags.gov.au

Find out more about AGS at <http://www.ags.gov.au>

Important: This message may contain confidential or legally privileged information. If you think it was sent to you by mistake, please delete all copies and advise the sender. For the purposes of the *Spam Act 2003*, this email is authorised by AGS.



Australian Government
Department of Health

Ministerial Submission – Standard
MS21-900189
Version (1)
Date sent to MO: 30 April 2021

To: Minister Hunt

Subject: Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements – High Risk Country Travel Pause) Determination 2021

Critical date: 2 May 2021 to manage people travelling into Australia who have been in India in the previous 14 days.

Recommendations:

1. NOTE the advice from the Chief Medical Officer (CMO) (at Attachment A).
2. INDICATE by circling whether you are satisfied (based on the advice provided by the CMO) of the matters necessary in order for you to make emergency requirements that a person who has been in India within 14 days must not enter Australian territory at a landing place.

Those matters are:

- (a) the requirements are necessary to prevent or control the entry into, or the emergence, establishment and spread of COVID-19 in Australian territory or a part of Australian territory, or to prevent and control the spread of COVID-19 to another country, and
- (b) the requirements are likely to be effective in, or to contribute to, achieving the purpose for which they are to be determined, and
- (c) the requirements are appropriate and adapted to achieve the purpose for which they are to be determined, and

1. Noted

2. Are you satisfied of the matters in 2(a); and 2(b); and 2(c); and 2(d); and 2(e); and 2(f) Yes / No

- (d) the requirements are no more restrictive or intrusive than is required in the circumstances, and
- (e) the manner in which the requirements are to be applied is no more restrictive or intrusive than is required in the circumstances, and
- (f) the period during which the requirements are to apply is only as long as is necessary.

3. INDICATE whether you are satisfied that the requirement for a person who has been in India within 14 days not to enter Australian territory at a landing place is necessary to prevent or control COVID-19 from entering, or establishing itself or spreading in, Australian territory or a part of Australian territory.

3. Yes / No / Please discuss

If YES to recommendation 2 and 3 above:

- i) SIGN & DATE the Determination (at Attachment B).
- ii) APPROVE the Explanatory Statement for the Determination (at Attachment C).

4. Signed and dated / Not Signed / Please discuss

5. Approved / Not Approved

Signature

Date: 30/4/2021



Media Release required? YES/ NO

Comments:

Contact Officer:	Stephen Bouwhuis	General Counsel, Legal Advice and Legislation Branch, Legal and Assurance Division	Ph: (02) 6289 7803 Mobile: [REDACTED]
Clearance Officer:	Caroline Edwards	Associate Secretary, Department of Health	Ph: (02) 6289 9100 Mobile: [REDACTED]

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 7/05/2021 3:41:09 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



Dated: 7/05/2021 3:41:16 PM AEST

A handwritten signature in blue ink, reading "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 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.