IN THE FEDERAL COURT OF AUSTRALIA **NSD388/2021**

GARY NEWMAN
Applicant

MINISTER FOR HEALTH AND AGED CARE
Respondent

APPLICANT'S OUTLINE OF WRITTEN SUBMISSION

A. INTRODUCTION

1. On 30 April 2021 the Minister for Health and Aged Care (the **Minister**) made a determination known as the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021* (the **Determination**) pursuant to section 477(1) of the *Biosecurity Act 2015* (the **Act**).

2. The Determination prohibited entry into Australia by a passenger on an aircraft who had been in India in the preceding 14 days (s 6). By section 479 of the Act, a person who "*fails to comply*" will commit an offence. The Determination included certain exemptions defined by category (s 7), and provided for its own repeal "*at the start of 15 May 2021*" (s 5).

3. The Applicant challenges the validity of the Determination on a number of grounds. By orders of the Federal Court made on 5 May 2021, the present hearing concerns only prayers 1 and 2 of the Originating Application filed on 5 May 2021.

4. The Applicant's case turns on the following issues:

   (a) Prayer 1(a): the Statutory Precondition Issue: Did the Minister fail to comply with the statutory preconditions to making a determination in section 477(4) (**Part C** below);

   (b) Prayer 1(b): the Statutory Construction Issue: As a matter of statutory construction does the Determination operate extra-territorially, and if so does section 477 displace the presumption against laws having extra-territorial effect (**Part D**);

   (c) Prayer 2: the Legality Issue: Whether there exists a fundamental common law right to re-enter Australia that can only be abrogated by clear words or necessary intendment; and whether the Act demonstrates that clear legislative intention? (**Part E**).

B. BACKGROUND AND STATUTORY FRAMEWORK

The applicant

5. The Applicant is an Australian citizen who is 73 years of age.[1] By reason of his age, as a matter of judicial notice, he is at high risk of serious illness or death if he contracts COVID-19.

6. He departed Australia for India in March 2020 before the Minister imposed a "travel ban" on departing Australia,[2] disembarking in Bangaluru, India, on 6 March 2020.[3] He has been in India ever since[4] and remains largely indoors for fear of contracting COVID-19.[5]

7. The Applicant was permitted by his visa to remain in India for up to 180 days, until September 2020.[6] In November 2020, when it appeared that airlines were re-commencing services, the Applicant booked a flight to Australia. That flight was later cancelled.[7] The Applicant presently wants to fly back to Australia. He has considered travelling via a third country to do so but knows that he would be committing an offence under the Act.[8]

The Determination

8. The Determination was made by the Minister on 30 April 2021.

9. According to publicly available material, the Minister received advice from the Chief Medical Officer, Mr Paul Kelly, by letter dated 30 April 2021 (*First Bradley affidavit*, p 10-13). By section 544 of the Act the person who occupies or is acting in the role of Chief Medical Officer, is also the Director of Human Biosecurity.

The statutory framework

10. The purpose of the Act is, among other things, to *"provide for managing… risk of contagion of a listed human disease"*, or the risk of listed human diseases "*entering*", "*emerging*" or "*establishing themselves or spreading in Australian Territory*" (section 4).

---

[1] See Annexure MB-1 to the Affidavit of Michael David Bradley affirmed 5 May 2021 (**First Bradley Affidavit**), being a copy of the Applicant's passport.
[2] *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020* (Cth) which commenced on 25 March 2020.
[3] First Bradley Affidavit at [9] and Annexure MB-4.
[4] First Bradley Affidavit at [12].
[5] First Bradley Affidavit at [19].
[6] First Bradley Affidavit at [8], [11] and Annexure MB-3.
[7] First Bradley Affidavit at [13]-[15].
[8] First Bradley Affidavit at [20]-[22].

11. Australian Territory is defined to include Australia, and *"the airspace over"* Australia (s12(a), (b)).

12. The Chief Medical Officer in his role as Director of Human Biosecurity, may determine that a human disease is a "listed human disease" if he considers that it may be communicable and cause significant harm to human health (section 42(1)).

13. Chapter 2 of the Act confers powers on the Minister to determine requirements in respect of individuals to prevent the entry, emergence, establishment or spread of a listed human disease (see 44 (Entry requirements), 51 (Determining preventative biosecurity measures), 60 (Imposing a human biosecurity control order on an individual), 87 (Restricting behaviour); 107 (offence for failing to comply with a human biosecurity control order).

14. Chapter 8 of the Act, by contrast, *"provides special powers for dealing with biosecurity emergencies of national significance"* (s442). Of present relevance is, Part 2 of Chapter 8 which contains section 477. As stated in s473, Part 2 of Chapter 8:

> provides special powers for dealing with emergencies involving threats or harm to human health on a nationally significant scale (these are called human biosecurity emergencies)

15. Section 475 provides that the Governor-General may declare that a human biosecurity emergency exists if the Minister is satisfied that a listed human disease is "*posing a severe and immediate threat, or is causing harm, to human health on a nationally significant scale*", and that the declaration is necessary to prevent or control the disease in Australia. The declaration must state the period of time for which it applies, and be no longer than 3 months (s475(3)(c), and (4), although that time can be extended under section 476.

16. By section 474 a power under Part 2 of Chapter 8 may only be exercised by the Minister personally.

17. Section 477(1) provides the Minister with a wide power to *"determine any requirement that he or she is satisfied in necessary… to prevent or control"* the entry into, emergence, establishment or spread of the declaration listed human disease in Australia (section 477(1)(a)(i)and(ii); or to prevent or control the spread to another country (section 477(1)(b)).

18. Section 477(2) expressly provides that a determination will not be subject to parliamentary disallowance under section 42 of the *Legislation Act 2003* (Cth). Section 477(3) provides a non-exhaustive list of requirements the Minister may determine. Section 477(4) sets out

the statutory preconditions to making a declaration. Section 477(5) ensures the primacy of the determination over any provision of Australian law.

19. Section 479(1) states that a person "*must comply with a requirement determined under subsection 477(1) that applies to the person*"; and section 479(2) makes it an offence to engage in conduct that contravenes the requirement, and imposes a penalty of 5 years imprisonment or 300 penalty units.

20. The Determination provides in section 6 as follows:

> 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.

21. Section 4 of the Determination defines a "relevant international flight" as a flight: "*that commences outside Australian territory and is intended to arrive at a landing place in Australian territory*".

22. "Australian territory" is defined in section 12(2)(b) to include Australia, and "*the airspace over*" Australia. "Passenger" is defined in section 9 of the Act as: "*a person who is lawfully entitled to be on board the aircraft*" other than its crew. "Landing place" is defined in section 9 as "*any place where the aircraft can land*", including an area of land or water.

Coronavirus is a listed disease and a human biosecurity emergency is declared

23. To the best of the Applicant's knowledge on 21 January 2020, the Director of Human Biosecurity (Professor Murphy) made the *Biosecurity (Listed Human Diseases) Amendment Determination 2020* (Cth) which determined that "*human coronavirus with pandemic potential*" was a listed human disease.

24. Pursuant to section 475, on 18 March 2020 the Governor General declared that "*a human biosecurity emergency exists*" in relation to the listed human disease, "*human coronavirus with pandemic potential*": *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020* (Cth).

25. Pursuant to section 476, that emergency declaration appears to have been extended most recently, on 2 March 2021 by the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 1) Instrument 2021*, so that the emergency period continues until 17 June 2021.

26. On the Applicant's present understanding, therefore, it appears the jurisdictional precondition in section 475 of the Act was satisfied at the time the Determination was made.

27. It is appropriate to turn first, to whether the Minister complied with the statutory preconditions in section 477(4).

C. FAILURE TO COMPLY WITH STATUTORY PRECONDITIONS IN s477(4)

The appropriate standard of review

28. There is some uncertainty as to whether the basis upon which a Court will review delegated legislation is completely co-extensive with the grounds of review of administrative decisions.[9] There is no doubt, however, that the Court may declare delegated legislation invalid on the bases that the exercise of the statutory power to make the delegated legislation was for an improper purpose, that there is an inconsistency or repugnancy with the empowering statute, and/or because its effect is so unreasonable that it cannot be regarded as falling within the contemplation of the legislature.[10] The latter has recently been held by this Court to incorporate notions of legal unreasonableness and irrationality.[11]

Compliance with the statutory preconditions

29. The power conferred under section 477 may only be exercised by the Minister personally (section 474). It further may only be exercised where the Minister has determined that the delegated legislation is "necessary" for one of the purposes in section 477(1)(a)-(c) and has reached the requisite state of satisfaction of the matters in section 477(4).

30. In the absence of direct evidence, the basis on which that state of mind was reached will generally be inferred by reference to the material that was before the Minister at the time of the decision.[12]

31. A Minister is entitled, in that regard, to rely on a summary or brief provided by their department and to adopt the reasons there set out as the basis for their decision (although

---

[9] Pearce and Argument *Delegated Legislation in Australia* (2017, 5 ed) [12.12] and the authorities discussed in [12.11] including *Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee* (2007) 163 FCR 451 [115], [125].
[10] *Vanstone v Clark* (2015) 147 FCR 299 [104]-[112] (Weinberg J) (FC).
[11] *Brett Cattle Co Pty Ltd v Minister for Agriculture* (2020) 274 FCR 337 at [289], [357], [359]-[360] (see [285]-[310] generally).
[12] *Brett Cattle Co Pty Ltd v Minister for Agriculture* (2020) 274 FCR 337 at [376]; *Stambe v Minister for Health* [2019] FCA 43 at [65]-[77], [95]-[98]

it is then adopted with all its virtues and foibles).[13] Equally, it is open to a Minister to take into account political considerations when exercising a legislative power to make delegated legislation.[14]

32. As to the drawing of inferences in respect of the decision making and the time required for a Minister to consider the relevant material the Full Court explained in *Chetcuti v Minister for Immigration and Border Protection* [2019] FCAFC 112; 270 FCR 335 at [99] that evidence in respect of how long the Minister in fact had the material before him can be relevant to the Court's assessment.

33. The Minister has now produced the materials said to have been before him at the time of his decision.[15] The following observations must be made in respect of that material:

(a) *First*, nowhere in the material is there to be found any alteration or annotation by the Minister to the component paragraphs of the *Ministerial Submission* document MS21-900189 dated 30 April 2020 or the material before him (other than the indication of his decision on the recommendations page);

(b) *Second*, while the *Ministerial Submission* purports to summarise and quote from the advice from the Chief Medical Officer (and attaches that same advice), certain of those quotes do not appear in the advice itself. Most significantly, the submissions at [16] suggest that the advice included the statement that the requirements will *"contribute significantly to protecting the Australian community and health system"*. That phrase is not found in the advice. There is nothing to suggest that the Minister was alive to this discrepancy (which would only become apparent by reading the underlying material);

(c) *Third*, the *Ministerial Submission* itself does not include any reference to the potential criminal sanctions attaching to a determination made under section 477 (although they were referred to in the Chief Medical Officer's advice).

(d) *Fourth*, the Chief Medical Officer's advice does not address the criminal sanctions, nor any proportionate benefit possibly gained by them, other than by a bare reference to them. Nor does it address the domestic public health risks associated with possibly covid-positive persons being detained or taken into remand on suspicion of breaching the determination. And yet, despite those apparent omissions, and although

---

[13] *Seafish Tasmania Pelagic Pty Ltd v Burke, Minister for Sustainability, Environment, Water, Population and Communities (No 2)* [2014] FCA 117 at 123 [93]-[95]

[14] *Brett Cattle Co Pty Ltd v Minister for Agriculture* (2020) 274 FCR 337 at [308]-[310]

[15] See *Second Bradley Affidavit at blank*

unnecessary, the Chief Medical Officer expresses his own satisfaction that it is necessary to impose an offence (final paragraph);

(e) *Fifth*, the Chief Medical Officer's advice makes reference to the direct flight ban that had only recently been introduced, saying:

> 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.

But the advice does not consider, at all, the effect of that direct flight ban upon the issues said to lie at the heart of the proposed Determination. It contains no evidence or analysis of the quantity of Australian citizens or permanent residents then present in India who could have, or were likely to, have taken advantage of third country transit routes, no evidence or analysis of the decrease in covid-positive arrivals as a result of the direct flight ban and any consequential reduction in pressures upon the quarantine system, and no health advice on the marginal benefit of the extraordinary step of imposing a criminal sanction on re-entry in light of that direct flight ban. Nor did the advice offer any consideration of the effect of flight bans that had been imposed by other governments[16] – part of the salient facts relevant to the "circumstances" in section 477(4)(d).

(f) *Sixth*, the *Ministerial Submission* is comprised, primarily, of conclusory statements of the matters to be satisfied in sections 477(1) and (4) and selective quotations from the Chief Medical Officer's advice; and

(g) *Seventh,* the historical Solicitor General's advices over which privilege is claimed are both dated March and November 2020. No inference could arise that they assisted the Minister in reaching his state of satisfaction about the Determination.

(h) *Finally*, there is no evidence as to the length of time such material was considered but it must have been less than one day given that the Chief Medical Officer's advice, and the *Ministerial Submission* are each dated 30 April 2021 – the same day as the Determination.

34. To summarise, there is no evidence that the Minister read or engaged with the *Ministerial Submission.* Even if the Minister did consider the *Ministerial Submission* that document made no reference to the imposition of a criminal penalty. It would therefore follow he failed to

[16] *First Bradley Affidavit* pages 15- 17 (MB6-MB7)

be satisfied that the requirement was *"likely to be effective in, or contribute to"*, nor whether it was *"appropriate and adapted"* to, the purpose of the Determination (section 477(4)(a)-(b)).

35. Even if (which is not admitted) the Minister went further and read the Chief Medical Officer's advice, that document does not provide health advice on either (i) the existence of any marginal health benefit of criminalising re-entry in light of the underlying circumstances of an existing flight ban from India, nor (ii) health advice on the *effect* of imposing the criminal offence (eg the domestic health risk consequent upon taking someone into remand if they failed to comply and forceful arrest was required).

36. Further still, the CMO does not purport to be giving any other form of (non-health related) advice on, matters including the appropriateness of a criminal penalty, the existence of legislative powers to restrict the entry of "aliens" as opposed to citizens, or the relative numbers of aliens as opposed to citizens seeking entry to Australia. Each of those matters would have been appropriate for the Minister to consider as part of reaching satisfaction that the restriction was "*no more restrictive or intrusive than is required*" in section 477(4)(c)).

37. Taken together, such matters reveal an absence of sufficient material from which a reasonable state of satisfaction could be reached to exercise the power in section 477. By ignoring the salient consequence of making the determination, the Minister's decision falls well outside the decisional freedom afforded to him. The Court ought thus to find that the making of the determination exceeded the power granted to the Minister, and declare the Determination invalid.

D. STATUTORY CONSTRUCTION

The Court's interpretive task

38. The task for the court in reviewing the legislation is first to determine the meaning of the words used in the Act of Parliament, second to determine the meaning of the subordinate legislation itself and finally to decide whether the determination complies with that description.[17]

39. The scope of a provision that empowers delegated legislation that are "necessary or convenient" or similar phrases was explained in *Shanahan v Scott* (1957) 96 CLR 245, 250 (Dixon CJ, Williams, Webb and Fullagar JJ):[18]

---

[17] *McEldowney v Forde* [1971] AC 632 at 658 (Lord Diplock) cited with approval in *Vanstone v Clark* (2015) 147 FCR 299 [103] (Weinberg J) (FC).

[18] Cited in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 [61]

> such a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends.

40. The Court in *Shanahan* also referred to Isaac J's reasoning in *Carbines v Powell* to the effect that delegated legislation could "complement" but not "supplement" the granted power.[19]

The scope of section 477 of the Act

41. The ambit of the authorising power may vary, depending on the *"character of the statute and the nature of the provisions it contains"*.[20]

42. In the present case, the Applicant necessarily accepts that section 477(1) of the Act confers a wide power to determine "requirements" that are "necessary" to "prevent and control" entry of a human disease into Australia, in the circumstances of a human biosecurity emergency of national significance.

43. The power to "control" when read with the word "regulate" has been treated as permitting something less than prohibiting.[21] However, "prevent" has been held to be equivalent to "prohibit" in certain circumstances.[22] But to the extent that a power of prevention has been conferred, it should be construed narrowly and must be appropriately and proportionately tied to preventing or controlling the entry of the listed human disease.

44. That is where the broad conferral in section 477(1), must be read harmoniously with the non-exhaustive and indicative examples of requirements that can be imposed in section 477(3). In this regard, section 477(3) may be seen to clarify the types of determinations which the legislature specifically contemplated might be made under the section.

45. The first of those, section 477(3)(a) refers only to "requirements" on entry, but does not expressly refer to a "prohibition", "restriction" or "prevention" on entry. As considered in Section E below, this is consistent with the conclusion that the legislature did not intend to abrogate the citizen's common law right of re-entry. That conclusion, in turn, informs the breadth of section 477(1) – it cannot contradict the position reflected in (3).

---

[19] *Shanahan v Scott* (1957) 96 CLR 245, 250; citing *Carbines v Powell* (1925) 36 CLR 88, 92.
[20] *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402, 410.
[21] *Co-operative Brick Co Pty Ltd v City of Hawthorn* (1909) 9 CLR 301, 307 (Griffiths CJ)
[22] *Seat Ads v Commissioner of Main Roads* (1985) 63 LGRA 85, 92.

46. The second example, section 477(3)(b) can provide no assistance to the Minister in locating a statutory source of authority for the Determination. That subsection indicates the Minister has power to make "*requirements that restrict or prevent the movement of persons, goods or conveyances in or between specified places*".

47. The Applicant's case is that section 477(3)(b) must be read as authorising prevention of movement only within the Commonwealth, and the Determination on its terms applies to restrict movement of people while they are overseas. Notably "specified places" is used also in sections 477(3)(a) and (c) in respect of matters over which the Minister could only exercise control within Australia. It would offend the principles of statutory construction for the term "specified places" to have two materially different meanings in different sub-paragraphs of the one provision.

48. As pleaded in prayer 1(b)(ii), section 477 has no extra-territorial effect. If it is to be argued on the Minister's case, that the Determination, properly construed, is an example of a requirement restricting or preventing "*movement...between specified places*" that can only be understood as movement between Australia and a place overseas. The Determination purports to operate in respect of "*a person*" (note all people, not just citizens), "*who is a passenger of an aircraft on a relevant international flight*" and requires that they must not "*enter Australian territory at a landing place*". A person can only become a "*passenger*" by boarding a "*relevant international flight*" (as defined) in places other than Australia.

49. There is both a common law[23], and statutory, presumption that legislation will not have extra-territorial effect, and that references in Commonwealth Acts are to things and matters "in and of the Commonwealth", subject to any contrary intention. The common law presumption arises in part as a principle of comity and – similar to the principle of legality (as considered below in Section E) – proceeds on the basis that absent clear words or necessary implication, statutes are to be construed on the basis that they do not apply to persons and matters outside the territory of Australia.[24]

50. The statutory presumption (which reflects the earlier common law presumption) is found in section 21(1)(a) of the *Acts Interpretation Act 1901* (Cth), in the following terms:

> (1) In any Act:
> ...

---

[23] *DJR v Commissions of Victims Rights* (2020) 383 ALR 517 [11] (Bell P).
[24] *Meyer Heine Pty Ltd v China Navigation Co Ltd* [1966] HCA 11; 115 CLR 10 at 23 (Kitto J; McTiernan J agreeing), 30-31 (Taylor J), 38 (Menzies J), 43 (Windeyer J); see also *Fair Work Ombudsman v Value-air (No 2)* [2014] FCA 759; 224 FCR 415 at 427 [72]; Herzfeld and Prince *Interpretation* (2020, 2ed) at [9.250]-[9.360]

(b) references to localities jurisdictions and other matters and things shall be construed as references to such localities jurisdictions and other matters and things in and of the Commonwealth.

51. Section 2(2) of the *Acts Interpretation Act* provides that the "*application of this Act or a provision of this Act to an Act or a provision of an Act is subject to a contrary intention*".

52. In *DJR v Commissioner for Victims Rights* (2020) 383 ALR 517 at [183] Leeming JA explained the effect of the similar State provision in section 12 of the *Interpretation Act 1987* (Cth) saying:

> The effect of s 12 is not to expand the operation of New South Wales legislation so that it extends to all matters and things with a nexus with New South Wales. Both the common law rules of construction, and the interpretative rule in s 12, operate to impose a territorial restriction on one or more of the generally worded terms of the statute

53. Accordingly in the present case, it is necessary to read the words of section 477(3)(b) as though it read "requirements that restrict or prevent the movement of persons, goods or conveyances in or between specified places [in and of the Commonwealth]". It therefore presumptively does not apply extraterritorially.

54. There is no contrary statutory indication that any part of section 477, including the broad power in section 477(1), was intended to operate extraterritorially.

55. This is a case in which *"useful and clear legislative guidance is given"*[25] as to the territorial reach of the Act. In the present case the drafters have turned their mind to the extra-territorial reach of the Act and determined not to include such a reference in respect of section 477.

56. The clearest express references to extraterritorial operation of the Act is found in Chapter 11 Part 3 Costs Recovery, where it is expressly stated in section 614: "*This Part extends to acts, omissions, matters and things outside Australian territory*".

57. No such indication is found in Chapter 8 in respect of section 477.

58. Notably, section 30 suggests Parliament turned its mind to expressly limit the operation of the Act in other respects (not presently relevant). Section 30 expressly provides the Act does not apply to the extent that its application would be inconsistent with the "*exercise of rights of foreign aircraft or vessels*", in accordance with the United Nations Convention on the

[25] *DJR v Commissions of Victims Rights* (2020) 383 ALR 517 [29] (Bell P).

Law of the Sea, "*above or in the territorial sea of Australia, the exclusive economic zone, or the waters of the continental shelf*".

59. There is nothing in the Act to rebut the presumption that section 477 is intended to authorise a determination with effect only within the Commonwealth.

60. There is, therefore, no statutory authorisation in section 477 insofar as the Determination operates extra-territorially. This conclusion once again informs the breadth of section 477(1).

61. That being so, the Determination as made exceeds the power granted by section 477(1).

E THE PRINCIPLE OF LEGALITY

Summary of the Applicant's case on legality

62. For the reasons outlined below, the applicant submits that the weight of High Court authority plainly supports the conclusion that a right of citizens to re-enter their country of citizenship exists as a fundamental common law right in Australia. Such a right is not to be infringed except and unless parliament has determined (by clear words or necessary implication) that this may occur. In the present case, the Act does not reveal that parliament so intended. As such, to the extent that the Determination seeks to deny citizens the right of re-entry, it is *ultra vires* as falling outside the grant of statutory authority.

63. This ground proceeds on the assumption (without prejudice or admission to any later hearing on prayer 4 of the Originating Application) that the Commonwealth Parliament has legislative power to abrogate the right to re-enter, if it had chosen to do so. The Applicant's case is that it has not acted to abrogate the right.

The principle of legality

64. It is a well settled principle of statutory construction that *"common law rights are to be regarded as abrogated by statute only by the use of language which manifests a clear intention to do so."*[26] What will suffice to demonstrate such intent as a matter of *"irresistible clearness"*[27] is not a low standard; any purported restriction *"must be perspicuously expressed and strictly construed"*.[28] In the absence of express and unambiguous words, what must be shown is that the legislation

---

[26] R *v Independent Broad-based Anti-corruption Commissioner* [2016] HCA 8; 256 CLR 459 at [40]; see more generally Herzfeld and Prince, *Interpretation* (2020) at [9.50]-[9.140]

[27] *Potter v Minahan* (1908) 7 CLR 277 at 304; R *v Independent Broad-based Anti-corruption Commissioner* [2016] HCA 8; 256 CLR 459 at [40].

[28] *Strickland (a pseudonym) v Director of Public Prosecutions* [2018] HCA 53; 266 CLR 325 at [101]

would be inoperative, meaningless, or wholly frustrated unless the right were affected (and so the intent to abrogate arises by necessary implication).[29] The principle applies not only to fundamental rights, but also to fundamental freedoms, immunities, and principles, and is reflective of the common law as the *"ultimate constitutional foundation in Australia"*.[30] It in turn constrains both parliamentary legislation creating a power to make delegated legislation, and the delegated legislation itself.[31]

The existence of a fundamental common law right of re-entry

65. For over a century now, the High Court has recognised (and subsequently re-endorsed) the existence of a fundamental common law right of citizens to re-enter their country of citizenship. Indeed, the uncontroversial existence of such a right has been recognised by the authors of Herzfeld and Prince, *Interpretation* (2020, 2ed); there described as a "freedom of movement" which it is presumed a statute does not interfere with.[32] Although it has been expressed with varying terminology over that time, the foundational principle is the recognition that the concepts of nationhood and citizenship rest on there being reciprocal obligations and rights between the State and its nationals.

66. The right first found expression in *Potter v Minahan* (1908) 7 CLR 277, a decision concerning the meaning of the term "immigrant" as it appeared in the *Immigration Restriction Act 1901* (Cth) (a "prohibited immigrant") and the boundaries of the legislative power to make laws with respect to immigration as conferred by s 51(xxvii) of the *Constitution*. Chief Justice Griffith described *"the division of human beings into communities"* as *"an elementary part of the concept of human society"*, and in this regard recognised that English common law had held that an "alien" *"has no legal right to enter a country of which he is not a national"* (at 289). His Honour concluded in turn that since every individual *"must be entitled to enter some community"* there must be *"at least one part of the world to which every human being, not an outlaw, can claim the right of entry when he thinks fit"* (at 289). So fundamental did his Honour regard this concept to be that it was stated to be *"self-evident"* and to *"not need the support of authority"* (at 289).

67. In *Potter*, Justice Barton likewise described the *"right of ingress, egress and sojourn"* as a *"birthright"*, and doubted that the Constitution could grant the government *"the right to*

---

[29] *Coco v the Queen* [1994] HCA 15; 179 CLR 427 at [8]-[13]
[30] *Momcilovic v The Queen* [2011] HCA 34; 245 CLR 1 at [42]-[43].
[31] *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1 at [43] and [44] (French CJ), [116]–[123] (Hayne J), [148]–[151] (Heydon J), [202]–[206] (Crennan and Kiefel JJ) and [224] (Bell J); *Brett Cattle Co Pty Ltd v Minister for Agriculture* (2020) 274 FCR 337 at [291]-[293]
[32] Herzfeld and Prince *Interpretation* (2020, 2ed) at [9.80]

prohibit the entry of those who are subjects" (at 293-294, 299). So too did Justice O'Connor regard it as *"beyond serious controversy"* that an Australian could *"remain in, depart from, or re-enter Australia as and when he thought fit"* (at 304). In an early reflection of the principle of legality, his Honour further stated that *"it must...be assumed that the legislature did not intend to deprive any Australian-born member of the Australian community of the right after absence to re-enter Australia unless it has so enacted by express terms or necessary implication"* (at 305).

68. This right to enter subsequently found expression in the joint decision of Chief Justice Mason and Justices Wilson, Brennan, Deane, Dawson, Toohey and Gaudron in *Air Caledonia International v The Commonwealth* [1988] HCA 61; 165 CLR 462. The Court there was tasked with considering the validity of a law which imposed an "arrival fee" on all incoming passengers on overseas flights in order to clear immigration. Their Honours – in considering whether the fee constituted a "tax" or a "charge"/"licence" (and thus was beyond any head of commonwealth legislative power) – placed significance on the fact that the fee was imposed on both citizens and non-citizens alike. Their Honours in turn held that *"The right of the Australian citizen to enter the country is not qualified by any law imposing a need to obtain a licence or "clearance" from the Executive"* (at [10], [12]). That being so, no "service" could be said to have been rendered to the citizen; they were entitled by right to enter.[33]

69. More recently the essential link between citizenship and a right of abode has been relied upon by the High Court in construing the concepts of "citizen" and "alien" (as they appear in sections 44 and 51(xix) of the *Constitution*). In *Re Canavan* (2017) 263 CLR 284, the Court (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon, Edelman JJ) regarded as determinative the existence (or not) of a person's *"right of abode"* (said to include *"the right to enter and to reside in the country of nationality"*) in concluding whether that person was a citizen of a country (at [131], [134]). In *Love v the Commonwealth* [2020] HCA 3; 94 AJLR 198, similarly, each of Justices Gageler, Nettle, Gordon and Edelman (in separate judgments) reasoned that the right to enter was a relevant point of distinction between a "citizen" and "alien" (at [94]-[95], [273], [325], [440]). Notably, both Justice Gageler and Justice Edelman placed reliance on the High Court's earlier decision in *Potter* to conclude that there was a "fundamental" (or "absolute and unqualified") right of a citizen to enter their country of citizenship.

70. Recognition of the fundamental common law right of entry may also be found in numerous decisions of this Court, most particularly in the context of migration law. By way of

---

[33] See further: *Minister for Immigration and Multicultural and Indigenous Affairs, Re; Ex parte Ame* (2005) 222 CLR 439 at [22] referring to *Air Caledonia* and to *"the right of an Australian citizen to enter the country being unqualified by any law"*.

example, in *Minister for Immigration, Multicultural Affairs and Citizenship v SZRHU* [2013] FCAFC 91 his Honour Justice Flick had regard to the international recognition of *"a right of an individual to enter a country of which they are a citizen"* as contained in Art 12(4) of the International Covenant on Civil and Political Rights. His Honour traced that right to the *"long-established common law position"* that *"every Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by sentence of the law"*.[34] Such a right has likewise recently been recognised by Justice Perry[35] and Justice Bromwich.[36]

71. The Applicant submits that the weight of authority binding on this Court (if not as *ratio*, then at least seriously considered *dicta*) is consistent with the existence of a common law right of citizens to re-enter their country as an incident of citizenship which right cannot be abrogated or restricted except as provided by the principle of legality.

The Determination and the Act

72. That being so, the question then is whether the Act reveals, by clear words or necessary implication, an intention to displace the presumption that there would be no interference with this right of re-entry and/or an intention to grant the executive the power to make a determination which would abrogate that common law right. The delegated legislation must, in this regard, give way to the primary legislation; it is only if the primary legislation provides clear authority for delegated legislation to override the common law right that this can occur.[37] Thus whilst the Determination in its terms plainly seeks to deny all persons (citizens and non-citizens alike) entry into Australia, it may only validly do so if the Act rebuts the presumption that the citizen's right of entry will not be impinged.

73. Nowhere in section 477 of the Act – or indeed in Chapter 8 more generally – is there to be found express words abrogating the common law right of re-entry or purporting to authorise the executive to make determinations which would have that effect.

74. To the contrary, the examples contained within section 477(3) as to the type of requirements which the Minister is empowered to make are consistent with a recognition of, and protection of, the right of entry. In particular, section 477(3)(a) as framed does not envisage a requirement being made which would prevent persons entering Australia; at its highest it envisages a requirement being imposed on such entry (such as, for example, the

---

[34] At [105] (and see [101]-[129] generally), with whom Justice Buchanan agreed (at [34], [84])
[35] *Azar v Minister for Immigration and Border Protection* [2018] FCA 1175 at [34]
[36] *Steve v Minister for Immigration and Border Protection* [2018] FCA 311 at [58]
[37] *City of Melbourne v Barry* (1922) 31 CLR 174 at 197; *Evans v State of New South Wales* [2008] FCAFC 130; 168 FCR 576 at [60] and [68]; Pearce and Argument, *Delegated Legislation in Australia* (2017, 5 ed) 333 [19.27]

need to quarantine after arrival). This may be contrasted with section 477(3)(b) (which, as outlined, only governs restrictions *within* the territorial bounds of Australia) where the word "prevent" was included. A general power of quarantine is not to be equated with a general power of exclusion capable of being applied to citizens. So viewed, there is a plain intention by the legislature to allow restraints on movement between places within Australia, but not a corresponding intention to prevent entry of citizens into the country. This deliberate legislative choice to distinguish the powers available to the Minister reinforces the presumption that the citizen's right of entry was not intended to be abrogated. The effective operation of section 477 – and Chapter 8 – does not otherwise depend on it being inferred that the legislature intended to deny citizens that right.

75. Despite this, the clear effect of the Determination (when read with the Act) is an infringement of that common law right – by legislating that a citizen *"must not enter Australian territory"* (s 6 Determination) and creating a criminal offence should a citizen attempt to contravene the Determination by entering Australia (sections 479(1) and (3) Act). The Determination thus seeks to do that which the Act has not contemplated would be done.

76. By reason of the above, the Court ought therefore to conclude: (1) that there exists a common law right of re-entry of citizens; (2) the Act does not itself seek to abrogate that common law right nor to empower the Minister to issue determinations which would abrogate it; (3) notwithstanding (2), the Determination seeks to abrogate the common law right by mandating that all persons (including citizens) must not enter Australia; and (4) therefore, the Determination is ultra vires as falling outside the statutory authority which was granted to the Minister by the Act.

7 May 2021

C S WARD SC
6 St James Hall
T: (02) 9236 8670
E: cward@stjames.net.au

P F SANTUCCI
New Chambers
T: (02) 9151 2071
E:santucci@newchambers.com.au

K A MORRIS
New Chambers
T(02) 9151 2048
E:morris@newchambers.com.au

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:	Outline of Submissions
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 3:41:15 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.