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

GARY NEWMAN
Applicant

MINISTER FOR HEALTH AND AGED CARE
Respondent

APPLICANT'S SUBMISSIONS ON STANDING AND FEDERAL "MATTER"

Introduction

1. On Friday evening, after receiving the Applicant's submissions (and despite two earlier directions hearings) the Minister raised for the first time a concern about standing of the Applicant and or the existence of a federal '*matter*.'

2. At 9.05am this morning the Applicant received the Minister's submissions (**RS**). Those submissions appear to challenge standing, it is not clear whether the Minister concedes the existence of a federal matter, but RS[4] notes that the questions are closely related. In any event: *[q]uestions of standing, matter and hypothetical issue cannot be separated into watertight compartments*".[1]

3. This Court is seised of a justiciable controversy because the Applicant Mr Newman is in India and would like to come home but as it presently stands the law (by means of the Determination) is directing him to avoid taking that course of conduct for fear of criminal sanction.

4. When considering whether a matter exists, the Court's attention ought to be focused not upon testing just how willing is the Applicant to break the law, but instead the Court must look to the absolute terms in which the Determination speaks to the Applicant because he has been in India - distinct from all others in the Australian community who have not – and purports to deprive him of his liberty to re-enter should he wish to.

5. Briefly stated, this submissions *first*, answers the factual matters challenged at RS[8] about the practical possibility of returning, by reference to the Third Bradley affidavit served this morning. *Second*, this submission reviews various of the authorities to explains that the

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[1] *Kuczborski v Queensland* (2014) 254 CLR 51, [98] (Hayne J).

Applicant falls squarely within what was contemplated by Nettle J in *CGU Insurance Limited v Blakely* (2016) 259 CLR 339, [102] where it was said:

> it is now well established that, where a claimant intends to take action which would subject him or her to a "theoretical" possibility of being subjected to legal process, the risk of being so subjected to that process is sufficient to ground standing to claim a declaration that the basis of the process (in that case, the offence) is invalid and, co-ordinately, that in such cases there is a matter upon which the court has jurisdiction to adjudicate.

Factual matters

6. The Applicant's evidence now makes clear the following propositions:

   (a) The Applicant has been looking for flights (*Third Bradley*, [4]);

   (b) There are particular flights available to him which could both exit India for a third country and then provide onward flights to arrive in Australia before the Determination expires (*Third Bradley*, [4] – [9]);

   (c) Despite whatever the purported effect of the Indian Government's ban on flights (considered further below), there are nonetheless still flights leaving India for third countries (other than Australia) (*Third Bradley,* [8]);

   (d) The Applicant would like to be able to book particular flights, but he remains concerned that he will commit an offence, or lose the cost of the airfare (*Third Bradley,* [10]).

7. In light of the above this is not a case about unlikely "contingencies" (cf RS[9]). Rather, a clear path of action for the Applicant to return home is currently being impeded by threat of criminal sanction. He is entitled to test whether that law is valid before he takes any further steps.

8. The above facts overcome each of the alleged factual problems recited in RS[8]. But something more needs to be said about the specifics of the "first" point in respect of the Indian flight ban. It is said "first" (RS[8])that all scheduled flights have been suspended from leaving India until 31 May 2021, by reference to statements from the "Office of the Director General of Civil Aviation Opposite Safdarjung Airport, New Dehli". [2] That point fails for two reasons.

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[2] *First Bradley Affidavit*, MB6-MB7, (**CB75, 77**)

9. First, on the face of those document they state they are subject to an exception that *"However, International Scheduled flights may be allowed on selected routes by the competent authority on case to case basis".*[3]

10. Second, and in any event, the *Third Bradley* affidavit makes clear at [8], that flights are in fact leaving India.

11. Finally, and contrary to the *"third"* point in RS[8], it is clear that that the reason the Applicant has not taken further steps is because he is concerned (as any reasonable person would be) about breaking the law.

Principles on standing and the existence of a Federal *"matter"*

12. This Court's original jurisdiction, in the sense of its authority to decide the present proceedings, is derived from section 39B(1A) of the *Judiciary Act 1903* (Cth) conferring upon the Federal Court Australia authority to decide any *"matter"* arising under any laws made by Parliament.

13. When exercising that original jurisdiction section 21 of the *Federal Court Act 1976* (Cth) confers upon the Court the power *"to make binding declarations of right, whether or not any consequential relief is or could be claimed"* (s21(1)); and provides that a *"suit is not open to objection on the ground that a declaratory order only is sought"* (s21(2)).

14. The existence of a *"matter"* in Federal jurisdiction has been the subject of significant exposition by the High Court.

15. As an important procedural point the High Court has made clear the desirability of having questions of standing determined concurrently with the substantive issues especially where – as here- there is an important issue which may never fall for decision in:

> if determination of standing requires the consideration of important questions which may never fall for decision if the plaintiff's claim is dismissed on its merits, it may be more convenient to determine the validity of the challenged statute. That discretion is, of course, always subject to the constraint that the court cannot decide validity as an abstract or hypothetical question. [4]

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[3] *First Bradley Affidavit*, MB6-MB7, (**CB75, 77**)
[4] *Kuczborski v Queensland* (2014) 254 CLR 51 [7] (French CJ) (citations omitted).

16. The Applicant submits that the present is such a case. The Court should address the substance of the claim at the same time as addressing standing in its reasons, given that it is unlikely the legislation will otherwise be challenged.

17. As to the issue of standing itself.

18. As a starting point, *Croome v Tasmania* (1997) 191 CLR 119 laid out some principles in respect of the existence of a "matter", as "standing" specifically was conceded.

19. In *Croome,* the plaintiff challenged sections 122(a) and (c) and 123 of the *Criminal Code* (Tas) that prohibited sexual intercourse between males and acts of gross indecency committed by a male with another male. The plaintiff's case was that the State law was, pursuant to section 109 of the *Constitution* inconsistent with section 4(1) of the *Human Rights (Sexual Conduct) Act 1994* (Cth) which provided that sexual conduct involving consenting adults in private is not to be subject under any Commonwealth or State or territory law to arbitrary interference with privacy.

20. Brennan CJ, Dawson and Toohey JJ said (at 127):

> It is a misconception of the principle in *In re Judiciary and Navigation Act* to suggest that, in proceedings for a declaration of invalidity of an impugned law, no law is administered unless the executive government has acted to enforce the impugned law. The law that is being administered in such proceedings is not the impugned law but the constitutional or administrative law which determines the validity or invalidity of the impugned law.

21. To similar effect, Gaudron, McHugh and Gummow JJ said (at 136)

> Their Honours in In re Judiciary and Navigation Acts are not to be taken as lending support to the notion that, where the law of a State imposes a duty upon the citizen attended by liability to prosecution and punishment under the criminal law, and the citizen asserts that, by operation of s 109 of the Constitution, the law of the State is invalid, there can be no immediate right, duty or liability to be established by determination of this Court, in an action for declaratory relief by the citizen against the State, unless the Executive Government of the State has, at least, invoked legal process against the particular citizen to enforce the criminal law.

22. In *Kuczborski v Queensland* (2014) 254 CLR 51, the Queensland State government had passed legislation that among other things:

(a) introduced the Vicious Lawless Association Disestablishment Act 2013 (Qld) (VLAD Act), which imposed mandatory sentences on "vicious lawless associates";

(b) amended sections 72, 92A, 320 and 340 of the Criminal Code (Qld) to introduce more severe sentences where the offender was found to be a "participant" in a "criminal organisation";

(c) added sections 60A-60C of the Criminal Code to provide for new offences relating to activities by individuals who were "participants in a criminal organisation"; and

(d) Section 13(3A) of the Bail Act 1980 (Qld) was amended to require a court or police officer to refuse bail to a defendant charged with an offence who was alleged to be or have been a participant in a criminal organisation unless he or she showed cause why detention in custody was not justified.

23. The Court was satisfied the plaintiff had standing to challenge the provisions creating new offences, but not the provisions altering the penalties for certain existing offences.

24. French CJ after referring (at [4]) to *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265; and *Croome* went on to explain (at [6]):

> A law which proscribes specified conduct as a criminal offence affects the freedom of a person who would otherwise engage in that conduct. If there is an arguable question whether such a law, properly interpreted, would prohibit what that person intends or wishes to do, he or she may have standing, in a court with the relevant jurisdiction, to seek a declaration that the intended or desired conduct is not unlawful. Similarly, if there is an arguable question that the law is invalid, there may be standing to seek a declaration to that effect. [Citations omitted]

25. To unpack what was said by French CJ, if the facts are sufficiently clear that they would ground a declaration that the future conduct of a plaintiff is not unlawful, those same facts are sufficient to ground standing to seek a declaration of invalidity in respect of the statute.

26. It was only in respect of the sentencing provisions in *Kuczborski* that French CJ was concerned about "contingencies". In respect of the sentencing provisions being challenged (as opposed to the new offences) French CJ explained (*Kuczborski* at [19]):

> Whether the VLAD Act would apply to him, however, would depend, among other things, upon whether he was charged with a declared offence and whether it was alleged that the conduct constituting that offence was done for the purposes of, or in the course of participating in the affairs of, the Club. It is not suggested that any of the contingencies which would attract the application of the VLAD Act provisions to the plaintiff has arisen.

27. It was further said that the plaintiff's case in that case rested "*upon contingencies which, if they did occur, could occur in a variety of factual circumstances*" (*Kuczborski* at [19]).

28. Importantly for French CJ it was not simply that the future facts were contingent, but also that the necessary fact (ie the commission of the offence and the finding of guilt necessary to give rise to a sentencing) could occur in a variety of factual circumstances.

29. That was distinct in *Kuczborski* from the circumstances that gave rise to the risk of commission of an offence in respect of which jurisdiction was conceded. French CJ explained precisely why that concession was correct (*Kuczborski* at [36]):

> Given that the plaintiff is a member of the Club, which is designated as a criminal organisation, the offence-creating provisions of the Criminal Code directly affect, inter alia, his freedom of movement and association. His claim for declaratory relief that the provisions are invalid invokes the jurisdiction of the Court under s 30(a) of the Judiciary Act. The matter is one on which it is properly conceded that the Court has jurisdiction and the plaintiff has standing.

30. Hayne J also considered relevant the fact that the plaintiff did not say he would engage in conduct in contravention of the provisions because (*Kuczborski* [97], [99]):

> [97] The arguments about standing and hypothetical issue in respect of the relevant provisions were all ultimately founded on the proposition that the plaintiff has not been accused of, or charged with, and does not say that he has committed, or will commit, any of the offences which engage the relevant provisions....
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> [99] he does not say that he will engage in that conduct, the plaintiff does not show that he is a person who is now, or in the immediate future probably will be, affected whether in person or his property, by the relevant provisions.

31. The plurality Crennan, Kiefel, Gageler and Keane JJ explained in respect of the sentencing laws that (*Kuczborski* at [178]):

> In *Croome v Tasmania* it was held by Brennan CJ, Dawson and Toohey JJ that a sufficient interest extends to any case where a person's freedom of action is affected by the impugned laws. The laws which the plaintiff seeks to challenge do not affect his freedom of action. The activities upon which the operation of the first category of challenged laws depends are unlawful under the general law. The new provisions add to the adverse consequences of contravention of existing norms of conduct, but do not impose any new prohibition or restriction on any person. The new provisions might lead to a more severe sentence; but their only present operation is to provide an extra incentive to obey existing, valid laws. That is not something which is said, or could be said, to be a disadvantage to the plaintiff.

32. Of importance in *Kuczborski* was that the change in sentencing laws affected the publicly at large equally, and depended on a number of contingencies (that could occur in a variety of circumstances) that were beyond the plaintiff's control.

33. But it ought not be assumed that *Kuczborski* stands for any wider principle that the Court has no jurisdiction to hear matters concerning contingent or future conduct.

34. That is made clear by *Onus v Alcoa of Australia* (1981) 149 CLR 27 where members of an indigenous tribe who had no immediate right of access to ancient relics tried to restrain Alcoa from potentially damaging the relics.

35. Alcoa argued that the cultural and historical associations which are relied upon by the appellants were no more than 'intellectual and emotional considerations' which are insufficient to grant standing.

36. The Court however applied *Australian Conservation Foundation Inc v The Commonwealth* (1980) 146 CLR 493 at 527 to find that the plaintiffs did have a *"special interest in the subject matter of the action"* despite not having an immediate right of access to the relics. Gibbs CJ stated: "*If the relics are preserved, the appellants will at least have a possible opportunity to have access to them*"(149 CLR 27 at 37, see also Wilson J at 62).

37. The above is neatly drawn together by the statement of Nettle J in *CGU Insurance Limited v Blakely* (2016) 259 CLR 339 at [102].

38. *CGU* was a case in which the liquidators of Akron commenced proceedings against a former director Mr Crewe and Crewe Sharp Pty Ltd, the corporate vehicle through which Mr Crewe provided consulting services to the Akron (which was also in liquidation). The liquidator was alleging a failure to prevent insolvent trading.

39. Crewe Sharp made a claim on professional indemnity policy with CGU. CGU denied liability. The liquidators of Akron joined CGU seeking a declaration of that CGU was liable to indemnify the Crewe Sharp and Mr Crew, in respect of any judgment the liquidators might (in the future) ultimately obtain against the insureds.

40. The plurality in French CJ, Kiefel, Bell and Keane JJ held that the Supreme Court had jurisdiction to hear that claim in Federal jurisdiction, noting that there was a matter arising under a Commonwealth law, and a real question of the Akron's liquidator's entitlement to the proceeds of the insurance policy (see [65]-[70]).

41. Nettle J's reasons explain why the plaintiff had standing, in terms that apply with equal force to the present case (*CGU* at [102]):

> Fourth, the issue in this case is not theoretical but, even if it were, the court does not lack jurisdiction to make a declaration concerning a theoretical issue, in the

> sense of an issue that does not presently exist but which is likely to arise in future, where the issue is productive of a real and pressing dispute, is of real practical importance or is one in which the claimant has a real commercial interest. Thus, for example, it is now well established that, where a claimant intends to take action which would subject him or her to a "theoretical" possibility of being subjected to legal process, the risk of being so subjected to that process is sufficient to ground standing to claim a declaration that the basis of the process (in that case, the offence) is invalid and, co-ordinately, that in such cases there is a matter upon which the court has jurisdiction to adjudicate. Similarly, where a claimant has a real commercial interest in establishing the claimant's legal status or entitlement in relation to proposed commercial conduct and there is a real controversy with some contradictor as to the existence or extent of the claimant's legal status or entitlement, the claimant may have standing to obtain, and the court co-ordinately will have jurisdiction to grant, a declaration as to the existence or extent of the status or entitlement. [emphasis added, citations omitted]

42. In the present case the Applicant clearly intends to take action to enter Australia, and he faces the risk of being subjected to the legal process. That is sufficient to ground standing.

43. To demonstrate the concreteness of the present case in another way, in addition to seeking a declaration as to the invalidity of the determination, the Applicant would be entitled to seek a declaration that his arrival in Australia on a particular date is not in breach of the *Biosecurity Act 2015* (Cth) or any delegated legislation made under that Act (as French CJ explained in *Kuczborski* (at [6])). The Court in the present case is dealing with a sufficiently concrete state of affairs to ground the Applicant's standing and the existence of a "matter".

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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

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