IN THE FEDERAL COURT OF AUSTRALIA **NSD 388 of 2021**

DISTRICT REGISTRY: NEW SOUTH WALES

DIVISION: GENERAL

GARY NEWMAN

Applicant

MINISTER FOR HEALTH AND AGED CARE

Respondent

RESPONDENT'S SUBMISSIONS

Filed on behalf of the Respondent by:

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INTRODUCTION

1. The Applicant seeks declarations that the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021 (Cth) (the **Determination**) is invalid, in whole or in part. By grounds 1 and 2 of his originating application, the Applicant contends that the making of the Determination was ultra vires the power conferred by s 477(1) of the *Biosecurity Act 2015* (Cth) (the **Act**).

2. For the reasons that follow, that contention should not be accepted. The applicants lack standing to seek the relief sought in respect of grounds 1 and 2. The Determination is amply supported by the broad power conferred on the Health Minister by s 477(1). Section 477(1) reposes in the Health Minister a non-delegable power to determine any requirement the Minister is satisfied is necessary to prevent or control the entry of COVID-19 into Australia or to prevent or control its emergence, establishment or spread. The Applicant seeks to superimpose onto s 477(1) restrictions that are not found in the statutory text and are inconsistent with the emergency context in which the powers are conferred. In so doing, the Applicant asks the Court to recalibrate the balance that the Parliament has carefully struck. None of that is altered by the principle of legality.

STANDING

3. The Minister contends that the Applicant lacks standing, with the consequence that the declarations the subject of grounds 1 and 2 must be refused.

4. It is often said that, within federal jurisdiction, questions of standing are 'subsumed' within the constitutional requirement that there be a 'matter'.[1] But that is not to suggest that the requirements are interchangeable. As Gummow J more fully explained in *Truth About Motorways*:[2]

> The notion of 'standing' is an implicit or explicit element in the term 'matter' throughout Ch III, identifying the sufficiency of the connection between the moving party and the subject matter of the litigation. However, it would be an error to

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1 Eg *Croome v Tasmania* (1997) 191 CLR 119 (***Croome***) at 132-133 (Gaudron, McHugh and Gummow JJ); *Truth About Motorways Pty Ltd v Macquarie Infrastructure Management Ltd* (2000) 200 CLR 591 (***Truth About Motorways***) at [45] (Gaudron J) and [122] (Gummow J); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [68] (Gummow, Hayne, Crennan and Bell JJ).

2 *Truth About Motorways* (2000) 200 CLR 591 at [122]. For that reason, 'an affirmative answer to the question - is there a matter? - may not be sufficient to answer the question whether the plaintiff has standing': *Kuczborski v Queensland* (2014) 254 CLR 51 (***Kuczborski***) at [5].

attribute to this notion a fixed and constitutionally mandated content across the spectrum of Ch III.

5. As that explanation suggests, the content of the standing requirement varies depending on the relief that is sought.[3] Relevantly for present purposes, the authorities establish that, where a declaration is sought as the relief or part of the relief that will resolve a 'matter', the availability of such relief turns principally upon whether the Applicant has a 'real'[4] or 'sufficient' interest[5] in obtaining that relief. That the moving party may feel a real sense of grievance or injustice does not suffice.[6] Rather, a person does not have a special interest 'unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails'.[7] That requirement is not satisfied merely because a person would be so positioned if a series of contingencies materialised.[8]

6. This point is well illustrated by the reasoning of Gibbs J in *University of New South Wales v Moorhouse*[9] Although his Honour's observations were made in the course of considering the discretion to refuse relief, they were subsequently cited in *Ainsworth v Criminal Justice Commission* in a discussion of the boundaries of judicial power.[10] Justice Gibbs said that in the case of an owner of copyright seeking to assert her or his rights, a declaration should not as a general rule be made unless 'it is established either that an actual infringement has occurred or that the defendant intends to take action that will amount to an infringement'. His Honour also referred to the many examples of cases

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3 *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 at 511 (Aickin J). This passage was quoted in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at [47] (Gaudron, Gummow and Kirby JJ), [97] (McHugh J). Standing is 'a metaphor to describe the interest required, apart from a cause of action as understood at common law, to obtain various common law, equitable and constitutional remedies': *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [68] (Gummow, Hayne, Crennan and Bell JJ).

4 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at [103] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437 (Gibbs J).

5 *Edwards v Santos Ltd* (2011) 242 CLR 421 at [36] (using both terms) (Heydon J, French CJ, Gummow, Crennan, Kiefel and Bell JJ agreeing); *Croome* (1997) 191 CLR 119 at 127 (Brennan CJ, Dawson and Toohey JJ).

6 *Kuczborski* (2014) 245 CLR 51 at [185] (Crennan, Kiefel, Gageler and Keane JJ).

7 *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, 530 (Gibbs J); *Kuczborski* (2014) 245 CLR 51 at [177], [185] (Crennan, Kiefel, Gageler and Keane JJ).

8 See Dixon J's reasons in *British Medical Association v Commonwealth* (1949) 79 CLR 201 at 258.

9 (1975) 133 CLR 1 at 10.

10 (1992) 175 CLR 564 at 582.

in which a declaration had been refused as regards 'circumstances that [have] not occurred and might never happen'.

7. Justice Gibbs' observations about circumstances which had not occurred and might never occur aptly describes the position of the Applicant. The Prime Minister has announced that the travel pause will not be renewed beyond the term of the current Determination: Affidavit of Jonathon Charles Hutton affirmed on 9 May 2021 (**Hutton Affidavit**), Annexure JCH-1. The Prime Minister's media release states that 'the medical advice provided to the Minister for Health is that it will be safe to remove the Determination on 15 May': Hutton Affidavit, p. 5.[11] That announcement is a statement at the highest level of the Commonwealth Executive Government that, upon the repeal of the Determination on 15 May 2021 (clause 5), no similar instrument will be put in its place. It will therefore expire at the end of Friday, four days after the hearing in this matter.

8. The evidence before the Court as to the Applicant's interest (given via his solicitor) does not suggest that he will be relevantly affected by the Determination in that very limited timeframe. The effect of that evidence is this: **First**, all scheduled international passenger services to and from India are suspended until 11:59 pm on 31 May 2021 (more than two weeks after the Determination will cease to be in effect).[12] **Second**, the Applicant had 'considered' travelling to Pakistan sometime after the Prime Minister's announcement of 27 April 2021, in order to then fly from Pakistan to Australia.[13] He does not say that he has progressed that hypothetical possibility beyond its 'consideration', or even that his consideration of that possibility is ongoing. He does not suggest he has any immediate concrete plan to travel to Pakistan, let alone in the next 4 days, or that concluding his affairs in India and travelling to Pakistan is a practical possibility within that short timeframe. He does not suggest that he has obtained any relevant visa or other permission to travel to Pakistan, to the extent that is required. Nor does he suggest that he has taken any steps to secure a flight from Pakistan to Australia, or that that would even be a realistic possibility (noting also his solicitor's evidence at [14]-[15] about the difficulties the Applicant experienced in securing a flight to Australia from India). **Third**, the Applicant does not adduce evidence that would demonstrate that all of those many required steps *are* in fact practically possible within the next four days, but that the Determination forecloses their pursuit by requiring the observance of particular norms (to

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11 See also the media statement of the National Cabinet, referring to the fact that 'medical advice provided to the Minister for Health is that it will be safe to allow it to expire as planned on 15 May': Hutton Affidavit, Annexure JCH-2, p. 9.

12 Affidavit of Michael David Bradley affirmed on 5 May 2021 (**First Bradley Affidavit**), [24] and annexures 'MB-6' and 'MB-7'.

13 First Bradley Affidavit, [21].

which are attached liability to prosecution and subsequent punishment) (cf the facts in *Croome*).[14] He says no more than that he is 'aware' of the effect of the Determination.

9. In short, the potential application of the Determination to the Applicant in the next four days rests upon a series of contingencies that have not come to pass and are, it may be inferred, highly unlikely to come to pass in the (narrow) window of time remaining. In those circumstances, there is no satisfactory evidence before the Court that would suggest the Applicant has any 'real' or 'sufficient' interest in obtaining the relief he seeks. The Applicant bears the onus of demonstrating that interest.[15] He has failed to do so. In federal jurisdiction, the consequence is that that relief must be refused[16] (it is not a matter of discretion).

10. The Minister has advised the Applicant that he proposed to make submissions broadly along the lines just made. In response, the Applicant indicated that should the Minister maintain his position, the Applicant may seek to adduce further evidence to address the Minister's concerns. The Minister has no objection to that course. The Court cannot grant relief unless it is satisfied that the Applicant has standing (again, that not being a discretionary matter in federal jurisdiction). Accordingly, the Minister proposes that the applicant be granted leave to adduce further evidence on that point and that (if necessary) the Court invite further submissions from the parties on that issue. Of course, it would not be necessary to consider that issue if the Court determined to dismiss the application. The High Court has said that the notion that standing is a 'threshold issue' does not prevent the Court, in its discretion, from proceeding immediately to an examination of the merits.[17] That is what the Minister proposes here.

LEGISLATIVE SCHEME

Special powers conferred in the event of human biosecurity emergencies

11. The Act establishes a scheme for the management of, among other things, biosecurity emergencies and human biosecurity emergencies: Act, s 4(a)(v). In pursuit of that purpose, Chapter 8 of the Act confers special powers for dealing with biosecurity

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14 *Croome* (1997) 191 CLR 119 at 137.

15 *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 74 (Brennan J); *Hazelbane v Doepel* [2008] FCA 290 at [13].

16 *Truth About Motorways* (2000) 200 CLR 591 at [52] per Gaudron J; see also *Plaintiff M61/2010E v Commonwealth* at [100]-[102].

17 *Wilkie v Commonwealth* (2017) 263 CLR 487 at [56]-[57] and see also *Combet v Commonwealth* (2005) 224 CLR 494 to which reference was made in *Wilkie*.

emergencies of national significance: see Act, s 442. Those powers are conferred on the Agriculture Minister (in the case of biosecurity emergencies) and the Health Minister (in the case of human biosecurity emergencies).

12. The special powers for dealing with human biosecurity emergencies are conferred on the Health Minister by Part 2 of Chapter 8. Those powers are enlivened in the event that the Governor-General declares a human biosecurity emergency under s 475(1) of the Act. The Governor-General may declare such an emergency only where the Health Minister is satisfied:

    (a) *first*, 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

    (b) *secondly*, that the declaration is necessary to prevent or control: (i) the entry of the listed human disease into Australian territory or a part of Australian territory; or (ii) the emergence, establishment or spread of the listed human disease in Australian territory or a part of Australian territory.

13. It is uncontroversial that, at all relevant times, human coronavirus with pandemic potential has been a listed human disease in respect of which a human biosecurity emergency declaration has been in force: AS [23]-[25].[18] The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020 (Cth) declares human coronavirus to be an infectious human disease 'that has entered Australian territory' and 'that is posing a severe and immediate threat to human health on a nationally significant scale': s 6.

14. The powers conferred on the Health Minister under Part 2 of Chapter 8 are powers which may only be exercised by the Minister personally: s 474. The conferral of a non-delegable power on the Minister tends to indicate that the primary constraints on the exercise of the power are political ones, having regard to the fact that a Minister is accountable to Parliament via the constitutionally entrenched system of representative and responsible government.[19] The Applicant appropriately acknowledges that it is open

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[18] Biosecurity (Listed Human Diseases) Determination 2016 (Cth), s 4(h); Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020 (Cth), s 4 (first made on 18 March 2020 and amended from time to time).

[19] *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at [50], quoted with approval in *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2015) 255 CLR 231 at [18]; *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [102], [181]-[187] and [244]-[247]; *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at [40]; Mark Aronson et al, *Judicial Review of Administrative Action* (6th ed, 2017) at [5.50]. See also *Palmer v Western Australia* (2021) 95 ALJR 229 at [155] (Gageler J).

to the Health Minister, in exercising a power of the kind conferred by s 477(1), to take into account political considerations: AS [31].

15. Commensurate with the situation of emergency that enlivens the power, Part 2 confers on the Health Minister broad powers to respond to such emergencies. Relevantly for present purposes, s 477(1) of the Act confers a power to determine, by legislative instrument, 'any requirement that he or she is satisfied' is necessary for one of the purposes enumerated in ss 477(1)(a)-(c).

16. The Applicant properly accepts that the power conferred on the Health Minister by that provision is wide: AS [17]. However, he immediately backs away from that (with respect) correct submission and seeks to give the provision an artificial and stunted construction in a number of ways. None are correct.

'Any requirement' means what it says

17. Contrary to what is said at AS [44], the term 'any requirement' makes plain that the power conferred by s 477 was not intended to be limited by the examples given at s 477(3). The reason for that is obvious: the matters to which the Minister may need to respond, involving an 'emergency' with the characteristics identified in s 475(1)(a), may require novel executive action, not readily specified in advance.

18. That is further emphasised by the very first words that appear in the chapeau to s 477(3) ('Without limiting subsection (1) …'). The words 'without limiting' evince an intention that a 'general power should be given a construction that accords with the width of the language in which it is expressed and… is not to be restricted by reference to the more specific character of that which follows'.[20] That s 477(3) operates without limitation to s 477(1) is confirmed by the Explanatory Memorandum to the Biosecurity Bill 2014 (Cth), which states, at p. 294: 'Some examples are listed under subclause (3) to give an indication of the types of requirements that might be determined by the Minister, but this is not intended to limit the types of requirements that may be determined.'

19. As such, the submissions at AS [45]-[47], which are directed at showing that the Determination does not fall within the examples listed in ss 477(3)(a) or 477(3)(b), cannot

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[20] *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 679 (Mason J), applied in *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240 at [38] (French CJ, Gummow, Hayne and Crennan JJ). See also *Buckle v Josephs* (1983) 47 ALR 787 at 792; *Commonwealth Bank of Australia v Reeve* (2012) 199 FCR 463 at [62]; *Transport Accident Commission v Hogan* (2013) 41 VR 112 at [51].

make good the wider proposition – essential to the Applicant's case – that the Determination was ultra vires s 477(1).

20. Rather, the primary limitations on the Minister's powers are the purposes specified in ss 477(1)(a)-(c) and the notion of 'necessity' in the chapeau to s 477(1), as further articulated in s 477(4). We will deal with each in turn.

Purposive powers – relating to both intra and extraterritorial subject matter

21. It will be noticed that the purposes in sub-paras (a)-(c) of s 477(1) have what might loosely be termed an 'inward' and 'outward' facing focus.

22. Sub-para (a)(ii) is in the former category (*inward* facing). It is concerned with the emergence, establishment or spread of the disease '*in* Australian territory'.

23. Sub-paras (a)(i) and (b) are in the latter category (*outward* facing). Sub-para (b) is concerned with possible spread to 'another country'. Sub-para (a)(i) is concerned with 'entry' of the disease 'into Australian territory', which can only refer to entry from *outside* Australian territory. Sub-para (c) can be seen to fall within both categories – it permits the Minister to respond to recommendations made by an international organisation, which recommendations might concern matters both within and outside Australian territory.

24. Of course, there is overlap amongst those purposes – measures directed to the purpose of preventing or controlling entry into Australian territory will prevent emergence, establishment or spread in Australian territory. The point is that s 477 operates upon subject matter which is both internal and external to Australia (as do other aspects of the Act[21]).

25. Something more should be said at this point about the words 'prevent' or 'control', which appear in each of sub-paras (a) and (b) and must each be given independent meaning.[22] The Applicant appears to accept as much (AS [43]), and yet contends, without elaboration, that the word 'prevent' should be given an unusually narrow meaning. That contention should not be accepted. Plainly, the word 'prevent' must mean something more than 'control', if each word is to have independent effect. There is no warrant for reading the word 'prevent' otherwise than in accordance with its ordinary meaning, being

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21 See, for example, ss 45(1), 47(1), 56(2) and 478(1).

22 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [71] (McHugh, Gummow, Kirby and Hayne JJ), citing *Commonwealth v Baume* (1905) 2 CLR 405 at 414 (Griffith CJ).

'to keep from occurring'.[23] To the contrary, the protective purpose served by Chapter 8 favours a construction that gives the word 'prevent' its full effect. This is consistent with the principle that laws concerning the protection and safety of the community should, wherever possible, be given an expansive construction, even where that protective purpose is achieved in part by creating civil penalties or offences.[24]

The width of the examples in section 477(3)

26. Applying the strained reading of 'prevent' in s 477(1) and overlooking the obvious contextual features identified above, the Applicant submits that the reference to 'specified places' in s 477(3)(b) is confined to places within Australia. If it is, that is beside the point for the reasons given at paragraphs 17 to 20 (s 477(3) merely provides examples of the requirements that may be made under s 477(1)). But, to the extent it matters, that submission is also wrong.

27. Section 477(3) has an express textual link with s 477(1) and must be read in the context of that provision and, in particular, the various purposes identified in ss 477(1)(a)-(c). And, as has been explained, those purposes clearly relate to matters both *within and outside* Australian territory. The most obvious means of achieving the object specified in s 477(1)(a)(i) (prevent the entry of a listed human disease into Australian territory) is to prevent a person at heightened risk of carrying that disease from entering Australia. That is because, of its nature, insofar as human disease gains 'entry' to Australian territory, it will generally be carried 'into' Australia by people arriving from another place. The Minister can (and did in this case) seek to address that matter by imposing a requirement that bites at the point of entry (the landing place specified in clause 6). This restricts movement of people between 'specified places' (being places outside Australia and within Australia) is readily understood as falling within s 474(3)(b), read in its proper context.

28. In contrast to that common-sense and contextual reading of s 477(3)(b), the Applicant's construction effectively confines the Minister's important powers such that she or he is primarily concerned with preventing the *spread* of the disease once it has already

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23 Macquarie Dictionary (online edition, 2020).

24 See *Bull v Attorney-General for New South Wales* (1913) 17 CLR 370 at 384 (Isaacs J), to the effect that laws of the subject kind 'should be construed so as to give the fullest relief which the fair meaning of its language will allow', cited with approval in *Waugh v Kippen* (1986) 160 CLR 156 at 164 (Gibbs CJ, Mason, Wilson and Dawson JJ); *Deal v Father Pius Kodakkathanath* (2016) 258 CLR 281 at [36] (fn 14) and [38] (fn 19) (French CJ, Kiefel, Bell and Nettle JJ); *Connective Services Pty Ltd v Slea Pty Ltd* (2019) 267 CLR 461 at [19] (fn 44) (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

entered, and emerged or been established in, Australia (ie a lop-sided power, directed primarily to the object in s 477(1)(a)(i)). It is difficult to understand why Parliament should be taken to have intended that result, particularly given the breadth of the various purposes to which the power is directed.

29. A similar point can be made as regards the identified purpose of preventing or controlling the spread of a declaration-listed human disease 'to another country': s 477(1)(b). Again, the most obvious way of achieving that purpose would be to prevent a person at increased risk of the disease from travelling to another country, being a place outside of Australia. Any determination addressing such a matter in that way would necessarily need to specify that 'place', albeit that the act to be proscribed could be leaving an Australian port for that place.

30. For the reasons given at [77], it is not necessary to determine whether the Act operates with extraterritorial effect. In any event, the Applicant gains no assistance for his strained construction from the statutory presumption that an Act does not operate extraterritorially at AS [48]-[60]. An Act that applies within Australian territory may nonetheless impose measures that *relate to* events overseas. To suggest otherwise stretches the presumption against extraterritorial application beyond its limits,[25] and would be particularly surprising in the context of an Act which clearly recognises the potential impact on Australia of events occurring overseas.[26]

31. Indeed, had Parliament intended the reference to 'places' in s 477(3)(b) to be confined to places within Australia, it may be expected that it would have done so expressly, given that notions of Australian territory (and entry into such territory) are deployed elsewhere in s 477.

Requirement that the Minister be satisfied that the Determination is 'necessary'

32. As we have already noted, the Minister must be 'satisfied' that the requirement to be

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25 See the discussion of *Broadhurst v Paul* [1954] VLR 541 in Pearce and Geddes, *Statutory Interpretation in Australia* (9th ed, 2019) at [5.14]. The case concerned a Victorian law that made it an offence to drive a heavy truck without having had at least 10 consecutive hours of rest in any 24-hour period. A person was arrested just after crossing the border from NSW into Victoria, having not had the required rest. The Court rejected an argument that to look to the period of driving in NSW would be to give the law extraterritorial effect. *Broadhurst* was applied by Samuels JA in *Morgan v Goodall* (1985) 2 NSWLR 655 at 657. See also discussing the 'non-rigid' operation of the presumption where a provision involves a number of elements, Perry Herzfeld and Thomas Prince, *Interpretation* (2nd ed, 2020) at [9.290]–[9.300].

26 To the extent it does have potential application, the presumption would defeat the purpose of the legislation, and it can therefore be assumed that the statutory intention was to override the presumption: *Kumagai Gumi Co Ltd v Federal Commissioner of Taxation* [1999] FCA 235; (1999) 90 FCR 274; 161 ALR 699 at [41]–[43].

determined is 'necessary': s 477(1). That is, s 477(1) involves what a Full Court of this Court described in *Ali*[27] as a 'subjective jurisdictional fact'.[28] Here, as elsewhere,[29] that statutory design reflects the fact that one is concerned with 'inherent value judgments … on which reasonable minds might differ' and which may include 'a not insignificant subjective element'.[30] Parliament can be taken to have recognised that 'there is no absolute conclusion or state of mind which might be reached in every case' and that 'usually a range of views might be held, and the power is enlivened if the repository reaches that state of mind on which it is conditioned'.[31]

33. Returning to the point we made above about the requirement for those powers to be exercised personally by the Minister, that statutory design can also be seen to be 'indicative of Parliament's intention that the person forming the opinion applies their special experience, understanding, knowledge and the resources at their disposal to the task'.[32] That calls for further caution in approaching any application for review of that decision: 'It is not any person's state of mind, nor is it the courts' opinion as to whether the state of mind should have been formed'.[33]

34. As was noted in *Ali*, although the existence of such a subjective state of mind is not beyond review by the Court, the grounds upon which it may be 'reviewed' are limited, extending only to what is generally referred to as '*Avon Downs* principles'.[34] As such, and contrary to the tenor of the Applicant's submissions, it is not enough to show that the Minister could have formed a different view. Rather, the Applicant must demonstrate, by reference to the *Avon Downs* principles, that it was not legally open to the Health Minister to reach the state of satisfaction specified in subsection (1).

35. A similar point arises by reason of the Applicant's (correct) acceptance that what is involved here is an attempt to review the making of delegated legislation: AS [28]. In

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27 *Ali v Minister for Home Affairs* [2020] FCAFC 109 (***Ali***) at [42].

28 See also *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [130] (Gummow J).

29 See, for example, the precondition the subject of consideration in *Wilkie v Commonwealth* (2017) 263 CLR 487 at [98], [103]-[104].

30 *EHF17 v Minister for Immigration and Border Protection* (2019) 272 FCR 409 (***EHF17***) at [67].

31 *EHF17* (2019) 272 FCR 409 at [67].

32 *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 (***Avon Downs***) at 360; *EHF17* (2019) 272 FCR 409 at [68].

33 *EHF17* (2019) 272 FCR 409 at [68].

34 *Avon Downs* (1949) 78 CLR 353 (*Avon Downs*) at 360 and see also the other authorities collected in *Ali* [2020] FCAFC 109 at [42].

Foley v Padley,[35] Gibbs CJ observed at 352-353, 'When a power to make by-laws is conditioned upon the existence of an opinion, it is the existence of the opinion, and not its correctness, which satisfies the condition.' More generally, in the context of challenges to the validity of delegated legislation, it has been observed that an applicant bears 'a much sterner onus' than that applicable where an administrative decision is under review.[36]

36. Section 477(4) further particularises what is required in order for the Minister to reach the relevant subjective state of satisfaction. As such, ss (1) and (4) operate together to require the Minister to undertake what is, in substance, an analysis of whether the measure exhibits a degree of 'proportionality' to the object sought to be achieved. To the extent that AS [29] suggests that ss (1) and (4) impose two independent tests, that is incorrect. The assessment under s 477(4) of whether the requirement will be (for example) 'effective in', and 'appropriate and adapted to', achieving one of the purposes in s 477(1) gives content to the requirement, under s 477(1), that the Minister be satisfied the requirement is necessary. In any event, to the extent it matters, the Minister considered each of s 477(1) and s 477(4) in turn (see further below).

37. We will now turn to the particular aspects of s 477(4) which are in issue here and explain their proper construction.

The analysis required by s 477(4)

38. The various limbs of s 477(4) involve a form of 'proportionality testing' (essentially enquiring whether there is a reasonable relation between the objective which is sought to be achieved and the means used to that end). Analyses of that sort are by no means novel in Australian law. And, although one should be wary of unthinking translation of tests developed for other legal purposes, some assistance can be derived from those other applications of proportionality-type tests.

Section 477(4)(a)

39. Section 477(4)(a) requires the Health Minister to be satisfied that a requirement is likely to be effective in, or to contribute to, achieving the purpose for which it is to be determined. That test broadly aligns with the 'suitability' test that is to be applied in the

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35 (1984) 154 CLR 349. See, further, the references to *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430-432 (Latham CJ) in *Foley v Padley* by Gibbs CJ at 353, Brennan J at 369-370 and Dawson J at 375.

36 *Austral Fisheries Pty Ltd v Minister for Primary Industries and Energy* (1992) 37 FCR 463 at 477; *Donohue v Australian Fisheries Management Authority* [2000] FCA 901 at [18].

third stage of the three-step analysis of the constitutional implied freedom of political communication. The suitability test is directed at whether there is a rational connection between the relevant measure and the purpose of the law.[37] It does not involve a value judgment about whether the legislature could have approached the matter in a different way. The requirement for a rational connection involves no more than asking whether the relevant 'purpose can be furthered' by the measure. That s477(4)(a) is a 'low level proportionality test' of that kind is plain from its terms: it need only be 'likely' to 'contribute to' achieving the purpose for which it is to be determined.[38]

Section 477(4)(b)

40. Section 477(4)(b) requires the Health Minister to be satisfied that a requirement is appropriate and adapted to achieve the purpose for which it is to be determined. The 'appropriate and adapted' test is one which was familiar in earlier constitutional discourse, prior to the adoption of the 'structured proportionality' test in *McCloy*.[39] In that context, it was remarked that 'there is little difference between the test of 'reasonably appropriate and adapted' and the test of proportionality'.[40]

41. However, the use of those words in s 477(4) could not require consideration of each of the other matters in s 474(4)(a) and (c)-(d) (being other aspects of what is now considered under the structured proportionality test in *McCloy*). That would render those provisions otiose. Section 477(4)(b) is rather to be understood as requiring some form of reasonable relationship between the means adopted and the relevant purpose – reflecting the principle that one does not apply a sledgehammer to crack a nut.[41] Again, that is a 'low level proportionality test' in the sense that it gives the decision maker considerable latitude and does not involve close scrutiny of the outcome of the exercise of power.

Sections 477(4)(c) and (d)

42. Sections 477(4)(c) and (d) are what might loosely be described as 'necessity tests' (ie the restriction is no more restrictive or intrusive than required, and that the manner in

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37 *Clubb v Edwards* (2019) 267 CLR 171 (***Clubb***) at [6] (Kiefel CJ, Bell and Keane JJ).

38 *McCloy v New South Wales* (2015) 257 CLR 178 at [80] (French CJ, Kiefel, Bell and Keane JJ).

39 *McCloy v New South Wales* (2015) 257 CLR 178.

40 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567 (fn 272). See also *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 377 (Toohey J) and 396 (McHugh J).

41 *Minister for Immigration v Li* (2013) 249 CLR 332 at [30] (French CJ). See also at [72]-[74] (Hayne, Kiefel and Bell JJ). In that sense, it may go little further than to make explicit that the decision-maker will exercise the statutory power reasonably: at [63] and [90].

which the measure is applied is no more restrictive or intrusive than is required in the circumstances). In general terms, this aspect of proportionality testing 'is based on the premise that the use of the law's means – or the need to use such means – is required only if the purpose cannot be achieved through the use of other (hypothetical) … means that would equally satisfy the rational connection test and the level of their limitation of the right in question be lower'.[42]

43. In the context of the constitutional implied freedom of political communication, a court will enquire into whether a measure is 'necessary' by asking whether there is an 'obvious and compelling alternative which is equally practicable and available and would result in a significantly lesser burden on the implied freedom'.[43] The necessity enquiry must be appropriately confined so as to preserve 'the role of the legislature to select the means by which a legitimate statutory purpose may be achieved', and to ensure that courts do not 'exceed their constitutional competence by substituting their own legislative judgments for those of parliaments'.[44] Thus, a measure does not fail the 'necessity' test merely because an applicant is able to hypothesise alternative measures which may be less restrictive. Instead, in order to demonstrate that a measure is not 'necessary', an applicant must demonstrate that alternative measures are 'obvious' and available, and are equally capable of fulfilling the identified purpose ('quantitatively, qualitatively, and probability-wise'[45]).

44. Observations to similar effect were made, in a different context, in *Loielo v Giles* [2020] VSC 722. That case concerned a challenge to the curfew imposed in greater Melbourne in response to COVID-19. The Supreme Court of Victoria was required to consider whether there were any 'less restrictive means reasonably available' for the purposes of s 7(2)(e) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). In that context, Ginnane J observed (at [251]):

> the existence of other options does not mean that they were 'less restrictive means reasonably available to achieve the purpose' of protecting public health. In determining what means were 'reasonably available', it was appropriate to consider what means had been tried, what had followed, the urgency of the situation and the risks if infection rates

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42 Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012) at 317.

43 *Comcare v Banerji* (2019) 267 CLR 178 at [35] (Kiefel CJ, Bell, Keane and Nettle JJ).

44 *McCloy v New South Wales* (2015) 257 CLR 178 at [58] and [82] (French CJ, Kiefel, Bell and Keane JJ).

45 *Tajjour v New South Wales* (2014) 254 CLR 508 at [114] (Crennan, Kiefel and Bell JJ).

surged again.

45. His Honour concluded (at [252]) that there were no other reasonably available means for the purposes of s 7(2)(e), observing that whether the decision-maker should have considered the restrictions 'were no longer proportionate to their purpose was a matter of judgment, open to different assessments'.

46. Similar observations have been made about the operation of the 'reasonable necessity' for the purposes of s 92 of the Constitution. In *Palmer v Western Australia* (2021) 95 ALJR 229 (***Palmer***), Gageler J observed at [137] that '[r]easonable necessity… expresses a standard that guides the making of an evaluative judgment as distinct from a test that substitutes for the making of an evaluative judgment'. To similar effect, Edelman J stated at [274] that 'the reasonableness threshold means there will be a margin of appreciation afforded to Parliament before its legislation will be found to fall outside the boundaries of choice of the means by which to implement the legislative purpose'. It is also notable in *Palmer* that the findings of fact made in that case (being that once a person infected with COVID-19 enters the community there is a real risk of community transmission and that it may become uncontrollable) were said by Kiefel CJ and Keane J to leave little room for debate about effective alternatives and the defendant's submission that there is 'no effective alternative to a general restriction on entry must be accepted': at [78]-[80].

Determination

47. On 3 May 2021, the Health Minister exercised the power conferred by s 477(1) to make the Determination. In addition to the aspects of the Determination identified at AS [20]-[22], there are several further features of the Determination to which attention should be drawn.

48. The first is the limited duration of the Determination. The Determination came into effect on 3 May 2021 (cl 2) and will cease to operate at the beginning of 15 May 2021 (cl 5). Consistently with its description in its title as a 'travel pause', it will endure for only 12 days.

49. The second is the limitations on the scope of cl 6, which are effected both by cl 7 and, importantly, by the definitional provision of the instrument. The definition of a 'relevant international flight' as extracted at AS [20] is incomplete. Clause 4 carves out from the definition of international flight 'an Australian Government facilitated flight' and 'an emergency medical evacuation flight'. As such, the Determination makes provision for

alternative means by which persons may enter Australia without engaging the prohibition in cl 6. Coupled with the express exemptions in cl 7, this accommodates a degree of flexibility in the operation of the pause, even in circumstances where the effect of the Determination is of limited duration.

The purposes to which the Determination was directed

50. The purposes to which the Determination was directed are those identified in ss 477(1)(a)(i) and (ii). Those purposes are reflected in the Explanatory Statement to the Determination, page 1 of which states:

> 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.
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> … 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.

51. The way in which the Determination was addressed to the purposes in ss 477(1)(a)(i) and (ii) was identified both in Professor Kelly's letter and the Ministerial submission. Professor Kelly observed that India was identified as a high risk country due to the significant increase in COVID-19 positive case numbers in returned travellers from India: Affidavit of Michael David Bradley affirmed 7 May 2021 (**Second Bradley Affidavit**), p. 13. Professor Kelly further observed that the proportion of overseas acquired cases from air arrivals had increased and that there had been a sharp increase in the proportion of overseas acquired cases that were reported as having originated in India (that proportion having risen to 50%): Second Bradley Affidavit, p. 13. Professor Kelly then considered the specific risks associated with international arrivals, including the risk of leakage into the Australian community through the quarantine system. The particular matter to which Professor Kelly understood the travel pause was directed was 'maintain[ing] the integrity of Australia's quarantine system' by 'likely allow[ing] the system to recover capacity'. He considered that to be a 'critical intervention in preventing and managing the spread of COVID-19 in Australia': Second Bradley Affidavit, pp. 13-14.

52. The Ministerial submission likewise said that an increase in overseas-acquired cases would strain the 'integrity' of hotel quarantine arrangements, and noted the concerns identified by the by the Chief Medical Officer (**CMO**) about the capacity of the quarantine

arrangements to withstand the risk of leakage: Second Bradley Affidavit, pp. 8-9, [11], [12], [14] and [15].

53. In short, the particular concern (as identified by the person holding the office of CMO) was that the very integrity of Australia's quarantine system was under threat (with 'leakage' from that system presenting an obvious risk to the Australian community) and that the pause until the start of 15 May 2021 on arrivals from India would allow that system to recover capacity.

54. The analysis called for by s 477(4) was to be conducted by reference to those identified purposes – as more precisely crystallised in the material before the Minister. For the reasons given below, the Minister did so in a manner which is legally unimpeachable.

Ground 1(a)

55. Ground 1(a) alleges that the Health Minister failed to have regard to or to consider properly the statutory preconditions to the exercise of power as set out in s 477(4). There appear to be a number of strands to that argument.

Evidence that Minister read and considered the material before him

56. First, and somewhat remarkably, it appears to be contended that the Minister has failed to adduce sufficient evidence to demonstrate that he read or engaged with the briefing materials: AS [34]. That inverts the onus of proof, which the Applicant plainly bears.[46]

57. In the absence of evidence to the contrary (of which there is none), it is to be inferred that the Minister read the ministerial submission and its accompanying attachments.[47] Indeed, the Applicant accepts that proposition at AS [30]. Those materials appear as 'Annexure MB-8' to the Second Bradley Affidavit. The version of the ministerial submission that was signed by the Minister is reproduced at 'Annexure MB-10'.

58. The observation that the ministerial submission was not altered or annotated by the Minister (AS [33(a)]) cannot support any inference that the Minister did not read the

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46 *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352 at [48]; *Chetcuti v Minister for Immigration and Border Protection* (2019) 270 FCR 335 (***Chetcuti***) at [66] and [95].

47 *Stambe v Minister for Health* (2019) 270 FCR 173 at [74]-[75]; *Stephens v Attorney-General (Cth)* [2021] FCA 204 at [6], referring to *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 (***Palme***) at [16] and [20]; *Alexander v Attorney-General (Cth)* [2019] FCA 1829 at [18]; *Makarov v Minister for Home Affairs (No 3)* [2020] FCA 1655 at [84].

submission, and in any event disregards the evidence as to the Minister's usual practice of considering submissions electronically: Second Bradley Affidavit, p. 32.

59. Similarly, the further suggestion that the Minister may not have read the attachments (AS [35]; see also AS [33(b)] and [33(c)]) fails to have regard to the scope of the inference that is properly to be drawn absent evidence to the contrary. There is no principled basis for distinguishing between the ministerial submission and the attachments to which it refers. The submission should be assumed to have been read as a whole, and parts should not be taken out of context.[48] It is in any event inherently unlikely that the Minister did not read the attachment to which the Applicant refers at AS [35], being a letter addressed to the Minister from the CMO and setting out the CMO's recommendations. Once the effect of that presumption is appreciated, the basis for the Applicant's submission at [33(b)] falls away. Whatever minor discrepancies there may have been between the CMO's letter and the ministerial submission, the Minister is taken to have considered both documents.

60. The oblique suggestion at AS [32] and AS [33(h)] that the Minister should have spent more than a day reviewing the ministerial submission and its attachments is surprising in light of the emergency context in which the power is enlivened and the relatively short length of the submission.[49] It also ignores the fact that the Minister was entitled to have regard to the considered opinion of the CMO, a matter which is obviously contemplated by legislation of this kind. That is especially so given that the CMO is assigned particular functions, as Director of Human Biosecurity, within the scheme of the Act: see Chapter 10, Part 3.

Merits of the Minister's reasoning

61. The other strand of ground 1(a) is that the Minister failed to reach the state of satisfaction required by s 447(4)(a) (particulars to ground 1(a), [2]) and/or s 447(4)(c) (particulars to ground 1(a), [4]). However, that ultimately reduces to an argument concerning the merits of the Minister's decision.

62. The decision-making record, as reflected in the ministerial submission of 30 April 2021, demonstrates that the Minister properly reached the subjective state of satisfaction required by s 477(4). There can be no doubt that the Minister was directed to the

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48 *Alexander v Attorney-General (Cth)* [2019] FCA 1829 at [18] (Lee J), citing *Palme* at [28].

49 The Applicant's reliance (in AS [32]) on *Chetcuti v Minister for Immigration* (2019) 270 FCR 335 at [99]-[101] is strained. That case, which concerned a review of 130 pages in 11 minutes, plainly falls to be distinguished.

applicable statutory test: Second Bradley Affidavit, p. 7, [6]-[7]. In addition to reproducing the terms of s 477(4), the ministerial submission sets out the evaluative considerations that can be taken to have informed the Minister's subjective satisfaction of the matters in s 477(4): Second Bradley Affidavit, Annexure MB-8, pp. 8-10, [14]-[22].

63. The main point sought to be advanced under this ground appears to be a suggestion that the Minister should have had regard to certain matters which the Applicant considers important: AS [35], [36] and see also AS [33](c), (d) and (e).

64. A failure to have regard to such matters could only result in invalidity if they were mandatory relevant considerations. And such matters can only be mandatory considerations if they are 'factors which the decision-maker is bound to consider … by implication from the subject-matter, scope and purpose of the Act'.[50] The applicant has identified no textual foundation for a submission that the Minister was required to consider the matters to which he refers. Indeed, given the nature of decision making in this unique statutory context, and the fact it will inevitably involve matters of national and public interest, it is inherently improbable that the Minister will be required to have regard to any particular matter as a mandatory consideration.[51]

65. In any event, there is nothing in the Act to suggest, either expressly or by implication, that the Minister was required to consider the particular matters raised in AS [35]-[36]. AS [35] pays insufficient regard to the fact that the Minister was entitled to rely on the considered opinion of the CMO,[52] the totality of whose analysis cannot be expected to feature on the face of the letter to the Minister. Moreover, the granularity of the considerations hypothesised at AS [35] speaks against their being considerations mandated by the Act (as opposed to matters the Minister could have regard to if he so chose – ie 'permissive' considerations). That the Applicant considers that it would have been 'appropriate' for the Minister to have considered the matters raised in AS [36] does not demonstrate that a failure to have regard to them constitutes a legal error: cf AS [36]. That is particularly so when all of this is seemingly directed to the state of satisfaction required by s474(4)(a) – again, the Minister need only be satisfied that the requirement

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50 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40.

51 See eg *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [30] (French CJ and Kiefel J), [99(v) and (vi)] (Gummow, Hayne, Crennan and Bell JJ) and [114] (Heydon J).

52 A decision maker may rely on advice from his or her Department: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 30-31 (Gibbs CJ). A decision-maker is also able to rely on expert advice: see *Assistant Minister for Immigration and Border Protection v Splendido* (2019) 271 FCR 595 at [88].

is 'likely' to 'contribute to' 'achieving the purpose'. The refined analysis seemingly envisaged by the applicant is not required to reach that state of satisfaction.

66. Insofar as the Applicant suggests that the Minister did not have regard to the fact that the Determination would impose a criminal sanction (AS [34]), that suggestion is contradicted by the Applicant's own acknowledgement that the CMO's letter referred to the imposition of a criminal penalty (AS [33(d)]). The letter stated: 'The penalty for breaching a section 477 determination is 5 years jail or 300 penalty units ($66,600) or both': Second Bradley Affidavit, p. 13. Further, the CMO's recommendation was itself couched in terms which demonstrate an obvious advertence to the criminal consequences of non-compliance. The CMO's recommendation was 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': Second Bradley Affidavit, p. 15 (emphasis added). Properly understood, the Applicant's submission collapses into a complaint that the Minister did not place sufficient *weight* on the criminal consequences that attached to non-compliance. For the reasons given in paragraphs [32] to [36] above, that it was open to the Minister to strike a different balance does not demonstrate that the Minister's decision was ultra vires.

67. The further suggestion that the Minister overlooked the 'domestic health risk' of imposing such penalties (AS [35]) goes no further. It assumes, without foundation, that rather than following the law by deferring their entry into Australia, significant numbers of people would defy the effect of the Determination and, within the 12 days for which it was in effect, seek to enter Australia illegally on commercial flights (presumably, through transit countries). That is a surprising assumption for the Minister to be required to proceed upon. The Applicant also assumes that such persons will be arrested and denied bail, and will then be detained among prison populations without any protective measures being implemented to reduce the risk of transmission of COVID-19 in these high-density custodial environments. Again, the Minister cannot be required, as a matter of law, to assume that the criminal justice and corrective services systems would respond in this way to this entirely speculative eventuality.

68. Insofar as the Applicant identifies legal issues he says ought to have been considered by the Minister (AS [36]), it is for the Applicant to demonstrate that those matters were not in fact considered. The Applicant is not relieved of that burden by reason of the fact that such legal opinions as were attached to the ministerial submission are the subject of a claim for legal professional privilege. If a party makes a valid claim of legal professional privilege, it is not open to draw an adverse inference against the party from

it having relied upon that privilege, because to do so would undercut the policy that is recognised in the establishment of the privilege.[53]

The Minister's state of satisfaction

69. Aside from the 'considerations' arguments identified above, the Applicant says very little about whether the Minister formed the state of satisfaction required by ss 477(1) and (4) within lawful limits. To the extent he does agitate that matter, he asserts, in a conclusory fashion that he could not have been so satisfied (AS [34]) or that the material before him was insufficient to allow a reasonable state of satisfaction to be reached (AS [37]). None of those arguments can be accepted.

70. The Applicant's generalised assertion (at AS [37]) that there was 'an absence of sufficient material' on the basis of which the Minister could have reached the state of satisfaction required by s 477(4) makes little effort to engage with the substance of the Minister's analysis as reflected in the decision record. The ministerial submission evidences an obvious advertence to the decision-making framework required by s 477(4): Second Bradley Affidavit, Annexure MB-8, pp. 8-10 [14]-[22].

71. The starting point for the analysis required by s 477(4) is the identification of the relevant purpose in s 477(1). Those are the specific purposes identified at paragraph [50] above. The basis on which the Minister was satisfied that the requirement was likely to be effective in achieving, and would be appropriate and adapted to achieve, the identified purpose is set out in [14]-[17] of the ministerial submission, which incorporates by reference the CMO's letter.

72. The ministerial submission identifies the 'high risk' that returned travellers from India present of 'incubating COVID-19 while in hotel quarantine': [14]. That is identified as having been so even where travellers returned a negative COVID-19 test prior to their scheduled departure (pointing, implicitly, to the inadequacy of pre-departure testing as an alternative measure): [14]. The ministerial submission cites the considered opinion of the CMO that, against that background, a pause on arrivals would be an effective and proportionate measure to maintain the integrity of Australia's quarantine system: [14]. It may be inferred from the reference to the measure as a 'pause', and the limited duration of the proposed determination, that the appropriate duration of the measure was actively

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53 See *Roach v Minister for Immigration and Border Protection* [2016] FCA 750 at [177] (Perry J) and, in the context of public interest immunity, *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* (2008) 234 CLR 532 at [5] (Gleeson CJ), [24] (Gummow, Hayne, Heydon and Kiefel JJ) (citing with approval *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 61 (Mason J)); see also *Sagar v O'Sullivan* (2011) 193 FCR 311 at [71]-[74] and [93] (Tracey J).

considered and resolved in favour of a 12-day limit. That may explain why the Applicant does not appear to contend that the Minister was not satisfied of the matter in s 477(4)(e).

73. It is clear from the decision record that the Minister had regard to matters in sub-paras 477(4)(a) and 477(4)(b) and was subjectively satisfied of those matters: see paragraphs 39 and 40, above. The Applicant's (implicit) suggestion that the Minister could not have reached the state of satisfaction in 477(4)(a) by reason of some failure to engage in further minute analysis (AS [35]) fails to bring to account the point made in paragraph 65 - that the Minister need only be satisfied that the requirement is '<u>likely</u>' to '<u>contribute</u> to' 'achieving the purpose'. A similar point applies as regards the state of satisfaction required by s 477(4)(b) (to the extent that is put in issue): the Minister need only be satisfied that there was some form of reasonable relationship between the requirement adopted and the relevant purpose (see paragraph [41] above).

74. As to the Minister's satisfaction of the matters in paragraphs 477(4)(c) and 477(4)(d), the Minister's consideration of those matters is recorded in [18] to [20] of the ministerial submission: Second Bradley Affidavit, p. 9. It was determined that the measure was no more restrictive than necessary having regard to the limited duration of the Determination and the exemptions incorporated into the instrument, both by cl 7 and by the carve-outs from the definition of a 'relevant international flight'. Those carve-outs excised from the scope of the Determination emergency medical evacuation flights and flights facilitated by the Australian Government. The Applicant makes no attempt to engage with the adequacy of those exceptions or why they were insufficient.

75. To the extent the Applicant says the Minister should have considered other measures in forming that state of satisfaction, it is not at all apparent what alternative course the Applicant proposes could have achieved, as effectively, the identified objective of preventing the entry of COVID-19 into Australia and stopping its emergence or establishment. To the extent they deal with it at all, the Applicant's submissions focus on one side of the proportionality equation – on measures said to be less restrictive of individual rights – without evaluating whether, and to what extent, alternative measures could have achieved the stated object as effectively. Clearly enough, confining cl 6 of the Determination to a narrower class of persons (the Applicant suggests, aliens: see AS [36]) would be less effective than subjecting <u>all</u> persons to the travel pause. That suggests, as in *Palmer*, there was no room for debate about effective alternatives.

76. In any event, postulation of such possibilities goes no further than pointing to the fact that this is a difficult area, involving matters of judgment and expert opinion, being matters on

which minds may reasonably differ. None of that could found any relevant error.

Ground 1(b) - Extraterritoriality

77. The premise of ground 1(b) of the originating application is that the Determination is invalid because it has extraterritorial effect. That premise is incorrect. Clause 6, read with s 479(1), makes it an offence to 'enter Australian territory'. An offence is committed only if a person enters Australia as a passenger on a 'relevant international flight', being a flight that 'is intended to arrive at a landing place in Australian territory': cl 4. Clearly enough, although as a practical matter a person boards a flight from outside Australia, the offence is not committed until a person actually enters Australian territory. The Determination does not operate extraterritorially.

78. Nor, for the reasons given at paragraphs [26]-[31], does any of that involve an exercise of power which exceeds any limits imposed by ss 477(1) or 477(3). The applicant's submissions to the contrary involves an argument which fails at multiple levels (s 477(1) is not constrained by the examples in s 477(3); and the example in s 477(3)(b) is far wider than suggested by the applicant).

Ground 2 Principle of Legality

79. The Applicant contends, by ground 2 of his originating application, that the Determination is not authorised by s 477(1) because it infringes the common law right of a citizen to enter his or her country.

Correct constructional approach

80. The principle of legality is but one of a range of interpretive techniques of more or less weight in any given case. It rests on the presumption that it is 'in the last degree improbable' that the legislature would overthrow fundamental principles, infringe rights or depart from the general system of law without clearly expressing its intention to do so.[54]

81. In analysing the extent of the restriction of liberty that Parliament has authorised, the Court ought also be mindful that Parliament will often seek to strike a balance between competing common law rights, or between such rights and other significant public interests. Thus, Gleeson CJ's remark in *Carr v Western Australia*[55] that '[f]or a court to construe ... legislation as though it pursued [one] purpose to the fullest possible extent

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54 *Potter v Minahan* (1908) 7 CLR 277 at 304, quoting *Maxwell's On the Interpretation of Statutes* (4th ed, 1905), p. 122.

55 (2007) 232 CLR 138.

may be contrary to the manifest intention of the legislation'[56] is also salutary in relation to the manner in which the principle of legality ought to be applied.

82. Further, whether Parliament has sufficiently indicated its intention to restrict liberty clearly in this context is a matter to be resolved utilising all of the conventional tools of statutory construction, including proper regard to the statutory context and object. Here, that includes the principle that protective laws should, where possible, be given an expansive construction so as to achieve their objects.[57] The principle of legality should not be applied so as to elevate one interpretive principle over all others, with a distorting effect on the balance Parliament has carefully struck in Chapter 8.

Relevant rights

83. It may be accepted that the common law confers on citizens a right to re-enter their country,[58] subject to long-recognised exceptions (such as restrictions on entry for the purposes of the quarantine) the scope of which need not presently be resolved.[59] However, as a common law right, it is susceptible of statutory abrogation, including by implication where the legislative object would largely be frustrated by the preservation of the right in that context.[60] Indeed, that the common law right of entry may be abrogated is evident from the description of that right by O'Connor J in *Potter v Minahan* (1908) 7 CLR 277 at 304 (cited in AS [67]) as a right 'to remain in, depart from, or re-enter Australia as and when he thought fit, unless there was in force in Australia a positive law to the contrary'. Similarly, Blackstone's *Commentaries on the Laws of England* observe that 'no power on earth, except the authority of parliament, can send any subject of England out of the land against his will'.[61]

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56 (2007) 232 CLR 138 at 143.

57 See *Bull v Attorney-General for New South Wales* (1913) 17 CLR 370 and the other authorities in the final footnote accompanying paragraph [25], above.

58 *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 469-470; *Love v Commonwealth* (2020) 94 ALJR 198 at [273] (Nettle J).

59 In considering the scope of the right, regard must also be had to the statutory criteria for citizenship prescribed by the *Australian Citizenship Act 2007* (Cth).

60 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [142] (Hayne and Bell JJ); *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at [43] (McHugh J), cited with approval in *R v Independent Broad-Based Anti-Corruption Commission* (2016) 256 CLR 459at [77] (Gageler J).

61 17th ed (1830), Book 1, Chapter 1, p. 137 (emphasis added).

Application to Chapter 8

84. Chapter 8 is a law of the kind anticipated by O'Connor J in *Potter* and restricts the common law rights relied upon by the Applicant.

85. **First**, for the reasons given above, it is a necessary incident of the scheme contemplated by Chapter 8 that a person may be prevented from entering (or leaving) Australia. Again, sub-paragraphs 477(1)(a) and 477(1)(b) empower the Health Minister to impose such requirements as he is satisfied are necessary to prevent or control the *entry* into Australia of a declaration-listed human disease, or the spread of the declaration-listed human disease to *another country*.

86. The power to restrict the movement of persons across borders is a necessary incident of such a power. That is reinforced by s 477(1)(c), which confers a power to determine any requirement necessary to give effect to a recommendation made by the World Health Organization under Part III of the International Health Regulations. The Explanatory Memorandum to the Biosecurity Bill 2014 (at p. 294) describes such regulations as 'health measures to prevent or reduce the international spread of disease' (our emphasis). Implicit in that description is an acknowledgment, consistent with what is recognised more directly in ss 477(1)(a)(i) and 477(1)(b), that a determination under s 477(1) may be directed at preventing the spread of diseases across international borders.

87. **Second**, consistently with that intent, the statement of compatibility in the Explanatory Memorandum to the Biosecurity Bill 2014 recognises (at p. 31) that s 477 would confer a power to take actions 'including restricting or preventing the movement of persons, goods or conveyances', which 'may operate to limit the right to free movement'. The reference to that right may be taken to be a reference to freedom of movement under Article 12 of the International Covenant on Civil and Political Rights: see p. 20.

88. **Third**, and contrary to AS [74], that objective intention to abrogate freedom of movement (including entry by citizens into Australia) is made plain by the examples in s 477(3). For the reasons given at paragraph [27] above, the example in s 477(3)(b) plainly contemplates requirements restricting or preventing movement of people between 'specified places', including places outside Australia and within Australia. Indeed, insofar as that example applies to the purpose in ss 477(1)(a)(i) and (b), such a requirement will almost inevitably involve a restriction of that kind.

89. It is unnecessary for the Minister to seek to shoehorn requirements of that nature into the example given in s 477(3)(a) (requirements that apply to persons 'entering' 'specified places'). As submitted above, the examples cannot detract from the width of s 477(1). But s 477(3)(a) is important for another reason. On the Applicant's *own case*, that provision could be used to apply a 'requirement' to a person's entry: AS [74]. Yet that is the very kind of measure which the High Court had in mind in *Air Caledonie International v Commonwealth* (1988) 165 CLR 462, upon which the Applicant relies at [68]. There, the Court made clear that the common law right of a citizen to re-enter Australia was not qualified by any need of any Executive fiat or 'clearance' (at 470), things that readily fall within the Applicant's notion of 'requirements'. And so, even on the Applicant's own unduly narrow (mis)reading of the statute, it plainly qualifies the very rights he says are left untouched. On any view, the object and subject matter of the statute is concerned with limiting those rights.

90. **Fourth**, that Chapter 8 contemplates restrictions on the movement of peoples (including citizens) is also reflected in the threshold conditions for the declaration of a human biosecurity emergency. As has been explained, human biosecurity emergencies are dealt with by Part 2 of Chapter 8. These may be declared in the event of harm, or a severe and immediate threat, 'to human health on a nationally significant scale: s 475(1)(a). At the risk of repeating an obvious but important point: the subject matter of Part 2 being diseases affecting humans, the most obvious way to prevent the entry into Australia of the disease (or its spread elsewhere) and so address that 'nationally significant' harm is to prevent the movement of persons.

91. **Fifth**, there are also other strong indicia that Parliament turned its mind to the possibility that a determination made under s 477(1) may significantly entrench upon the rights of individuals. So much is reflected in s 477(6), which prevents the Health Minister from imposing on an individual a measure of a kind that could instead be included in a human biosecurity control order under Chapter 2 (so as to attract the protections conferred where that chapter applies).

92. More importantly, Parliament's contemplation of affectation of rights is also evident from the terms of s 477(4), which, as noted above, requires the Health Minister to undertake a proportionality analysis of the kind familiar in human rights law. The very point of such an analysis is to provide a rational approach to the question of whether an entrenchment upon rights can be justified.[62] Where Parliament has adopted such a mechanism, the

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[62] *Palmer v State of Western Australia* (2021) 95 ALJR 229 at [55] (Kiefel CJ and Keane J). Although that case concerned s 92 of the Constitution, their Honour's remarks concerned

statutory design necessarily *assumes that rights will be impinged upon* and provides a *means for the relevant degree of impingement to be determined* (including by supervision of that constraint by a Court). That intricate scheme leaves no room for the application of a principle which operates only 'where constructional choices are open': *Momcilovic v The Queen* (2011) 245 CLR 1 at [43] (French CJ). The choices have already been made by the Parliament.

93. **Sixth**, other provisions of the Act also evince an intention that Parliament intended to restrict the ability of persons, including citizens, to enter Australian territory at will. The Act empowers the Director of Biosecurity (being the Agriculture Secretary: s 540) to approve a direction that an aircraft not land at any landing place in Australian territory (s 241(2)) or that a vessel not be moored at any port in Australian territory (s 249(2)). The Director of Biosecurity may also approve a direction that an aircraft or vessel be moved to a place outside Australian territory: s 206(3)(a). Such powers are conferred whether or not a human biosecurity emergency has been declared and are not confined to the management of human biosecurity risks.

What all that means

94. The principle of legality 'at most can have limited application to the construction of legislation which has amongst its objects the abrogation or curtailment of the particular right, freedom or immunity in respect of which the principle is sought to be invoked'.[63] That is plainly the case here. For the reasons given in paragraphs [84] to [93] above, the scheme established by Chapter 8 clearly contemplates that the requirements imposed under s 477(1) may include preventing persons (including citizens) from entering Australia.

Further obstacle to the Applicant's argument

95. There is also a further, separate, difficulty with the Applicant's argument. Although not clearly acknowledged, the necessary consequence of that argument must be to read into the words of s 477(1) a limitation to the effect that the general power thereby conferred does not include a power to prevent entry into Australia of citizens (but, by inference,

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proportionality analysis as applied in various contexts, including comparative ones. See also *Maloney v The Queen* (2013) 252 CLR 168 at [166] (Kiefel J).

63 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at [314] (Gageler and Keane JJ)]; *R (Belhaj) v Director of Public Prosecutions (No 1)* [2019] AC 593 at 630 [14] (Lord Sumption JSC; Baroness Hale PSC agreeing), 639-640 [41]-[42] (Lord Lloyd-Jones JSC; Lord Wilson JSC agreeing). Cf *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at [11] (French CJ, Kiefel and Bell JJ).

does include a power to exclude aliens). That must be so, because the principle of legality could have nothing to say as to the position of aliens. It is clear, in that regard, that an alien enjoys no right (whether 'fundamental', 'important' or otherwise) to be in Australia and to form part of its community.[64]

96. To say the least, that construction is surprising. It is not a construction that finds any foothold in the text. It requires, for example, that one read the word 'persons' in ss 477(3)(a) and (b) in different ways depending upon the particular requirement under consideration.[65] What is involved is a construction whereby the 'essential meaning of statutory words [which cannot be read down to abide by the relevant right] is not applied generally to all facts and circumstances that would otherwise have been encompassed'.[66] In the case of a requirement directed to entry, and by reason of the principle of legality, the Act is to be read as if it only applied to aliens, despite the fact that it appears from the text that it applies to citizens and aliens alike.

97. The words of s 477(1) are not capable of being read in that way. To read the power in s 477(1) as confined to particular classes of persons would run contrary to the scheme of Chapter 8, which is to confer powers which are broad in scope, applicable to all and subject to carefully delineated – and express – preconditions (e.g. in s 477(4)) and safeguards (e.g. s 477(6)). An Act should not be construed in such a way as to alter the statute's general policy or scheme or the specific policy or purpose of the relevant provision.[67] That is the role of the legislative branch.

CONCLUSION

98. For the foregoing reasons, the originating application should be dismissed with costs.

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64 See, eg, *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at [92] (Nettle J), and the cases there cited.

65 That, in itself is unlikely, given that the concept of a non-citizen appears elsewhere in the Act (s 102) and so could readily have been deployed had Parliament intended to limit the power in the way the Applicant contends.

66 What Justice Edelman terms 'partial disapplication': see *Clubb v Edwards* (2019) 267 CLR 171 at [424].

67 See, by analogy, Edelman J's consideration in the constitutional context of the notion of 'partial disapplication' in *Clubb* (2019) 267 CLR 171 at [431] (Edelman J).

99. If, contrary to the Respondent's submissions, the Court finds that the Applicant has standing, the relief sought in grounds 1 and 2 of the originating application should be refused with costs.

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10 May 2021

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 10/05/2021 9:01:14 AM 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.

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