



PRIVATE AND CONFIDENTIAL

16 April 2021

The Hon Greg Hunt MP
Minister for Health
Canberra

Cc: The Hon Karen Andrews MP
Minister for Home Affairs
Canberra

By email only: Minister.Hunt@health.gov.au

Dear Minister,

Overseas Travel Ban Emergency Requirements – Open Letter

1. I act on behalf of clients who have been impacted by the operation of:
 - the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020* (“OTB Determination”) issued by the Health Minister under section 477(1) of the *Biosecurity Act 2015* (“BSC Act”); and
 - the *Outward Travel Restrictions Operation Directive* (“OTRO Directive”) issued by Australian Border Force on behalf of the Australian Government Department of Home Affairs under the OTB Determination.
2. The OTB Determination prohibits Australian citizens, permanent residents and outgoing aircraft and vessel operators from leaving the country unless an exemption applies. Its purpose, as stated in s.477(1)(b) of the BSC Act, is to prevent or control the spread of COVID-19 to another country.
3. Clause 7 of the OTB Determination confers on the Australian Border Force a discretion “in exceptional circumstances” to grant an exemption to citizens, permanent residents and operators of outbound aircraft and vessels if they can provide “a compelling reason for needing to leave Australian territory”.
4. Clauses 8 and 9 of the OTRO Directive list some 12 situations “that would generally be approved and can be assessed and decided” pursuant to individual applications for exceptional circumstances exemptions, which include:
 - travel overseas for at least 3 months for a compelling reason.

- attend the funeral or visit a critically ill relative.
 - medical treatment.
 - pick up a minor child.
 - complete a work contract.
 - travel for business.
 - travel again after prior request approved for the same reason.
5. Section 477(6) of the BSC Act excludes certain biosecurity measures from the operation of s.477, including “traveller movement measures” under s.96, namely measures that prohibit individuals from leaving Australian territory on an outgoing aircraft or vessel. The general prohibition against outbound travel imposed by the OTB Determination purportedly pursuant to s.477(1) of the BSC Act clearly constitutes a s.96 traveller movement measure and is therefore excluded from the scope of s.477 by operation of s.477(6).
 6. The Human Biosecurity Control Order (“HBSC Order”) regime established under Part 3 of the BSC Act instead applies under these circumstances. This regime provides for individual medical assessments and is buttressed by the Minister’s discretion to set appropriate exit requirements under s.45 addressing matters such as passenger screening, declarations and questionnaires. The discretion remains subject to the general protections for individuals set out in ss.34 and 35 relating to justification, proportionality and least restrictive manner of imposition.
 7. The HBSC Order regime reflects an evidence-based scientific method, requiring diagnostic assessment to be conducted on an individual basis by suitably trained and qualified personnel in accordance with accepted medical standards. Civil liberties safeguards are preserved in the general protections and rights of merits review.
 8. It is disappointing that the Minister has departed from the BSC Act and instead imposed an arbitrary and unscientific blanket regime that fails to address contagion risks and discards general protections. Prohibiting healthy individuals from traveling overseas after they have been assessed and cleared against established clinical case criteria does not reduce the spread of disease. Further, the exemptions grounds cited above are merely pragmatic or compassionate, and so are also irrelevant and detract from the purpose. Simply put, the current approach is irrational from a scientific/ medical perspective and appalling from a civil liberties viewpoint, rendering the approach entirely unlawful, irresponsible and absurd.
 9. So, in addition to the Minister acting *ultra vires* and without authority by purporting to prohibit overseas travel pursuant to s.477(1) of the BSC Act, the Minister, the Department of Home Affairs and the Australian Border Force have erred in law by imposing irrelevant and improper considerations for regulating when individuals may travel overseas during this declared biosecurity emergency.
 10. Due to this compound of negligent blunders and oppressive restrictions, our clients have and continue to suffer loss and damage, including loss of liberty and dignity, coupled with fear, stress and anxiety, as well as in some cases significant economic losses.

11. We therefore request that the Minister review the Government's position and confirm that urgent steps will be taken to rectify the overseas travel ban regime, including without limitation to:

- (a) repeal the OTB Determination and the OTRO Directive;
- (b) introduce individual, proportionate and least restrictive exit requirements pursuant to the applicable provisions of the BSC Act; and
- (c) ensure that biosecurity measures are applied in accordance with the BSC Act and do not restrict people's rights to freely travel unless they genuinely pose a contagion risk.

12. Should I not receive satisfactory response by **23 April 2021** I will need to confirm instructions to issue proceedings without further notice.

If you have any queries please do not hesitate to contact the writer.

Yours sincerely

CLEMENS HASKIN LEGAL

Per:



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