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CONTENTS

ANITA MACKAY & JACQUELINE GIUFFRIDA	<i>ENSURING THE RIGHT TO A FAIR CRIMINAL TRIAL USING COMMUNICATION ASSISTANCE</i>	1
CHRISTOPHER ALEXANDER & MAI SATO	<i>STATE COMPLICITY IN THE EXTRALEGAL KILLING OF AHMADI MUSLIMS IN PAKISTAN: A CASE FOR BRUTALISATION</i>	30
BRUCE CHEN	<i>NO WAY OUT? AUSTRALIA'S OVERSEAS TRAVEL BAN AND 'RIGHTS-BASED' INTERPRETATION</i>	53
KATHY BOWREY	<i>RACIST IDEOLOGY AND HASHTAG ACTIVISM: THE COLLISION OF ART, BRAND, AND LAW IN PETER DREW'S AUSSIE FOLK HERO, MONGA KHAN</i>	80
BELINDA BENNETT	<i>OLDER PERSONS, THE SUSTAINABLE DEVELOPMENT GOALS, AND HUMAN RIGHTS</i>	104

NO WAY OUT?

AUSTRALIA'S OVERSEAS TRAVEL BAN AND 'RIGHTS-BASED' INTERPRETATION

BRUCE CHEN*

Shortly after COVID-19 was recognised as a national threat to Australia, in late March 2020 the Commonwealth Government prohibited Australian citizens and permanent residents from travelling overseas, with severe criminal penalties for non-compliance. The overseas travel ban, made under human biosecurity emergency powers under the Biosecurity Act 2015 (Cth), caused significant outrage. Australia was seen as an outlier in its approach to interfering with the rights of citizens and permanent residents to exit the country. The ban engaged a citizen's fundamental common law right to depart from Australia, and a person's human right to leave their own country. This article analyses the relevance and limits of two statutory interpretation principles protective of those rights — the principle of legality and presumption of consistency with international law. It examines the treatment of those principles in the Full Court of the Federal Court case of LibertyWorks Inc v Commonwealth (2021) 286 FCR 131. The article concludes that the Full Court's decision was underdeveloped with respect to the principle of legality. It deserved greater attention, even during a time of public emergency.

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CONTENTS

I INTRODUCTION	2
II THE <i>BIOSECURITY ACT</i> AND HUMAN BIOSECURITY EMERGENCY DECLARATION	4
A <i>The Human Biosecurity Emergency Declaration Power</i>	5
B <i>The Human Biosecurity Emergency Powers</i>	5
III THE DETERMINATION	7
IV HUMAN RIGHTS AND THE PRINCIPLE OF LEGALITY	8
V THE <i>LIBERTYWORKS CASE</i>	12
A <i>Summary of the Proceedings</i>	12
B <i>Analysis of the Findings</i>	14
VI CONCLUSION	19

I INTRODUCTION

Australia's approach to border control in response to COVID-19 caused significant consternation. It was characterised in the media as creating a 'prison island'¹ or a 'hermit kingdom'.² The making of the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 (Cth) ('Determination') was a central aspect of the Commonwealth Government's border control response. The Determination imposed a general prohibition on Australian citizens and permanent residents from leaving Australia unless

¹ Chris Uhlmann, 'We Need Exit Strategy for Prison Island', *The Age* (Melbourne, 28 April 2021); Latika Bourke, "'I Am On Prison Island": Australia's Travel Ban Tearing Families Apart', *Sydney Morning Herald* (online, 2 August 2020) <<https://www.smh.com.au/world/europe/i-am-on-prison-island-australia-s-travel-ban-tearing-families-apart-20200707-p559z4.html>>; Alexander Downer, 'Prison Island: Australia's Covid Fortress Has Become A Jail', *The Spectator* (London, 28 August 2021).

² Tim Soutphommasane and Marc Stears, 'How Failure on Covid-19 has Exposed the Dangerous Delusion of "Fortress Australia"', *New Statesman* (online, 9 July 2021) <<https://www.newstatesman.com/politics/2021/07/how-failure-covid-19-has-exposed-dangerous-delusion-fortress-australia>>; Janet Albrechtsen, 'Come to the Party, Santa Claus, and Reopen the Border', *The Australian* (Sydney, 8 September 2021).

an exemption applied. It was accompanied by heavy criminal penalties for non-compliance.³

The Determination was described as a ‘pretty extraordinary restriction on people’s liberty’.⁴ It was ‘an utterly abnormal chapter in our history’;⁵ ‘one of the strictest coronavirus public health responses in the world’.⁶ Australia was ‘on par with’⁷ and had ‘the dubious honour of joining North Korea as one of the very few countries that forced its citizens to seek permission to leave’.⁸ The effect of the Determination was ‘heartless and impersonal’;⁹ ‘tearing families apart’.¹⁰ Its exceptional nature drew the attention of national and international human rights organisations for potentially breaching human rights.¹¹ This, together with other strict COVID-19-related border controls, led commentators to ask: what is the point of Australian citizenship?¹²

In *LibertyWorks Inc v Commonwealth* (*LibertyWorks*),¹³ a judicial review application was heard by the Full Court of the Federal Court, seeking to challenge the making of the Determination by the Health Minister on the basis that it was ultra vires and invalid. This article analyses the reasoning and outcome of the Full Court’s decision.

³ As to the rights impacts of state and territory border closures within Australia during the COVID-19 pandemic, see, for e.g., Kate Ogg and Olivera Simic, ‘Becoming an Internally Displaced Person in Australia: State Border Closures during the COVID-19 Pandemic and the Role of International Law on Internal Displacement’ (2022) *Australian Journal of Human Rights* (forthcoming).

⁴ Caitlin Fitzsimmons, ‘“On Par with North Korea”: Three Out of Four Requests to Leave Australia Refused’, *Sydney Morning Herald* (online, 16 August 2020) <<https://www.smh.com.au/lifestyle/life-and-relationships/on-par-with-north-korea-three-out-of-four-requests-to-leave-australia-refused-20200814-p551uj.html>>.

⁵ Waleed Aly, ‘The Nation that Cast Out Its Own’, *The Age* (Melbourne, 25 February 2022).

⁶ Sophie Meixner, ‘Australia’s Outbound Travel Ban is One of the Strictest Coronavirus Public Health Responses in the World’, *ABC News* (online, 31 August 2020) <<https://www.abc.net.au/news/2020-08-31/coronavirus-covid-outbound-international-travel-ban-morrison/12605404>>.

⁷ Fitzsimmons (n 4).

⁸ Tim O’Connor, ‘Time for Clarity on Our Rights’, *The Age* (Melbourne, 14 August 2021).

⁹ Caitlin Fitzsimmons, ‘Calling Australia Home’, *The Age* (Melbourne, 20 February 2022).

¹⁰ Bourke (n 1).

¹¹ See *Human Rights Watch, World Report 2021: Events of 2020* (Report, January 2021) 60–1; Human Rights Watch, *World Report 2022: Events of 2021* (Report, January 2022) 52, 54; Australian Lawyers for Human Rights, ‘Fortress Australia: Legal Body Calls for Rights of Appeal for Australians Denied Exit Permission under COVID-19 International Travel Restrictions’ (Press Release, 6 August 2021) <<https://alhr.org.au/locked-fortress-australia-covid-19-restrictions-australian-citizens-permanent-residents-leaving-australia/>>.

¹² See, for e.g., Kim Rubenstein, ‘No Help for Australians Trapped by Travel Bans’, *The Age* (Melbourne, 22 April 2021).

¹³ (2021) 286 FCR 131 (*LibertyWorks*).

Part two of the article outlines the legislative framework under the *Biosecurity Act 2015* (Cth) (*'Biosecurity Act'*), particularly the power to make a human biosecurity emergency declaration, and the Health Minister's human biosecurity emergency powers to determine emergency requirements. Part three outlines the Determination and the context in which it was made. Part four examines the relevance of human rights law, and common law rights and freedoms engaged by the Determination. Part five provides an overview and analysis of the Full Court's decision in *LibertyWorks*. The analysis discusses the Full Court's interpretation of the emergency powers provision of the *Biosecurity Act*, including the Court's treatment of principles of statutory interpretation — particularly the principle of legality, and to an extent, the presumption of consistency with international law. Part six concludes that the Full Court's analysis erroneously overlooked certain aspects of the principle of legality and treated it as if it was converged with the presumption of consistency with international law. The Full Court did not take a principled approach based on precedent, when rejecting its application.

This article does not discuss potential constitutional law issues which were not raised in *LibertyWorks*, such as whether there is an implied constitutional right or freedom to depart from Australia. Those are beyond the scope of the article.¹⁴

II THE *BIOSECURITY ACT* AND HUMAN BIOSECURITY EMERGENCY DECLARATION

The Determination was made under the *Biosecurity Act*. The objects of that Act include providing for the management of 'human biosecurity emergencies', the 'risk of contagion' of listed human diseases, and their risk in entering, emerging, establishing or spreading in Australia.¹⁵ Relevantly, 'human coronavirus with pandemic potential' was added as a listed human disease in January 2020.¹⁶

¹⁴ For further discussion, see Helen Irving, 'India Travel Ban Breaches Constitutional Rights', *The Age* (Melbourne, 6 May 2021); Claudia Long, Flint Duxfield and Ange Lavoipierre, 'Australians Trying to Leave Could Have A Constitutional Challenge to COVID-19 Travel Restrictions, Says Legal Expert', *ABC News* (online, 8 July 2021) <<https://www.abc.net.au/news/2021-07-08/australians-trying-to-leave-could-make-legal-challenge-covid/100273572>>.

¹⁵ *Biosecurity Act 2015* (Cth) s 4(1) (*'Biosecurity Act'*).

¹⁶ Biosecurity (Listed Human Diseases) Amendment Determination 2020 (Cth).

A The Human Biosecurity Emergency Declaration Power

Part 2 of Chapter 8 deals with ‘human biosecurity emergencies’. Section 475 provides that the Governor-General may declare that a human biosecurity emergency exists, if the Health Minister is satisfied that:¹⁷

- (a) 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) 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.

A human biosecurity emergency was declared by the Governor-General on 18 March 2020.¹⁸ It recognised that COVID-19, as a ‘human coronavirus with pandemic potential’,¹⁹ had entered Australia, was ‘fatal in some cases’, had no available vaccine or treatment (at the time), and ‘pos[ed] a severe and immediate threat to human health on a nationally significant scale’.²⁰ The declaration continued to be extended pursuant to s 476 until 17 April 2022.

B The Human Biosecurity Emergency Powers

The making of a declaration allows for potential exercise of the Health Minister’s broad, discretionary human biosecurity emergency powers. Section 477(1) confers a general power. It provides that during the ‘human biosecurity emergency period’, the Health Minister ‘may determine any requirement that he or she is satisfied is necessary’:

- (a) to prevent or control:

¹⁷ *Biosecurity Act* (n 15) s 475(1).

¹⁸ Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020 (Cth).

¹⁹ *Ibid* cl 5.

²⁰ *Ibid* cl 6.

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

Section 477(3) relevantly provides that, without limiting s 477(1), the determination may include ‘requirements that apply to persons ... when entering or leaving specified places’ (sub-s (3)(a)) and ‘requirements that restrict or prevent the movement of persons ... in or between specified places’ (sub-s (3)(b)).

Section 477(4) provides that the Health Minister, before determining a requirement under s 477(1), ‘must be satisfied of all of the following’:

- (a) that the requirement is likely to be effective in, or to contribute to, achieving the purpose for which it is to be determined;
- (b) that the requirement is appropriate and adapted to achieve the purpose for which it is to be determined;
- (c) that the requirement is no more restrictive or intrusive than is required in the circumstances;
- (d) that the manner in which the requirement is to be applied is no more restrictive or intrusive than is required in the circumstances;
- (e) that the period during which the requirement is to apply is only as long as is necessary.

The above sets out a number of statutory preconditions which the Health Minister must be satisfied of before making a determination. These are subjective jurisdictional facts.

The Health Minister must hold the subjective belief that these criteria are satisfied. Once made, a person must comply with a Health Minister's determination per s 479(1). Failure to comply gives rise to an offence, with a maximum penalty of five years imprisonment, a \$66,600 penalty, or both: s 479(3). These high penalties are said to 'reflect the high level of threat or harm posed ... and the potential consequences of non-compliance'.²¹

A determination is exempted from the procedures for disallowance of legislative instruments by Commonwealth Parliament (s 477(2)). A requirement under a determination overrides any other Australian law (s 477(5)). Section 477(7) provides that a determination ceases to have effect at the end of the human biosecurity emergency period, unless earlier revoked.

Finally, s 477(6) provides that a determination 'must not require an individual to be subject to a biosecurity measure of a kind set out in' sub-div 3B of pt 3 of ch 2 of the *Biosecurity Act*. Part 3 of ch 2 provides a scheme for the making of individual 'human biosecurity control orders'. Subdivision 3B confers discretionary powers on biosecurity officers to impose human biosecurity control orders on a certain individual, including someone who has symptoms of or has been exposed to a listed human disease²² (with accompanying procedural safeguards and review rights including merits review). Relevantly, s 96(1) provides that '[a]n individual may, for a specified period of no more than 28 days, be required by a human biosecurity control order not to leave Australian territory on an outgoing passenger aircraft or vessel'. The relevance of this scheme will be discussed below when examining *LibertyWorks*.

III THE DETERMINATION

Shortly after the human biosecurity emergency declaration, the Prime Minister on 24 March 2020 foreshadowed the making of the Determination, saying that for people who defied advice not to travel overseas: 'when they come home, that's when they put Australians at risk'.²³ The next day, the Health Minister made the Determination pursuant to s 477(1), prohibiting an Australian citizen or permanent resident from

²¹ Explanatory Memorandum, Biosecurity Bill 2014 (Cth) 206.

²² See *Biosecurity Act* (n 15) s 60(2).

²³ Prime Minister of Australia, *Press Conference — Australian Parliament House* (Transcript, 24 March 2020) <<https://www.pm.gov.au/media/press-conference-australian-parliament-house-5>>.

leaving Australia as a passenger on an 'outgoing aircraft or vessel', unless one of the exemptions applied.²⁴ For the general population, an exemption would only be granted to an individual where 'exceptional circumstances' were involved, demonstrated by 'a compelling reason for needing to leave' Australia.²⁵

The Replacement Explanatory Statement said the Determination was:²⁶

in response to the COVID-19 pandemic, which continues to represent a severe and immediate threat to human health in Australia and across the globe, and has the ability to cause a high level of morbidity and mortality and to disrupt the Australian community socially and economically. As worldwide case numbers of COVID-19 increase, and the countries reaching the peak of their epidemic curve change, it is impossible to manage the risk of imported cases through targeting specific countries...

Further, the Health Minister was said to be satisfied, on advice of the Director of Human Biosecurity (the Commonwealth Chief Medical Officer) and the Secretary of the Department, 'that the outbound travel restriction is necessary to prevent or control the entry, emergence, establishment or spread of COVID-19 in Australian territory and abroad'.²⁷

IV HUMAN RIGHTS AND THE PRINCIPLE OF LEGALITY

The Determination engaged rights sourced under both human rights law and common law.

International human rights law recognises the significance of liberty of movement as 'an indispensable condition' for human beings.²⁸ Article 12(1) of the *International Covenant*

²⁴ Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 (Cth) ('Determination') cl 5.

²⁵ *Ibid* cl 7.

²⁶ Replacement Explanatory Statement (No 2), Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 (Cth) 1.

²⁷ *Ibid*.

²⁸ Human Rights Committee, *General Comment 27: Article 12 (Freedom of Movement)*, 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [1] ('*General Comment 27*').

on *Civil and Political Rights* ('ICCPR')²⁹ provides that everyone who is lawfully within a State territory has the right to liberty of movement and freedom to choose their residence. Most relevantly for this article, art 12(2) provides that '[e]veryone shall be free to leave any country, including [their] own', which enshrines the ability to leave to a destination of choice, regardless of the purpose and the period of time spent overseas.³⁰ Article 12(4) provides that '[n]o one shall be arbitrarily deprived of the right to enter [their] own country'.

Despite the importance of such human rights, Australia is exceptional in that it is 'the only democratic country in the world'³¹ without a national bill of human rights. In lieu of this, the Commonwealth Parliament enacted a human rights parliamentary scrutiny process pursuant to the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ('HRPS Act'). Nevertheless, there are two pre-existing rights-based principles of statutory interpretation which can be raised in court proceedings in Australia.

First, there exists the common law presumption of consistency with international law. It is presumed that Parliament intends to give effect to Australia's international law obligations.³² Accordingly, 'a statute should be interpreted and applied, as far as its language permits',³³ so that it conforms with international human rights treaties. Where the legislation is ambiguous, it must be interpreted consistently with, for example, art 12 of the *ICCPR*. But the presumption may be rebutted by 'clear' language to the contrary.³⁴

Second, the common law principle of legality is a presumption that Parliament does not intend to abrogate or curtail fundamental common law rights, freedoms, immunities and principles, or to depart from the general system of law.³⁵ The presumption may be

²⁹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

³⁰ *General Comment 27* (n 28) [8].

³¹ George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (University of New South Wales Press, 4th ed, 2017) 17.

³² *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).

³³ *Ibid* 287 (Mason CJ and Deane J). See further *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31, 50 [44] (French CJ and Kiefel J).

³⁴ *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 526–7 [8] (French CJ); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 ('*Malaysian Declaration Case*') 206 [153] (Heydon J).

³⁵ See Bruce Chen, 'The Principle of Legality: Issues of Rationale and Application' (2015) 41(2) *Monash University Law Review* 329.

rebutted by ‘clear and unambiguous’ language;³⁶ with ‘irresistible clearness’.³⁷ This can be either by express words or necessary implication.³⁸ The case of *Potter v Minahan* (‘*Potter*’) is the seminal 1908 High Court case on the principle of legality in Australia.³⁹ Justice O’Connor said, quoting *Maxwell on the Interpretation of Statutes*:⁴⁰

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 expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.

Potter is also of direct relevance to the fundamental common law right engaged by the Determination. An Australian-born man of Chinese descent seeking to return to Australia was denied re-entry, having failed the notorious dictation test under the ‘White Australia’ policy and as required by the *Immigration Restriction Act 1901* (Cth). Justice O’Connor said ‘[a] person born in Australia, and by reason of that fact a British subject owing allegiance to the Empire’ is ‘a member of the Australian community’ entitled to the fundamental common law ‘right to depart from and re-enter Australia as he pleases without let or hindrance’.⁴¹ This right of Australian citizens, particularly in relation to re-entry, continues to be affirmed by the High Court.⁴² It attracts the protection of the principle of legality.

Hence, in this context there is an overlap between international human rights law and the presumption of consistency, as well as the fundamental common law right and the

³⁶ *Bropho v Western Australia* (1990) 171 CLR 1, 17 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ) (‘*Bropho*’); *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, 439 [86] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

³⁷ *Potter v Minahan* (1908) 7 CLR 277, 304 (O’Connor J) (‘*Potter*’), quoted in *Bropho* (n 36) 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *R v Independent Broad-based Anti-corruption Commissioner* (2016) 256 CLR 459, 471 [40] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ) (‘*R v IBAC*’).

³⁸ *Potter* (n 37) 305 (O’Connor J); *Coco v The Queen* (1994) 179 CLR 427, 436–8 (‘*Coco*’).

³⁹ *Potter* (n 37).

⁴⁰ *Ibid* 304 (citation omitted).

⁴¹ *Ibid* 305. See also at 289 (Griffith CJ), 293–4 (Barton J).

⁴² *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462, 469–70 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ); *Love v Commonwealth* (2020) 270 CLR 152, 197–8 [94]–[95] (Gageler J), 254 [273] (Nettle J), 309 [440] (Edelman J).

principle of legality.⁴³ Although, the latter right is narrower in scope, being couched in terms of citizenship.⁴⁴ Both presumptions of statutory interpretation protect the rights holder against infringements on exiting and re-entering Australia, where it is possible to interpret the legislation in that manner (as to how limits on those rights are addressed, this is discussed below).⁴⁵ However, they are merely presumptions and can be overridden by clearly drafted legislation, thereby preserving the concept of parliamentary sovereignty or supremacy in Australia.

In the earlier case of *Newman v Minister for Health and Aged Care* ('*Newman*'),⁴⁶ the Federal Court upheld the validity of a determination made under s 477(1) which prohibited travellers, including Australian citizens and permanent residents, who had been in India from re-entering Australia.⁴⁷ This article focuses predominantly on the rights protection for exiting Australia, although it must be acknowledged that its operation is interlinked with the rights protection for re-entering Australia. A rights holder, who wishes to continue residing in Australia, is inhibited from exercising their right to exit the country without the knowledge that they are able to freely re-enter it.

⁴³ As to the origins of the right at international human rights law and common law, see Jane McAdam, 'An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty' (2011) 12(1) *Melbourne Journal of International Law* 27.

⁴⁴ See Regina Jefferies, Jane McAdam, and Sangeetha Pillai, 'Can We Still Call Australia Home? The Right to Return and the Legality of Australia's COVID-19 Travel Restrictions' (2022) 27(2) *Australian Journal of Human Rights* 211, 216–9; *Minister for Immigration, Multicultural Affairs and Citizenship v SZRHU* (2013) 215 FCR 35, 58–9 [106]–[107], 60 [113] (Flick J). Cf *General Comment 27* (n 28) on art 12 of the ICCPR.

⁴⁵ Although the orthodox view is that the presumption of consistency with international law in Australia has a stricter requirement of textual ambiguity before it can be applied: Dan Meagher, 'The Common Law Presumption of Consistency with International Law: Some Observations from Australia (and Comparisons with New Zealand)' [2012] *New Zealand Law Review* 465; and Wendy Lacey, *Implementing Human Rights Norms: Judicial Discretion and Use of Unincorporated Conventions* (Presidian Legal Publications, 2008) 100–1, 147.

⁴⁶ [2021] FCA 517 ('*Newman*').

⁴⁷ Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements — High Risk Country Travel Pause) Determination 2021 (Cth). See discussion in Bruce Chen, 'The COVID-19 Border Closure to India: Would an Australian Human Rights Act have Made a Difference?' (2021) 46(4) *Alternative Law Journal* 320; Samuel Walpole and William Isdale, 'COVID-19, The Principle of Legality and the "Legislative Bulldozer" of the *Biosecurity Act 2015* (Cth): *Newman v Minister for Health and Aged Care*' (2021) 32(4) *Public Law Review* 267; Jefferies, McAdam and Pillai (n 44); Olivera Simic, 'Australia, COVID-19, and the India Travel Ban' (2022) 9(2) *Griffith Journal of Law and Human Dignity* 35.

V THE *LIBERTYWORKS* CASE*A Summary of the Proceedings*

In *LibertyWorks*, the applicant was a private, conservative think-tank in Australia. LibertyWorks Inc's activities included organising an annual conference. It sought an exemption under the Determination for an employee to travel to London 'to assess potential ... conference venues there on [their] behalf'.⁴⁸ While business-related grounds for exemption to travel existed,⁴⁹ clearly the above was not, in the words of the Determination, 'exceptional circumstances' and 'a compelling reason for needing to leave'.⁵⁰ Unsurprisingly, the request was rejected.⁵¹

In the judicial review proceeding, Libertyworks Inc claimed that restricting overseas travel was 'a measure "of a kind" that may not be included'.⁵² It was ultra vires — 'invalid by reason of inconsistency with, or of lacking authority in, the [*Biosecurity Act*]'.⁵³

LibertyWorks made three main arguments. First, while s 477(3)(b) specifies that the Health Minister may under s 477(1) make requirements that restrict or prevent the movement of persons in or between specified places, 'places' meant places within Australia, 'so as to apply only to movement within Australia'.⁵⁴ Second, a determination could not be made under s 477(1) to impose a prohibition on a group of individuals from leaving Australia for overseas, as a result of the operation of s 477(6).⁵⁵ Provisions such as s 477(6), LibertyWorks Inc argued, 'demonstrate Parliament's concern for the protection of individual rights and freedoms'.⁵⁶ It will be recalled that s 477(6) excludes a determination from subjecting an individual to a biosecurity measure 'of a kind' such as that in s 96(1). Third, LibertyWorks Inc raised in support⁵⁷ both the principle of legality

⁴⁸ *LibertyWorks* (n 13) 134 [8].

⁴⁹ Anthea Vogl, 'There's a Ban on Leaving Australia under COVID-19. Who Can Get an Exemption to Go Overseas? And How?', *The Conversation* (online, 31 August 2020) <<https://theconversation.com/theres-a-ban-on-leaving-australia-under-covid-19-who-can-get-an-exemption-to-go-overseas-and-how-145089>>.

⁵⁰ Determination (n 24) cl 7.

⁵¹ *LibertyWorks* (n 13) 134 [8].

⁵² *Ibid* 136 [21].

⁵³ *Ibid* 134 [4].

⁵⁴ *Ibid* 144 [59]. LibertyWorks Inc raised the presumption against extra-territorial operation in support.

⁵⁵ *Ibid* 137 [26].

⁵⁶ *Ibid* 137 [27].

⁵⁷ *Ibid* 146 [70].

(presumably in relation to the fundamental common law right to depart),⁵⁸ and the presumption of consistency (it seems)⁵⁹ with the international human right to freedom of movement.

The matter was heard by the Full Court of the Federal Court, constituted by Katzmann, Wigney and Thawley JJ.⁶⁰ The Full Court unanimously found that the Determination was within power and valid. It favoured a purposive,⁶¹ and apparently ‘harmonious’ approach,⁶² having regard to the legislative context of the *Biosecurity Act* and broad scope of the Health Minister’s emergency powers in s 477(1).

The Full Court found that to construe ‘places’ as only referring to places within Australia would be ‘contrary to the plain words of’ s 477(3)(b),⁶³ and the ‘broad scope’ of the general power in s 477(1).⁶⁴

As to the exclusion in s 477(6), sub-s (1) ‘takes precedence’.⁶⁵ LibertyWorks Inc’s approach ‘would at least emasculate’ (if not ‘eviscerate’) the Health Minister’s emergency powers.⁶⁶ That construction ‘would frustrate Parliament’s clear intention in enacting the emergency powers’,⁶⁷ which were ‘very broad, as might be expected in the case of an emergency power’.⁶⁸ The Full Court expressed the view that ‘it defies belief’ s 477(1) be constrained so that the only way of preventing Australians from returning with and spreading a listed disease would be to make a human biosecurity control order under s 96(1) ‘with respect to every single would-be traveller’.⁶⁹

One purpose of the general power in s 477(1) was to prevent or control the spread of the listed human disease to *another country*: sub-s (1)(b). That being so, the Full Court considered that ‘[t]he principal (or at least the most effective) way of achieving this

⁵⁸ The Full Court’s judgment did not specifically mention the right.

⁵⁹ The Full Court’s judgment did not specifically mention this principle of statutory interpretation by name.

⁶⁰ Justice Thawley had earlier decided the *Newman* case (n 46), which also raised the principle of legality.

⁶¹ See *LibertyWorks* (n 13) 137–8 [31], 144 [58], 145–6 [67].

⁶² See *ibid* 138 [32], 144 [58].

⁶³ *Ibid* 144 [59].

⁶⁴ *Ibid* 144 [60].

⁶⁵ *Ibid* 144 [58].

⁶⁶ *Ibid* 145 [63].

⁶⁷ *Ibid*.

⁶⁸ *Ibid* 144 [58].

⁶⁹ *Ibid* 145 [66].

purpose is by restricting international travel'.⁷⁰ This of itself 'tells against LibertyWorks' construction'.⁷¹ The Full Court did not confine its analysis to this purpose (nor did the Determination suggest it was only for this purpose).⁷² Even so, everyday Australians might be surprised to hear that such reliance was placed on protecting persons overseas in upholding the Determination — given the Commonwealth Government's emphasis on prioritising those within Australia's 'prison island'⁷³ or 'hermit kingdom'.⁷⁴

The Full Court accepted that Parliament had drawn a clear distinction — s 96(1) was for a particular individual, whereas s 477(1) was for a group or class of individuals (in this case, the citizenship and permanent residency).⁷⁵ The emergency powers were 'additional' to the control orders power.⁷⁶

Finally, in relation to the principle of legality and human right to freedom of movement, the Full Court was dismissive. It said: 'The problem with this submission is that it proceeds from the erroneous premise that the right is absolute. Yet Article 12 expressly allows for restrictions provided by law which are necessary, among other reasons, to protect public health.'⁷⁷

It should be noted here that art 12(3) of the *ICCPR* relevantly provides that a person's freedom to leave a country can be subject to restrictions which are necessary to protect public health. Accordingly, the right can be limited to protect against the COVID-19 pandemic as a public health emergency,⁷⁸ provided those limitations are justified and proportionate.⁷⁹

B Analysis of the Findings

LibertyWorks is notable for five reasons. First, the Full Court recognised that, under international human rights law, any limitations under the *Biosecurity Act* 'must be

⁷⁰ *Ibid* 145–6 [67].

⁷¹ *Ibid* 146 [67].

⁷² See Part 3 of this article.

⁷³ See n 1.

⁷⁴ See n 2.

⁷⁵ *LibertyWorks* (n 13) 146 [68].

⁷⁶ *Ibid* 146 [69].

⁷⁷ *Ibid* 146 [71].

⁷⁸ As to art 12(3), see further discussion in Jefferies, McAdam and Pillai (n 44).

⁷⁹ *General Comment* 27 (n 28) [14].

necessary and proportionate to protect the purpose for which it is imposed and should be as least intrusive as possible to achieve the desired result'.⁸⁰ This justification and proportionality testing was explicitly 'addressed' in s 477(4),⁸¹ which sets out the statutory preconditions before the Health Minister can determine a requirement. Therefore, the conferral of emergency powers contained a safeguard against their exercise in breach of art 12 of the *ICCPR*.⁸² Presumably then, the Full Court did not consider it necessary to adopt LibertyWorks Inc's narrow construction to ensure consistency with human rights.

However, there is some difficulty with treating the principle of legality with the same broad brush. That is because the predominant position in Australian law is that the principle of legality does not incorporate justification and proportionality considerations, as a matter of statutory interpretation.⁸³ Although highly contested,⁸⁴ this is said to prevent Australian judges trespassing the separation of powers — from interpreting laws to legislating them.⁸⁵ Accordingly, the judiciary adopts the following approach:⁸⁶

When applying the principle of legality, one takes the right at its highest. It is not appropriate to consider whether any abrogation of a common law fundamental right or freedom is justified. It must be kept in mind the fact that the principle of legality does not require one to look at whether the intended end justifies the proposed means.

⁸⁰ *LibertyWorks* (n 13) 146–7 [71], quoting Human Rights Compatibility Statement, Biosecurity Bill 2014 (Cth) 26.

⁸¹ *LibertyWorks* (n 13) 147 [71].

⁸² See further Human Rights Compatibility Statement (n 80) 31, 32.

⁸³ For clear and notable exceptions, see *DPP v Kaba* (2014) 44 VR 526; *Brett Cattle Company Pty Ltd v Minister for Agriculture* (2020) 274 FCR 337. Cf the United Kingdom position: *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532; *R (UNISON) v Lord Chancellor* [2017] 4 All ER 903. The New Zealand courts are only beginning to fully grapple with this issue: *Four Midwives v Minister for COVID-19 Response* [2022] 2 NZLR 65, 87–88 [63]–[64].

⁸⁴ See Dan Meagher, 'The Principle of Legality and Proportionality in Australian Law' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 114. Cf Hanna Wilberg, 'Common Law Rights Have Justified Limits: Refining the "Principle of Legality"' in *ibid* 139; Chen (n 35).

⁸⁵ See Meagher (n 84) 134–5; John Basten, 'The Principle of Legality: An Unhelpful Label?' in Meagher and Groves (n 84) 74, 84. See further Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35(2) *Melbourne University Law Review* 449, 465–6, 469–71 who contrasts this to the position under the presumption of consistency with international law.

⁸⁶ *WBM v Chief Commissioner of Police* (2012) 43 VR 446, 465 [80] (Warren CJ). See also Pamela Tate, 'Statutory Interpretive Techniques under the *Charter*: Three Stages of the *Charter* — Has the Original Conception and Early Technique Survived the Twists of the High Court's Reasoning in *Momcilovic*?' (2014) 2 *Judicial College of Victoria Online Journal* 43, 44, 58. See further Basten (n 85) 79–80, 84.

The Full Court's approach in *LibertyWorks* was therefore inconsistent with the present state of the jurisprudence. In dismissing the principle of legality simultaneously with the presumption of consistency with human rights, it erroneously subsumed both under the human rights approach to justification and proportionality.

Second, the approach under the principle of legality requires clear and unambiguous language (or irresistible clearness) through express words or necessary implication to rebut the principle. Here, express words were used to curtail movement generally (as evidenced by s 477(3)(b)), but s 477 did not go so far as to expressly curtail the right to depart from Australia. This can be contrasted to s 96(1) under the human biosecurity control orders scheme, which expressly allows for the curtailing of an individual's right to depart for up to 28 days. Curtailment of the right under s 477 therefore needed to be by necessary implication.

On one established view, the test of necessary implication 'is a very stringent one'.⁸⁷ The Full Court did state in the course of its judgment Parliament's awareness that the travel restrictions which may be imposed were 'harsh' and 'intrude[d] upon individual rights', but it 'intended that ... such measures could nonetheless be taken'.⁸⁸ It is possible, likely probable, that the Full Court would have considered the principle rebutted — even on a strict approach to necessary implication.⁸⁹ However, this was not directly addressed. The Full Court should have extended its analysis to do so, rather than a perfunctory dismissal of the principle — given the requisite clarity demanded.⁹⁰

Third, it has recently been reaffirmed that 'the required clarity increase[es] the more that the rights are "fundamental" or "important"'.⁹¹ Arguably, the common law right to depart and re-enter Australia is amongst the most fundamental and important. The right's

⁸⁷ *Coco* (n 38) 438; *Bropho* (n 36) 17.

⁸⁸ *LibertyWorks* (n 13) 145 [66].

⁸⁹ In recent years, there has been a perceived divergence in approach with respect to strictness of the necessary implication test: see Francis Cardell-Oliver, 'Parliament, The Judiciary and Fundamental Rights: The Strength of the Principle of Legality' (2017) 41(1) *Melbourne University Law Review* 30; Bruce Chen, 'The French Court and the Principle of Legality' (2018) 41(2) *University of New South Wales Law Journal* 401; T F Bathurst, 'Address to NSW Legislative Drafters on the Principle of Legality' (Speech, Sydney, 30 October 2018); Dan Meagher, 'On the Wane? The Principle of Legality in the High Court of Australia' (2021) 32(1) *Public Law Review* 61.

⁹⁰ This is somewhat surprising, given that Thawley J, one of the judges sitting on the Full Court, had earlier undertaken such an analysis in *Newman* (n 46). See discussion in Walpole and Isdale (n 47).

⁹¹ *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560, 623 [159] (Nettle, Gordon and Edelman JJ) (citations omitted).

origins have been traced to ancient philosophy and natural law,⁹² and its existence at common law is ‘beyond serious controversy’.⁹³ While the High Court has yet to go so far, it can be described as an aspect of the right to liberty — considered one of the most cherished of common law rights.⁹⁴ There would be a particular high threshold before the principle of legality would be considered rebutted. Again, this was not addressed by the Full Court.

Fourth, *LibertyWorks* illustrates the inherent tension between a purposive approach to statutory emergency powers and rights-based principles of statutory interpretation. The former involves adopting an expansive construction to give effect to broadly drafted provisions, whereas the latter often involves adopting a narrow construction to broadly drafted provisions in order to protect fundamental common law rights and freedoms or human rights. How can the two be reconciled? As the Full Court said, s 477(1) ‘is very broad, as might be expected’.⁹⁵ It quoted: ‘reposing a power of that nature in a Minister reflects the reality that ... “[t]he Executive Government is the arm of government capable of and empowered to respond to a crisis”’.⁹⁶

The reasoning process was further explained by Thawley J in *Newman*:⁹⁷

The precise nature of future threats could not be known. In this context and appreciating that emergencies may take a wide variety of forms it is hardly surprising that the legislature would want to provide a broad power capable of addressing human biosecurity emergencies of whatever kind. Parliament should be taken to have intended to provide a broad power to facilitate appropriate responses, including novel responses, to future and unknown threats.

It is therefore apparent the courts will tend to give greater weight to a purposive approach to statutory emergency powers. Yet as Gleeson CJ famously recognised in *Carr*

⁹² McAdam (n 43) 32.

⁹³ *Potter* (n 37) 304 (O’Connor J).

⁹⁴ See William Blackstone, *The Oxford Edition of Blackstone’s: Commentaries on the Laws of England* (Oxford University Press, 2016) bk 1, ch 1, 91; bk 1, ch 7, 171.

⁹⁵ *LibertyWorks* (n 13) 144 [58].

⁹⁶ *Ibid* 144 [61] quoting *Palmer v Western Australia* (2021) 388 ALR 180, 216–7 [155] (Gageler J) where the constitutional validity of Western Australia’s COVID-19-related border closures and emergency legislation was challenged.

⁹⁷ *Newman* (n 46) [92].

v Western Australia, 'legislation rarely pursues a single purpose at all costs'.⁹⁸ Here, the question of 'how far does the legislation go in pursuit of that purpose or object' is primarily answered by the statutory preconditions in s 477(4),⁹⁹ enacted by Parliament. Considering the above, it seems unlikely that (any constitutional issues aside) the courts would impose any further limits on the scope of s 477, as a matter of statutory interpretation, that would constrain an emergency response.

This also brings to mind the obiter dicta of Gageler J in *R v IBAC*,¹⁰⁰ where his Honour called it 'inherently problematic' for the principle of legality to examine 'a complex and prescriptive legislative scheme' which is already 'designed to comply with identified substantive human rights norms'.¹⁰¹ That is especially so given the principle of legality is said not to incorporate justification and proportionality considerations. It might be argued then that the strength of the principle of legality is mitigated with respect to the *Biosecurity Act*. The kind of situation referred to by Gageler J could become increasingly common, with legislation developed in light of statutory bills of human rights currently in three state and territory jurisdictions in Australia,¹⁰² and a national human rights parliamentary scrutiny process under the *HRPS Act*.¹⁰³

Fifth, *LibertyWorks* only examined the outer boundaries of the power in s 477. The Full Court held that a general prohibition on overseas travel fell within the boundaries and so was *intra vires*. The Full Court had no cause to examine whether the general prohibition *itself* was justified and proportionate in accordance with s 477(4). For example, whether the Determination was 'appropriate and adapted' and 'no more restrictive or intrusive than is required' in the particular circumstances. *LibertyWorks Inc* 'made it clear that it does not contend that the Health Minister was not in fact satisfied of any of the matters' in s 477(4).¹⁰⁴

⁹⁸ [2007] 232 CLR 138, 143 [5]. See also *Lee v NSW Crime Commission* (2013) 251 CLR 196, 250 [126] (Crennan J), 292 [262] (Bell J).

⁹⁹ *Ibid* 143 [7].

¹⁰⁰ *R v IBAC* (n 37).

¹⁰¹ *Ibid* 480–1 [76].

¹⁰² *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2019* (Qld).

¹⁰³ Although the *Biosecurity Act* may be an outlier: see Adam Fletcher, *Australia's Human Rights Scrutiny Regime: Democratic Masterstroke or Mere Window Dressing?* (Melbourne University Publishing, 2018) 149–50.

¹⁰⁴ *LibertyWorks* (n 13) 135 [12]. This can be contrasted to *Newman* (n 46).

This meant that the evidence surrounding the Health Minister's making of the Determination, such as the underlying public health advice (referred to in the Determination's explanatory statement), were not ventilated and interrogated. Given the criteria under s 477(4) are subjective jurisdictional facts, this would nevertheless have presented a relatively high bar for LibertyWorks Inc to overcome. Such criteria are based on the Minister's personal satisfaction, and as the Full Court found, the Minister had not 'misapprehended the law in making the Determination'.¹⁰⁵ It would likely have been difficult to make out the ground that the Health Minister had no power to make the Determination due to the absence of a subjective jurisdictional fact.¹⁰⁶

VI CONCLUSION

In *LibertyWorks*, the Full Court in upholding the validity of the Determination briefly dismissed the application of rights-based principles of statutory interpretation. The facts of the case presented a poor vehicle to engender the Full Court's sympathy. This was not a vulnerable or marginalised applicant who had arguably compassionate grounds for overseas travel.

Nevertheless, the Determination itself imposed serious limitations on the right to depart from Australia, being amongst the most fundamental rights. The Full Court's analysis of the principle of legality was underdeveloped. It effectively treated the principle of legality as if it converged with the presumption of consistency with international law. This failed to sufficiently engage with whether a fundamental common law right was displaced.

However, the Full Court may very well have reached the same finding — on the basis that the *Biosecurity Act* rebutted the principle of legality as a matter of necessary implication. Indeed, even the potential imposition of less restrictive interferences such as pre-departure quarantine and COVID-19 testing, as complete alternatives to a general prohibition on travel, would have involved some kind of interference with the right to depart from Australia. But the point is that the Full Court's reasoning was neither rigorous nor principled. Rights matter, even (or especially) during times of public

¹⁰⁵ *LibertyWorks* (n 13) 135 [12].

¹⁰⁶ Relevantly, *LibertyWorks Inc* also did not pursue a claim that the Determination was legally unreasonable: *ibid* [12].

emergency, and the principle of legality argument should not have been so readily dismissed. *LibertyWorks* forms part of a troubling broader pattern during the COVID-19 pandemic of the minimisation of rights-based interpretive principles by courts, when challenges have been brought against restrictions impacting on rights.¹⁰⁷

¹⁰⁷ See in the United Kingdom context: Lord Jonathan Sumption, 'COVID-19 and the Courts: Expediency or Law?' (2021) 137 (July) *Law Quarterly Review* 353. In the New Zealand context: Claudia Geiringer and Andrew Geddis, 'Judicial Deference and Emergency Power: A Perspective on *Borrowdale v Director-General*' (2020) 31(4) *Public Law Review* 376.

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