[1. Introduction 2](#_Toc40959453)

[2. Policy environment 3](#_Toc40959454)

[2.1 Covid 3](#_Toc40959455)

[2.2 Initial motivations 3](#_Toc40959456)

[2.2 A national approach? 5](#_Toc40959457)

[2.4 Policy objective 5](#_Toc40959458)

[2.5 Types of restrictions 6](#_Toc40959459)

[2.6 Legal basis of restrictions 6](#_Toc40959460)

[3. NSW restrictions 8](#_Toc40959461)

[3.1 Source of power for restrictions 8](#_Toc40959462)

[3.2 Circumstances of the 30 March Order 8](#_Toc40959463)

[3.3 The ‘stay home’ rules 8](#_Toc40959464)

[3.4 ‘Exercise’ 8](#_Toc40959465)

[3.5 Residence 9](#_Toc40959466)

[3.6 Pearl Beach saga 10](#_Toc40959467)

[4. Queensland border 12](#_Toc40959468)

[4.1 Source of power 12](#_Toc40959469)

[4.2 Precedent 12](#_Toc40959470)

[4.3 The directions 15](#_Toc40959471)

[4.4 Circumstances of the directions 15](#_Toc40959472)

[4.5 Effects of Direction 16](#_Toc40959473)

[4.6 Constitutional principles 17](#_Toc40959474)

[4.7 Consideration of border closures 18](#_Toc40959475)

[5. Conclusions 19](#_Toc40959476)

[Post script: 20](#_Toc40959477)

## 1. Introduction

‘Tinpot’ considered politicisation of the 2019-20 bushfires initiated by climate ‘activists’. The result would hardly have been welcomed by proponents: The Prime Minister asked for powers to unilaterally declare emergencies and to undertake whatever action – including use of the military – he thought necessary. Elsewhere known as authoritarianism. [[1]](#endnote-1)

A late February 2020 sequel referred to establishment of a Royal Commission led by a former military chief to examine adequacy of Commonwealth Government emergency powers. It noted Australia was perhaps on a slippery slope and warned to be careful about: what you ask for; other people who shout ‘fire’ or ‘emergency’.[[2]](#endnote-2)

Shortly afterwards, in March 2020, a bona fide emergency started – an international outbreak of Corona virus and Covid-19 that spread to Australia. Attempts have been made to tie this to political agendas including climate change and economic ‘reform’.[[3]](#endnote-3)

Australian responses to Covid to date have generally been held to be good. Like in many countries activities and personal freedom were severely curtailed – largely by State Governments – to reduce Covid spread. The restrictions impacted economic activity and raised the chance of a major recession, although many economists claimed Covid made that inevitable. To ameliorate economic effects, the Commonwealth - like other national Governments - introduced expansionary macro-economic policies. The spread-fighting and macro-economic policies were together presented as the Australian response to Covid.[[4]](#endnote-4)

There was debate about the weighting of spread-fighting and economic consequences. One view proposed preservation of life threatened by Covid should be the goal, implying an ‘endgame’ of elimination of the virus. Others saw multiple goals which implied economic factors constrain what should be done – and for how long. Proponents of the latter argued a recession may last for many years after Covid risks reduce, and such recession would have adverse effects on public health.

This article takes a different perspective. Starting with the fact that Australian responses were initiated by Executive Governments – rather than Parliaments - it assumes a binding constraint on those responses should be the existing rule of law. This is apart from any debate about the balance of suppressing Covid and limiting economic damage.

Some commentators warn Covid, like the bushfires, represent ‘the new normal’. They see Covid as a grim ‘dress rehearsal’ for catastrophic risks arising from: ‘crisis in natural resources; collapse of ecosystems; excessive population growth; global warming; global pollution; food and water insecurity; nuclear war; pandemics; new technologies; and failures in global governance’.[[5]](#endnote-5)

Irrespective of views about such risks, reactions to Covid – Governments severely limiting personal freedoms without contemporaneous Parliamentary oversight - should be questioned rather than assumed as ‘the new normal’. Modern history provides warnings about Governments by-passing Parliaments to restrict personal freedoms in the name of dealing with emergencies. In some extreme cases, their actions damaged social bonds, usurped institutions such as Parliaments and abolished rule of law.

This article raises several cases of Executive Government restrictions on people in response to Covid in Australia for the period late March to mid-May 2020.

## 2. Policy environment

### 2.1 Covid

Covid is a disease caused by a coronavirus, thought to have originated in bats, now affecting humans of all ages. It is new, infects the respiratory system and spreads by contact with people, surfaces and droplets from a cough, sneeze or speaking. A person can be infected by being within 1.5metres of a person with Covid, or even further in a confined space.

While some people show no symptoms, others suffer fever, cough, sore throat and difficult breathing. People can infect others prior to symptoms emerging and can be infectious for up to two weeks. Covid can be spread by apparently healthy people, and testing of those with symptoms understates the infected population.

It was assumed to be fatal in 1% of cases – although this reportedly varies among countries. Those most susceptible to dying are the elderly and those with chronic health problems. There was no vaccine to prevent infection and no proven antidote to counteract infection. Treatment in the most severe cases was via artificial respirators in hospital intensive care units.

Covid was first identified as virus caused on 7 January 2020 in Wuhan, China. The first reported Australian case of Covid was 25 January 2020 by which time several other countries identified cases, and three cities in Wuhan had been quarantined and were soon to be under lockdown.

By 30 January, there were over 14,300 cases in China and the World Health Organisation declared an emergency. The disease caused by the virus was named Covid-19 on 11 February and declared a pandemic on 11 March. By 21 March, Europe had become the epicentre with Italy recording 53,600 cases and 4,800 related deaths. By the end of March there were over 600,000 cases and 24,000 related deaths worldwide, with the United States recording 124,000 cases and 2,000 deaths.[[6]](#endnote-6)

### 2.2 Initial motivations

By late February 2020 there were reports of panic buying and hoarding in Australia – of toilet paper, disinfectant, masks etc. From early March, all Australian Governments had advised people to ‘social distance’ (below) and to not congregate in large crowds.

From early-March Australian media was saturated with Covid coverage. TV stations ran nightly extended Covid related programs, with an array of medical experts feted as celebrities and highlighting horrors. While not all experts agreed in public, media reports – notably on the ABC which had its own ‘expert’ personality and program - heavily favoured an instant, ‘hard lockdown’. This would involve a cessation of almost all social activity and confinement of people to their homes. The message for the public was reinforced by images from other countries such as Italy and Spain of coffins and overcrowded hospitals.

On 12 March, the Commonwealth Government announced a ‘stimulus package’ costed at $18 billion to deal with the expected (un)employment effects of reduced demand during the pandemic.

On the weekend 13-15 March, when Australian cases rose from 198 to 298, the Government initiated a National Cabinet comprising the Prime Minister and State Premiers. The very fact of such a Cabinet implied a wish for cooperative and coordination action among Governments.

The start was the Government ordering all people returning to Australia to self-isolate for 14 days and prohibiting gatherings of more than 500 people. Nonetheless the Prime Minister declared he would go to the football on the weekend – a remark drawing strong criticism in the media.

Various media competed to present the direst prognosis – giving explanations that epidemics grow at geometric rates and claiming an expectation of between 50,000 to 150,000 deaths - based on undisclosed modelling for Governments, memorably summarised as ‘*you can do the maths*’.[[7]](#endnote-7)

On 18 March, the Government declared a ‘human biosecurity emergency’ under *the BioSecurity Act (2015)*. This ‘gave’ the Minister for Health powers to impose restrictions throughout Australia e.g. to prevent movement of people. On 20 March Australia closed its borders to non-residents.

On 21 March, the Government set a ‘social distance’ rule of 4 square metres per person in any enclosed space. The Prime Minister’s explanation of progressively tighter restrictions focussed on economic – actually financial - reasons for avoiding an immediate ‘lockdown’. Such a lockdown would likely involve economic dislocation faster and more severe than the Great Depression, with considerable uncertainty about economic recovery.[[8]](#endnote-8)

Despite the above sense of impending crisis, the weekend of 21 March saw crowds in Sydney’s east so large that beaches were closed. There were reports of large parties, some of which generated new Covid cases. Governments and medical experts expressed frustration at people or flouting advice. The Prime Minister presaged draconian measures:

*‘what happened at Bondi Beach yesterday was not okay and served as a message to federal and state leaders that too many Australians are not taking these issues seriously enough. So the measures that we’ll be considering tonight means that state Premiers and Chief Ministers may have to take far more draconian measures’.[[9]](#endnote-9)*

He added although National Cabinet wanted consistency, measures may differ across and among States, and particularly differ from and across Sydney:

*‘what may be necessary in a part of Sydney may not be necessary at all in…. other parts of the country…. So, if you see it happening in one part of the country, that doesn't necessarily mean it has to apply in your part of the country. There are parts of the country, particularly in Sydney, where these outbreaks have been more severe’.*

On 22 March the Government announced another ‘stimulus package’ costed at $66bn. The Prime Minister indicated National Cabinet was exercised about forthcoming holidays - especially Easter (10-14 April) - and advised cancellation of non-essential interstate travel. Schools was a topic of discussion but not agreement (below).

On 23 March, the Government ordered closure of places of social gathering, including registered and licensed clubs, pubs, entertainment venues and places of worship. Cafes and restaurants were permitted to remain open, but only to provide takeaways. Schools were to remain open. Several State Governments additionally ordered closure of ‘non-essential’ businesses

A result of the business closures was an immediate loss of over 1 million jobs which led to Commonwealth social welfare agency websites crashing and long queues – in breach of ‘social distancing’ – outside Commonwealth offices. On 30 March the Government announced another stimulus package – Jobkeeper – costed at $130 billion to expire 1 September 2020.

On 29 March, the Prime Minister outlined the type of further restrictions National Cabinet had in mind. Gatherings would be limited to two persons subject to some exceptions.

The Prime Minister gave ‘strong guidance’ for everybody to stay home except for necessary shopping, medical care, exercise and work/study. While he indicated the gatherings limit might be mandated/enforced by States, he did not refer to mandating ‘stay home’.[[10]](#endnote-10)

However, despite the presented drama, media reports highlighted members of the public ignoring warnings about Covid and showing flagrant disregard of requests for self-restraint. The prominence of these reports widened the stakes from balancing health and economic goals to maintaining social order via demonstration of law enforcement capability. This made inevitable new laws to control behaviour and reduce individual liberties.

### 2.2 A national approach?

State Governments followed National Cabinet ‘decisions’ – for a week. On 18 March, Tasmania announced something not indicated by National Cabinet - *‘the toughest border measures in the country*’ - all non-essential travellers to the State to be quarantined for 14 days. At the time it had 10 out of Australia’s 506 cases. Its border closure was contagious – on 24 March Western Australia (175/2150 cases), South Australia (170) and the Northern Territory (6) followed suit; Queensland from 26 March (493/2180). Entry into NSW, Victoria and the ACT remained uncontrolled.[[11]](#endnote-11)

On 22 March, the Victorian Government diverged further and more directly. Its Premier said his State’s schools would be closed from 24 March and he *‘will tell the national cabinet tonight that he will "implement a shutdown of all non-essential activity”.* That is, instead of listening to, or participating in, National Cabinet on that issue he would tell it what Victoria will do.*[[12]](#endnote-12)*

Among the build-up was debate over whether schools should remain open when other large assemblies had been closed. A day after the Victorian Premier’s comments, the Prime Minister said schools would remain open until the Easter Holidays. The Commonwealth Chief Medical Officer said *‘The consensus view of all of the chief health officers is schools should stay open”.* Victoria’s chief medical officer thought differently and so advised the public. Victoria’s position ignited controversy about mixed messages and confusion about whether there was a national approach.[[13]](#endnote-13)

The fractious nature of the National Cabinet continued. State Premiers frequently, and loudly, said they would impose more restrictions on people - than what was supposedly agreed at National Cabinet. This included supplementing the agreed business closures and ‘stay at home’ rules the terms and enforcement of which varied significantly among States. National Cabinet had nothing to say about those matters.

Absence of effective external scrutiny of Government restrictions was also notable – most media formed a cheer squad and Parliaments seldom sat during the peak months of the crisis.[[14]](#endnote-14)

### 2.4 Policy objective

Neither National Cabinet nor Governments stated an explicit policy objective for responses to Covid. An implicit partial objective, broadcast while the rate of infection was accelerating in mid-March, was to ‘flatten the curve’ – to slow the rate of increase in infection. The degree of flattening sought – the target infection peak - can be implied from ‘modelling’ for Governments which sought to assess potential restrictions against the number of infections the health system can cope with.

The national modelling, conducted in March, was released on 7 April, after different ‘lockdown’ decisions had been made by various States. It had the relevant aspect of the health system as intensive care unit beds. It argued peak bed demand would vary with how the spread was controlled: ‘*uncontrolled spread – 35,000; isolation and quarantine – 17,000; isolation, quarantine and social isolation – below 5000’.* As Governments were boosting bed numbers to 7,000, it concluded: ‘*If we continue with our strategy of isolation, quarantine and social isolation, we expect that our health system will cope with the projected peak in cases.’*[[15]](#endnote-15)

The modelling claimed infections would greatly reduce with greater restrictions. If there were no restrictions 89% of the population would (eventually) be infected, but this would drop to only 12% - 19 million fewer - under ‘isolation’, ‘quarantine’ and ‘social isolation’. It argued the reduction would be due to allowing better detection and isolation of infection thus lessening aggregate infection.

The modelling indicated severe restrictions would also delay the peak from early June to early December 2020. To keep the ‘flatter curve’, restrictions would need to be for the epidemic’s duration - to mid-2021 – earlier if a vaccine became widely available although some comments suggest they might be eased in later stages.[[16]](#endnote-16)

The paper indicated an objective was lowering illness and loss of life but did not specifically address the latter. It implied restrictions greatly reduce deaths by (at least) lowering infections. In the absence of comparison of deaths, it put the policy objective as: *‘preserve health sector continuity’.*

### 

### 2.5 Types of restrictions

#### 2.5.1 Isolation - ‘Self isolation’ / quarantine,

This was typically for a period of two weeks. Isolation initially referred to someone who was infected. Quarantine referred to someone who was assessed as having a sufficiently high probability of being infected. These measures were presented as aiming to reduce personal contacts that pose a direct risk to public health. Self-isolation etc. for those capable of transmitting Covid had a direct relation to health powers. Quarantine of international arrivals was related to health (and Commonwealth) powers because they were the initial and predominant source of Covid in Australia.

#### 2.5.2 Social distancing

This included requirements for individuals to keep more than certain distances apart and limits to the number of people at gatherings, including in homes. It included closure of activities that induce people to gather such as in pubs, churches, entertainment venues. Social distancing was presented as minimising opportunities of Covid to be transmitted, especially to a significant number of people at one time. It was relevant to identifying the source and spread of disease and to reducing the prospect of health services being overloaded.

#### 2.5.3 Location rules, such as ‘stay at home’

These were originally presented as protecting people who might be severely affected by Covid, and for this reason applied to them. However, these rules – and their explanation - changed to a form of attempting to prevent geographical spread of the virus by applying to everyone. An example of this type of restriction was being away from home without ‘reasonable excuse’. Over time, location rules were increasingly represented as a form of social distancing.

### 2.6 Legal basis of restrictions

The ability of Governments to undertake action in relation to Covid-19 arose from State and Australian Constitutions. These enable Governments to undertake actions to protect their communities during emergencies.

State Constitutions allow their Parliaments to legislate on health matters. State legislation enables Health Ministers or Officials to take action in the event of health crises. For example, the NSW *Public Health Act (2010)* includes:

*s.7 (1) …. if the Minister considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health……*

*(2) …. the Minister (a) may take such action, and (b) may by order give such directions,*

*as the Minister considers necessary to deal with the risk and its possible consequences.[[17]](#endnote-17)*

Despite the apparent breadth of such provisions – and the absence of a specified threshold level of risk beyond which powers arise – the legal ability to take action or make directions is limited. To be valid, actions and directions need to have some connection and proportionality with public health.

These limits reflect the ‘lighthouse’ principle. A power to make laws about lighthouses authorises the making of laws regarding actual lighthouses but: *‘does not authorize the making of a law with respect to anything which is, in the opinion of the law-maker, a lighthouse*’.[[18]](#endnote-18)

The principal Commonwealth Government restrictions were made under the *BioSecurity Act (2015)*. Such actions are valid only insofar as they are supportable by the Australian Constitution.

The Australian Constitution does not provide the Commonwealth with direct powers over health matters. However, its s.39 does provide the Commonwealth direct powers over e.g. quarantine, corporations, Australia’s external borders, interstate trade and commerce. During the Spanish Flu epidemic 1919-20, the Commonwealth had relied on its quarantine powers to close State borders.

Constitution s.61 provides the Commonwealth with Executive powers such as for the Government to undertake actions for the '*execution and maintenance of the Constitution*’. As the States are formed under the Constitution, the Commonwealth can take action to protect their institutions.

The Constitution provides the Commonwealth with ‘implied powers’, including to ‘protect the nation’ and the nationhood power to: '*engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation'*. These are controllable by the Commonwealth Parliament via statute.[[19]](#endnote-19)

Certain Commonwealth restrictions under the *BioSecurity Act* – e.g. on corporations, international and interstate travel, or based on quarantine would be directly supportable by Constitution s.39. An international pandemic could conceivably impede maintenance of the Constitution giving rise to s.61 powers. Whether the nationhood power would support further Commonwealth restrictions – which can be equally achieved by the States - is open to question.[[20]](#endnote-20)

The Commonwealth and the States are limited by the Constitution. Among the limits are: action by one is not to directly undermine the sovereignty of others; States are not to discriminate between ‘residents’ and other Australians; trade, commerce and intercourse – movement of people – among the States is to be ‘absolutely free. This is outlined with reference to Queensland in part 4 below.[[21]](#endnote-21)

More fundamentally, the point of making laws/rules is to guide public behaviour. For this reason, most laws are valid only if published - differentiating systems of rule-of-law from tyranny.[[22]](#endnote-22)

## 3. NSW restrictions

### 3.1 Source of power for restrictions

On 30 March 2020, 10.20pm, the NSW Minister made an *Order* to address risks arising from Covid. Parliament was not sitting – it rose on 24 March until 12 May. The *Order* dealt with restrictions on: movements; gatherings; (closure of) certain premises. It referred to: COVID being highly contagious and potentially fatal; international and Australian outbreaks; NSW cases of COVID.[[23]](#endnote-23)

### 3.2 Circumstances of the 30 March Order

Prior to 30 March, there was an acceleration in Covid cases in NSW. On 12 March, 13 new Covid cases were identified in NSW. On 20 March, there were 83 new cases, and on 27 March, 212.[[24]](#endnote-24)

On 19 March, cruise ship Ruby Princess docked in Sydney Harbour after a voyage from New Zealand. A breakdown in procedure – under investigation – resulted in 2,700 passengers disembarking without being screened for Covid. Subsequently, several hundred passengers travelled to various places in Australia while unknowingly infected with Covid - by 3 April they accounted for around 14% of NSW Covid cases. One result was finger pointing between agencies that might have had some responsibility - NSW Health and the Commonwealth’s ‘Borderforce’.[[25]](#endnote-25)

### 3.3 The ‘stay home’ rules

While the Prime Minister on 29 March did not indicate States would regulate and enforce ‘stay home’ wishes, on 30 March Victoria and NSW did just that via Executive orders.[[26]](#endnote-26)

The NSW *Order* was to expire 29 June unless. Its operative provisions were:

*5. (1) …a person must not, without reasonable excuse, leave the person's place of residence.*

*5. (2) …a reasonable excuse includes doing an activity specified by Schedule 1. [[27]](#endnote-27)*

The *Schedule* listed sixteen reasonable excuses, such as ‘*exercising’*. Authorities had discretion to allow further excuses. However, taking a holiday in a regional area was not one.[[28]](#endnote-28)

### 

The *Order* set uniform restrictions throughout NSW – unlike what the Prime Minister suggested. State-wide uniformity was not obviously consistent with publicly available health information. That information showed substantial differences in the number and frequency of Covid cases across local government areas and health districts – Sydney’s eastern suburbs being a national hotspot.[[29]](#endnote-29)

The NSW reasons for a person to leave residence were largely consistent with Victoria’s. However, there were differences in interpretation by authorities which did not always relate to health. The fact of differences means some interpretations were wrong. The view some restrictions were nonsense cast doubt on their validity. This raised questions about use of Executive power in NSW - illustrated below by reference to the reasons of ‘exercise’ and travel to another residence.[[30]](#endnote-30)

### 3.4 ‘Exercise’

Exercise was a listed reason for not being at residence. Walking near the residence was considered exercise. Beyond that, matters were murky. The NSW *Order* gave no indication as to how far, or for how long, a person might be away from residence to undertake exercise. While the relevant text of the *Order* was the same as in Victoria, States’ authorities interpretations differed. For example, NSW authorities held golf to be exercise, Victorian authorities did not. Victoria did not consider recreational fishing to be exercise, NSW did - including from a power boat.[[31]](#endnote-31)

While NSW authorities considered recreational fishing to be ‘passive’ exercise, they thought sitting too passive. Even the solo eating of a kebab was insufficient to lift sitting into the realm of NSW exercise - called a joke by the Western Australian Premier but defended by NSW police who claimed a single person sitting in the park, or sunbaking, would encourage crowds to gather. Unmentioned was the idea that Corona virus might degrade far faster outdoors – in the sun - than indoors.[[32]](#endnote-32)

The position on the more athletic pursuit of surfing was unclear. Some argued surfing was exercise and therefore reason for not being home. Other groups posited something not in the *Order* - surfing was only exercise when done at ‘local’ beaches. Advice such as ‘*don’t travel to surf*’ aided their cause. However, less helpful was contradiction of NSW Heath advice - surfing was not banned - by police at Bronte Beach, Easter Sunday via megaphone calls: ‘*Surfers, you must come to the beach’.* The author of that report complained: ‘*the problem for eastern beach surfers is compounded by the fact that there are now severe restrictions on driving anywhere’*. Adding to the surfing debate was the question of whether beach closures affected sand, water or both. The increase in aircraft sightings of sharks off closed beaches was odd, especially reports that added ‘beach evacuated’.[[33]](#endnote-33)

The surfing debate was not motivated entirely by public health. Rather surfing ‘localism’, with its long standing ugly – at times violent – reputation, likely had an influence. Proponents adulterated the health message from ‘everyone stay home’ to ‘visitors stay away’. They implied locals need not stay home, outsiders cause trouble and some police interpretations of the *Order* ‘*miscast surfers as villains’.*  Their views were consistent with the thesis of dog whistling presented later.[[34]](#endnote-34)

To conclude, NSW authorities interpreted ‘exercise’ as including recreation, Victorian authorities did not. Yet this conflict paled into insignificance when considered against driving. Police in both States did not consider this to be a reason to be away from home - without apparent justification.

### 3.5 Residence

#### 3.5.1 NSW and Victoria residences

Both NSW and Victoria regulations allowed a person to travel among their residences. The Victorian regulations provided the example of a person working/living in the city during the week, elsewhere on the weekend - authorities said it allowed travel to a ‘holiday house’.

On its face, the NSW *Order* permitted at least what was allowed for residences in Victoria, except for an extraordinary qualifier of not taking a holiday in regional NSW. However, the *Order* lacked definition of this - none of *residence*, *holiday* or *regional area* was defined. Lack of definition, inconsistency with other parts of the *Order* and Government confusion cast doubt on its bona fides.

#### 3.5.2 Dog whistle

The NSW qualifier applied only to holidays in regional areas. It extended to anybody (taking a holiday) in a region. Its ex-facie intention was to discourage movement within – rather than to - a region*.*  Yet the media published claims NSW rules prohibited visits to regions – for holiday or not. When placed alongside statements that *exercise* included recreational activities – like fishing or golf – and that surfing was for locals only, this gave the appearance of a ‘dog whistle’ in policy. Of politicians pushing to restrict visitors who might trouble their constituents e.g. leisure over Easter.*[[35]](#endnote-35)*

Whether intended or not, parts of NSW reacted as if a dog whistle was used. Like for surfing, ‘everyone stay home’ mutated into ‘visitors stay away’ when broadcast by regional politicians.

The message seemed delivered more to their own electors – via local media – than to potential visitors, until close to Easter.

Official advice about ‘holidays’ reinforced the error in interpretation, and the Police Commissioner’s stated wish that people stay at their primary home differed from the text of the *Order*. The Deputy Premier weighed in with: *‘… regional communities have made themselves abundantly clear, they don’t want you at this time’*.[[36]](#endnote-36)

Some in regional communities took up the cue with gusto – decrying visitors and giving advice that unfamiliar people and vehicles with ‘non-local’ number plates should be reported to police. Along with circulated information about the threat of Covid, this created undue concern among recipients. It appeared some people were leaving their homes – in breach of the *Order* - to detect whether visitors had entered their wider districts. [[37]](#endnote-37)

In several places, anti-visitor placards with threatening tones appeared in public. Wollongong Council became *‘extremely’* concerned about vigilantism. Its Mayor warned:

*"Vigilantism can be dangerous in itself. We don't want individuals to feel they have permission to actively be racist or violent towards others and what might be an innocent sign on the beach can turn into a permission …or people to take matters into their own hands.*[[38]](#endnote-38)

Yet local governments were not blameless. Wollongong wasn’t so concerned about vigilantism to revoke its repudiation of an ‘all in this together’ sentiment - that its beaches are ‘*for our residents only’*. Eurobodalla Shire, aware of likely reception to the ‘visitors stay home’ mutation, played to it:

*‘Our region's mayors, members of parliament and health chiefs could not have done more to tell visitors to stay home, but if you're convinced someone is ignoring the advice, contact CrimeStoppers’.[[39]](#endnote-39)*

Canberra people and vehicles were a particular target on the NSW South Coast. Certainly, the much greater than normal population in those areas likely to result from an Easter visitor influx would have increased probabilities of more Covid cases - a possible rational concern if the change in probability was significant, if there were limited medical resources, and if there was an inability to transfer patients to better facilities elsewhere. However, none of those conditions was true. The data suggested an ACT resident had a higher risk of picking up, rather than setting down, Covid on the Coast – ignored by local media which later spread more misinformation to lobby for preference.[[40]](#endnote-40)

Vigilantism and busybodyism aside, local politicians might have thought dog whistled parochialism useful to enable a vote-catching message that their electors were ‘special’ – even with its dangerous corollary of local electors being less susceptible to Covid circulating within their electorate than from Covid outside. It also was central to a breakdown in governance which undermined trust in Government reactions to emergencies – the Pearl Beach saga.

### 3.6 Pearl Beach saga

On 9 April, the Sydney Morning Herald reported Cabinet Minister Harwin had been ‘*holed up*’ in his holiday home. Seventeen days before the *Order,* he relocated from his Elizabeth Bay, Sydney, Unit some 90km to his ‘million dollar’ house at Pearl Beach, Central Coast where he intended to primarily live. He then had travelled to and from Sydney several times. [[41]](#endnote-41)

The report had the Premier thinking it a ‘bad look’ but not a breach of the *Order.* Officials had assured the Minister was ‘*compliant with the guidelines…’* and *‘a government spokesman said Mr Harwin had not breached …. health orders, and pointed to a clause …. which does allow moving ­between different places of residences of the person’.*

However, the Police Commissioner warned: *‘he faced a $1000 fine if he did not have a "reasonable excuse" for travelling’.*[[42]](#endnote-42)

The Daily Telegraph also claimed the Premier said the *Order* was not breached - because he had already moved to Pearl Beach, a different reason than offered by the Minister. The Deputy Premier differed from the Premier by saying people could move between residences, although the expectation was everyone should stay home. Then he seemingly contradicted that: *‘The rules apply to everyone, politicians aren’t exempt’.* The Telegraph implied Ministers considered multiple residence issues prior to the *Order* being made yet they misunderstood the *Order* as made.[[43]](#endnote-43)

After interviewing the Minister, NSW police issued him a fine on 10 April. The Minister then resigned. The ABC, reporting the resignation, gave yet another version of the intent of the *Order* and pointed to conflict between the interpretations of the Police Commissioner and the Minister. It further claimed the Premier (now) said Mr Harwin breached the *Order –* contradicting a media release from the Premier which said the Minister did not but did break the rules.*’[[44]](#endnote-44)*

Mr Harwin’s resignation did not end the controversy. There was scepticism about the validity of the fine given his reasons conformed with the *Order*. The Premier’s statement of backing the police -‘*absolutely*’ - did not deal with the concerns. Reports the police ‘refused’ to give (more) detail on the fine added to suspicions. Several barristers claimed the fine was not justified by available information.

Doubts about the validity of penalties issued under the *Order* – including to Mr Harwin - have not since been allayed. An academic commented: *‘there were …. examples of fines being handed out across the state where it was unclear what law had been broken’* and doubted whether some behaviour prohibited by the *Order* was actually illegal because it had no effect on public health.

On 3 May the issue recurred. The Deputy Premier said he built a cubby house at his ‘farm’ at Nerriga – reportedly the multi-million dollar ‘Dungowan Estate’. He had travelled around 100km from his home in Queanbeyan – a large town considered to be joined to Canberra - to spend the weekend there. By 7 May the purpose of the visit in regional NSW was said to be: "to *feed chickens, mow lawns and tend to maintenance.*” Regional politicians had railed against this type of behaviour in the lead-up to Easter. The Premier, who was unaware of the trip offered irrelevant, inaccurate comments: ‘*I think it's important for us to acknowledge …. NSW hasn't put a restriction on how far you can travel if it's for work, or to care for someone."* [[45]](#endnote-45)

The Deputy Premier’s explanation - "*In NSW you have always been permitted to travel to your farm or property to tend to it*" – was put against his loud condemnation of, and being *‘bloody angry’* about Mr Harwin. Like the Premier, he offered another not entirely clear/relevant explanation: *‘As of 1 May two adults and dependant children can visit another household no matter the distance required to travel…. My property in Nerriga is located within my electorate of Monaro and is an acreage which requires maintenance.’*

Notably under - or not - reported in either Mr Harwin’s or the Deputy Premier’s case was the opinion of the person in the best position to say what the *Order* was intended tomean – the person who made the *Order* – the Minister for Health.

Nonetheless, NSW police said neither the Deputy Premier’s trip nor stay was a breach of the *Order*.

## 

## 4. Queensland border

### 4.1 Source of power

On 19 March 2020 Queensland Parliament passed amendments to its *Public Health Act (2005)* to allow the chief health officer: *‘to give a direction ….* *to assist in containing, or to respond to, the spread of COVID-19 within the community’*. Possibilities included directions: restricting the movement of persons; requiring persons to stay at or in a stated place; requiring persons not to enter or stay at or in a stated place; restricting contact between persons.[[46]](#endnote-46)

The Chief Health Officer issued directions to restrict non-residents entering Queensland on 26 March – the first such restriction since the Spanish Flu of 1919.[[47]](#endnote-47)

### 4.2 Precedent

Queensland was established as a separate colony by Queen Victoria in 1859, the letters patent including directions on establishment of borders. Surveys were concluded in 1863 and 1881.

It became a State on Federation after holding a single referendum on the topic at which there was a low voter turnout and a low ‘yes’ vote. It did not fully participate in the Conventions – a result of internal dissent about representation and the possible creation of a North Queensland State.

In late January 1919, the border with NSW was closed. Closure was by the Commonwealth as part of the efforts to stop pneumonic influenza - the ‘Spanish Flu’.

The Spanish Flu global epidemic killed more than 50 million people between 1918 and 1920. Among the reasons for its spread, and problems with its control, were difficulties doctors faced in diagnosis - early symptoms were ‘indistinct’ and had similarities with ordinary influenza.

It (arguably) originated in the United States in January 1918 and was transmitted to Europe – the main theatre of World War 1 - in April. By mid-1918 the European epidemic was fully blown and had come to the attention of the Commonwealth which had sent troops to the War and had been allocated quarantine responsibilities by the Constitution.

With the war drawing to a close, Australia’s 180,000 troops were progressively repatriated. Repatriation by ship allowed Australia time to prepare and plan for quarantine arrangements. As part of this, a November meeting of Commonwealth and State Governments agreed a process in which State chief health officers would inform the Commonwealth of any Spanish Flu infection - on which the Commonwealth would declare the State ‘infected’ and close land borders with adjacent uninfected States. Interstate movement of people would then be by sea. The land borders would then only be reopened by the Commonwealth. People within 10 miles of a border – a buffer - could cross it. All States but Queensland formally endorsed the agreement by the end of 1918.

Repatriation ships arrived in Australia from October with infection on-board. Soldiers were quarantined on board or in places like North Head Sydney, away from the population. A quarantine period of one week was based on the observed duration of the illness. The last ‘infected ship’ arrived in December 2018.

Four weeks later, after rejoicing about the effectiveness of the quarantine, the first local civilian case was seen. One explanation of the apparent paradox was fabrication of entries into ship logs – under-reporting of influenza cases to quarantine and health authorities.

The Commonwealth-State agreement broke down when it became clear Victoria had failed to inform about its infections. Suspicions of cases in Melbourne led to a meeting between Commonwealth and Victorian officials on 23 January. Victoria, uncertain about whether the cases were pneumonic influenza, decided to wait before advising the Commonwealth.

On 27 January, NSW advised the Commonwealth of a case – a soldier who travelled by train from Melbourne to Sydney. At 10pm, the Commonwealth declared NSW infected and put all of the State under quarantine - which closed the border with Queensland. On 28 January, Victoria admitted there were numerous cases in Melbourne and was declared infected. NSW unilaterally closed its border with Victoria. Professor Bognioro has commented on the futility of this action:

*‘As with the rabbit-proof fence ridiculed by Henry Lawson, there was not much point in trying to prevent the border crossing of a disease already on both sides, especially considering the threat to interstate commerce.’* [[48]](#endnote-48)

Others also commented on the apparent ineffectiveness of border closures in combatting the spread of the disease. Following the initial border closures ‘*it was every State for itself*’ with the Commonwealth retreating to quarantine of interstate sea passengers and being unconcerned with enforcing land border closures. [[49]](#endnote-49)

Queensland had escaped some previous epidemics that hit Australia – e.g. missing 21 out of 23 smallpox epidemics between 1850 and 1918. Like other States, its quarantine responsibilities were handed to the Commonwealth on Federation, the latter exercising them until 1909 via uniform State legislation. Until then, quarantine, public health and policing were intimately linked in States.

Long distance interstate travel at that time was primarily by rail. There was a break of gauge between NSW and Queensland rail systems and the only lines used for interstate travel met at Wallangarra, around 250 km south west of Brisbane – well inland from the present route. The other important border crossing – for short distance travel – was at Tweed Heads/Coolangatta on the coast. At the time, Tweed Heads provided most of the services used by people in Coolangatta.

Contrary to the November agreement, Queensland refused to allow those within 10 miles to cross the border, including Queensland residents seeking to return home. Supposedly this was based on advice that otherwise a Queensland resident could travel to Sydney and back unimpeded.

The refusal affected 350 Queensland bound passengers on a train that left Sydney on January 27 but had not arrived at Wallangarra before the border closure. The passengers disembarked at Tenterfield, just over 10 miles away, surprising that town. Camps were eventually established – to the disappointment of the Commonwealth – at both towns to quarantine passengers from the first and subsequent trains. Tweed Heads saw a ‘public indignation meeting’ when the border was closed, and shortly thereafter, quarantine camps. Eventually over 5,300 transited the camps.[[50]](#endnote-50)

The Commonwealth and Queensland became embroiled in public tit for tat.

The acting Prime Minister Watt – Prime Minister Billy Hughes was in England/France – wrote to the States in early February offering interstate quarantine at sea but rejecting quarantine near land borders. This was rejected by all States but Victoria. The practice of quarantining at sea changed on 2 February when Queensland was advised some returning soldiers would be quarantined at Lytton outside Brisbane. Queensland argued the risk of breakouts was too high and suggested quarantine on islands in Moreton Bay – which was ignored with the first soldiers landing at Lytton on 4 February. Four soldiers immediately broke out and visited Brisbane – an event replicated shortly afterwards in Sydney. Queensland sought but failed to gain an injunction from the High Court. A large meeting in Brisbane two weeks later condemned the Commonwealth, echoing claims in NSW Parliament of: ‘*gross incapacity and disregard of the necessities of the moment which seemed to characterise every action of the federal Government.’*

Other disputes included: ‘assistance’ for the quarantine camps; the suggestion camp inmates return to Sydney and travel by ship – but Commonwealth ‘refusal’ to make available coastal steamers; which of national and Queensland backed vaccines were superior - although neither worked.

Newspapers suggested people affected by the brawl were bewildered and resentful. Historian Humphrey Mc Queen said the arguments – which lasted for 6 months and ended only when there were infections in all States - did not improve responses to the epidemic and demonstrated a need for more Commonwealth action and powers, presaging the Commonwealth Department of Health:

*‘it was as if the European system of passports had invaded Australia along with the flu. On a range of domestic matters the Commonwealth of Australia passed into recess. Despite this welter of control, prohibition, closure and proclamation, people persisted in dying. Indeed, the death rate was highest in New South Wales where compulsion was most extensive.’*

At the time Labor held office in Queensland. The Commonwealth Government was Nationalist (Conservative), Labor had lost office when Mr Hughes split the party.

A Queensland-style perspective was that its Government ‘*felt impeded in its ability to combat the pandemic through the unwelcome interference and centralist attitude of the Commonwealth’.* It argued there were *‘unnecessary and, at times, spiteful attacks by the Commonwealth on the states; which the Queensland government was only too happy to reciprocate’*.

The border closure and quarantine did not stop spread of Spanish Flu to Queensland. On 30 April, its authorities declared there was no pneumonic influenza in Queensland – only to ‘*two days later admit it was in Brisbane General Hospital’*. While the first case was said to be at Kangaroo Point Brisbane, an almost instantaneous outbreak across Queensland suggested it had been present throughout the State for months. Eventually it was to kill at least 1,200 in the State.

Several waves of Spanish Flu swept Australia in 1919, the later ones being more deadly, occurring after the public became weary of the restrictions – some on again/off again - on daily life imposed by the States to stop the spread of the disease.[[51]](#endnote-51)

McQueen concluded parochial Government responses to Spanish Flu endangered the Federation:

*‘In 1915, an external menace had driven Australians together; by 1919, an internal danger revealed yet again how easy it was for Australians to stand apart.’ If national unity involved loyalty to the Commonwealth as an administrative machine, the Pandemic showed how little of it there was.’[[52]](#endnote-52)*

### 4.3 The directions

On 25 March Queensland’s chief health officer issued directions to close non-essential businesses and to partially close the border (with NSW) to inbound travellers from 26 March. There were no similar restrictions on travellers leaving Queensland.

Travellers to Queensland needed to self-isolate – within the State - for a period of 14 days, unless they were ‘exempt’. Among the exempt were Queensland residents and employees of government, freight, health, emergency services, infrastructure, fly-in-fly-out (fifo) mining. Also exempt were those who lived close to the border and crossed the border for work or essential purposes.

Further changes were made on 4 April, and 10 April, including that but for exceptional cases only Queensland residents could work in fly-in-fly-out jobs, and reinforcing a requirement for travellers to Queensland to have a permit/border pass. A direction taking effect on 11 April limited entry to Queensland to exempt people. This was confirmed by a further direction taking effect on 5 May. [[53]](#endnote-53)

The border closure was part of a wider set of directions. Another part was a ‘stay home’ direction made three days after the initial closure - which avoided one controversy experienced in NSW by not providing a ‘travel among residences’ exemption to the ‘stay home’ direction.

### 4.4 Circumstances of the directions

From 15 March, the Commonwealth had required all international arrivals to Australia to self-isolate for 14 days. On 20 March the Commonwealth closed Australia’s borders to non-residents/citizens. These restrictions were based on data demonstrating arrivals to be by far the highest risk of transmitting Covid-19 to or in Australia – which also apparently held for Queensland. Similarly, all Covid-19 cases in Australia were to isolate irrespective of whether they had travelled from overseas.

Internal border entry restrictions had been introduced for Tasmania (18 March), South Australia and Western Australia (22 March). All required self-isolation of travellers – including returning residents. Entry to Western Australia after 4 April required an ‘exemption’ only available to returning residents, essential workers etc. NSW, Victoria and the ACT did not close their borders.[[54]](#endnote-54)

The primary land travel interface between NSW and Queensland is now Tweed Shire/Gold Coast. The border dividing these places is relevant only for administrative purposes. In other respects, the Shire is considered to be part of the Gold Coast - part of the Gold Coast airport runway is in the Shire. For many years the border had no practical relevance to most aspects of daily life in the area.

On commencement of the Queensland restrictions, the State had 443 cases of Covid-19. NSW had many more - 1029.[[55]](#endnote-55)

However, the situation near the border was reversed: the Gold Coast had 87 cases yet there were only 22 cases in all of northern NSW – extending to 215km away. While most Queensland cases (414 or 84%) were in its South East, mostly within an easy drive - 100km - of the border, the bulk of NSW cases were in Sydney, more than 800km or an 8-hour drive away.[[56]](#endnote-56)

The figures consistently suggested a substantially higher risk of being infected in Queensland’s Gold Coast – or Brisbane - than adjacent NSW areas. Unlike Northern NSW, South East Queensland entailed several ‘hotspots’. However, the Queensland Premier apparently held a different view:

*“This is no time to be travelling past the border and there’s real risks that you pose, not only to yourself and your family, but to other Queenslanders if you choose to go into some New South Wales hotspots”[[57]](#endnote-57)*

Queensland identified 13 interstate hotspots - all near Sydney. And despite the Premier’s comment, Queensland did not close its border for outbound travel.

On 11 April – the time of full border closure – Gold Coast had recorded 181 cases and Tweed 14. By 7 May, Gold Coast cases had increased to 194, Tweed had remained at 14.

### 4.5 Effects of Direction

Reputedly only three roads into Queensland remained opened. State police patrolled the border questioning potential entrants. There were long traffic queues.

Within a day of the closure politicians and ‘community leaders’ in Northern NSW were levelling charges of hypocrisy at Governments and calling for reciprocal restrictions. After noting the over 3 million people in South-East Queensland, one Northern NSW community leader commented:

*“Lots of locals are calling me to say the situation is just ridiculous. Northern NSW has relatively few cases and yet we are locked out of Queensland, but Brisbane and Gold Coast are corona spots in Queensland and visitors from those cities are still coming in numbers into the north of the state.”*[[58]](#endnote-58)

By 7 April, just prior to Easter, the complaints had ramped-up with NSW Councils closing parks and:

*‘Councillor Wright said if the border was not shut then the area needed extra resources. "….*

*At the moment people from Queensland or people staying in Queensland have got free reign to come down here and they're not being checked on the way back.’" [[59]](#endnote-59)*

On 8 April, the Australian reported ‘*Tension over Queenslanders exploiting open NSW border’* - stoked by reservation of Gold Coast beaches for locals. NSW engaged in tub thumping via an often-repeated sound bite from its Police Commissioner about ‘*NSW police going through caravan parks’* – looking for exotics: *‘people will be given one opportunity to pack up, go back to your home state and go back home. Otherwise, we will, unfortunately have to issue tickets’.[[60]](#endnote-60)*

In fact, by Easter, ‘stay home’ orders were operating in both States. Their combined effect made the Queensland border control legally redundant.[[61]](#endnote-61)

Nonetheless, inconvenience was reported on both sides of the border, including claims the closure had divided farms and added hours to commuting. Some ingenious attempts to overcome the problems were noted – including a practice of people using two cars; parking one, walking across the border, and using the other. Whatever the inconvenience, it did not seem to match the pictures of the previous border closure.[[62]](#endnote-62)

In early May, after publication of the ‘road map’ out, the Queensland Premier reportedly said re-opening the border was out of her hands. This expression, at odds with the fact of her Government patrolling the border, presumably related to a view about internal transmission of the disease in NSW – a view apparently outdated and not supported by publicly available data. It also was at odds with her indicating when the border might be opened – a surprise in itself, given that power ostensibly was held by the chief health officer and not herself.[[63]](#endnote-63)

### 4.6 Constitutional principles

The validity of State laws – and regulations made under them such as Queensland’s health directions - rests on the Australian Constitution. Issues with the border closure arise from specific provisions of the Constitution – sections 92 and 117 – both modelled on the United States Constitution.[[64]](#endnote-64)

In explaining the proposal for Australia’s Constitution, Parkes said a central principle would be:

*‘no barrier of any kind between one section of the Australian people and another; but, that the trade and the general communication of these people shall flow on from one end of the continent to the other, with no one to stay its progress or call it to account’.[[65]](#endnote-65)*

This sentiment became established in Constitution s.92. The section prohibits Commonwealth or State laws that aim to restrict interstate movement for a protectionist purpose:

*‘a law which has the effect of preventing or impeding the crossing of the border will be held invalid if the circumstances are such as to show that that is its only or chief purpose.’[[66]](#endnote-66)*

On 22 March 2020, prior to the Queensland border closure, Professor Twomey argued border restrictions then in place – for Tasmania, Western Australia and South Australia - were valid because they were for public health purposes. She cited the High Court:

*‘to protect the State or its residents …. a law which expressly prohibits or impedes movement of the apprehended source of injury across the border into the State may yet be valid’.[[67]](#endnote-67)*

Constitution s.117 prohibits discrimination by one State against residents of other States. On 3 April, former Foreign Affairs Minister Mr Downer opined s.117 precluded border closures of the type made by some States. On 23 April, ABC Fact Check claimed Mr Downer’s view was doubtful:

*‘constitutional experts contacted by Fact Check said …. there can be valid exceptions to these prohibitions, where it is necessary to protect the people of a state from the risk of injury …. the deadly coronavirus was likely to fall under such an exception as long as the restrictions imposed by a state are limited to the life of the emergency, tailored to protecting public health and do not single out people's interstate status without good reason’.*

The ABC’s downplaying of s.117 is questionable. For most of the 20th Century the section was ‘read down’ e.g. not invalidating different tax rates for residents/non-residents. However, some earlier interpretations were overturned in *Street v. Queensland Bar Association* (1989) where Queensland’s attempt to a prevent a non-resident practicing at its Bar was rejected by the High Court. Professor Simpson noted different approaches to arrive at that result. Chief Justice Mason gave s.117 a federal-structural role: it *‘should be seen as serving the object of nationhood and national unity.’* Justice Gaudron considered s.117 covered the wider concept of discrimination: *‘instances of differentiation between different classes or groups that turn on “considerations which are irrelevant to the object to be attained.”*  While the difference in reasoning points to a fundamental matter – does the Constitution defends individual rights? – on any view, the border closure was suspect.[[68]](#endnote-68)

Professor Simpson also referred to US jurisprudence not cited in s.117 decisions noting: ‘*Where a law impacts most harshly on people who had no say in its creation, the theory goes, it is legitimate to see that law as suspect and thus to subject it to extra scrutiny.’*  She argued as s.117 is best seen as a federal matter, US cases may not be relevant. However, the lead US case also said there is no presumption of constitutionality *‘when legislation appears on its face to be within a specific prohibition of the Constitution’*. Moreover, a ‘*more searching judicial inquiry*’ may be in order for statutes directed at ‘*discrete and insular minorities’* who cannot use ordinary political processes. The border closure on its face was inconsistent with s.92. Moreover, non-residents are an example of a minority - they cannot democratically influence the law affecting them as they cannot vote. Hence, it is at least arguable that border closures could infringe s.117 under either structural or discrimination interpretations. This supports the view of experts cited by ABC Fact Finder: border restrictions are valid only insofar as they are – and continue to be - reasonably necessary to prevent the spread of Covid-19. One noted that differences in State restrictions may present some difficulties for justification of more stringent border closures.[[69]](#endnote-69)

### 4.7 Consideration of border closures

The above suggests Queensland’s border closure was valid only, and only for so long, as it was expected to be reasonably necessary to protect public health. Reasonable necessity is relevant in two respects; to enable the chief health officer to draw on powers of the legislation and make the direction; for Queensland legislation to be able to infringe the ex-facie provisions of the Constitution.

Accepting Covid to be a public health risk, a variety of circumstances throw doubt on whether the border closure was reasonably necessary.

Some historical research suggested border closures were ineffective in preventing the spread of the Spanish Flu across Australia – the manner in which it infected people appears to have been similar to the Coronavirus. Further, self-isolation and quarantine were undertaken at home, rather than at border sited quarantine camps such as used during the Spanish flu. This could decrease the health efficacy of the border closure below the results suggested by historical research.

Infections had been observed in Queensland – indeed adjacent to the border – prior to the closure; Queensland was not a ‘clean State’. The amount of infections on the Queensland side of the border was and remained far higher – at time over ten times higher – than in adjacent areas of NSW.

All Queensland hotspots, Gold Coast and in Brisbane, were at most only 150km from the border, an easy drive to the border and NSW – far closer than the NSW hotspots over 700km away. Given their population – around 3 million people – it is likely the predominant risk of Queensland importing further infection was travel of its own residents.

Yet Queensland residents and ‘essential visitors’ were exempt from the restrictions and could enter the State, apparently irrespective of health risk. Initially they were not subject to self-isolation. There was no outbound border control. Queensland residents were permitted to visit NSW – and the Premier implied even visit hotspots in Sydney - yet return.

At first, restrictions with similar effect were not set for travel within Queensland, despite wide disparities of infections across State districts and the vast size of the State.

Among other exemptions were non-residents whose role was unrelated to health etc. e.g. ‘fifo’. The later prohibition of non-residents from working in fifo appears to be in point with the s.117 case which invalidated similar restrictions: that only residents could practice at the Queensland Bar.

Other States already had ‘stay home’ orders which mitigated the risk of Queensland being further infected by non-residents. After Queensland made its ‘stay home’ direction the risk of its residents bringing further infection into the State was also mitigated. The combination of States’ ‘stay home’ orders are likely to have more effectively supported public health intentions than the border closure.

## 5. Conclusions

Covid-19 presented challenges to communities and Governments not seen for generations. It might yet present further difficulties if it returns in successive waves, like the Spanish Flu of a century ago.

Some commentators foresee further unprecedent challenges – from global warming, loss of natural resources etc. They suggest recent experiences – bushfires, epidemic – may be a ‘new normal’.

Public discussion about the response to Covid, and the easing of severe restrictions on normal freedoms imposed by Governments, focused on a trade-off between economic activity/jobs and risk of public health damage. Such a trade-off needs to be made by Governments and is best informed by experts in relevant fields.

This article focussed on something which need not be traded - which underpins the effectiveness of economic and public health policies: application of the law. It looked at examples in two jurisdictions: NSW and Queensland.

In a democracy, a law should instruct the community how to behave. The community will have difficulty conforming with vague or ambiguous laws. The community may be reluctant to obey a law that extends beyond the authority of the lawmaker, is unconnected with ostensible purpose, is arbitrary, or admits partisan exemptions. Some might consider such defects in laws a ‘natural’ result of democratic processes starting from local levels – an explanation all too easily read as an excuse.

Heavy handed enforcement can paper-over defects in laws by coercing or bluffing - rather than instructing - the community. However, that would be problematic for, and ultimately inconsistent with, democracy. A community bluffed once might be harder to bluff again – tending to undermine the later effectiveness of laws necessary to address further crises.

Neither NSW nor Queensland lacked the legal framework for optimal responses to Covid. Yet their responses – made by Executive Governments without direct involvement of Parliaments - included ambiguous and seemingly arbitrary elements that likely involved a bluff to satisfy extraneous aims.

The NSW Government’s ‘stay home’ *Order* was debased by exemptions seemingly unrelated to public health. One exemption - ‘exercise’ – was arbitrarily interpreted as only available if undertaken ‘near’ home and equally arbitrarily was said to include some forms of recreation – passive, relaxing activities – but not others. Another exemption allowed people to travel among their several residences yet conflicted with an extraordinary, unnecessary specific prohibition on ‘holidaying’ in regional areas. The reasonable and clear message of ‘stay home’ mutated into ‘visitors stay away’, most likely reducing public health outcomes. It was a dog whistle to parochialism, taken up by some local communities.

When the Government was tested on this issue - by possible infractions of two Cabinet Ministers - some of its reported explanations were wrong, irrelevant and misleading. It appeared the Government did not understand the law it had made. Of even greater concern were: reluctance of the Government to then clarify its intention by the simple expedient of amending the *Order*; in the absence of amendment, the appearance of a Government encouraging divisive populism and for police to issue fines some suspected to be invalid.

Queensland’s Government discriminated against non-residents by a land border closure that did not appear strongly related to public health e.g. infections were orders of magnitude higher within (an easy drive of) the Queensland side of the border than (an easy drive of) the NSW side. To underline this, on the date of writing, the media carried reports about infection exported from Queensland.[[70]](#endnote-70)

The closure appeared unnecessary given other restrictions imposed on the public. Advertising of the closure, like the broadcasting of (supposed) ‘visitor stay away’ orders in NSW, is likely to have been viewed as an appeal to parochialism – giving the lie to the sentiment ‘we’re all in this together’.

It is possible the Queensland border closure breached the Constitution. However, it was less likely to damage the Federation than the last closure of the Queensland border – by the Commonwealth - century ago. At best, the 21st Century border closure was an unfortunate throwback.

NSW and Queensland could likely have achieved better results – and more quickly – with approaches more consonant with public policy, rule of law and Parliamentary supremacy over their Executives. It is possible the same holds for other Governments that imposed radical and sometimes strange restrictions on people without Parliamentary oversight, and without proper explanation.

Some commentators argue the incongruities and inconsistencies in States’ Covid responses were so great people could not understand all they were expected to (not) do. They point to uncertainty about - and question the wisdom of relaxing - ‘social distance’ restrictions, a result of confusion created by Governments calling any and all restrictions ‘social distancing’. Governments’ failure to publish medical and expert advice on which they claim to have acted compounded problems.[[71]](#endnote-71)

The effectiveness of severely curtailing public freedom to fight an emergency is likely to come under more challenge in the future – if not formally, then informally by community scepticism. More convincing reasons are in order next time.

The ‘go it alone’ radical actions of various Australian Governments, the opaque reasons, the absence of direct oversight by Parliaments and the eschewing of a national approach - in spite of a National Cabinet - should not be accepted as any part of a ‘new normal’.[[72]](#endnote-72)

J Austen

16 May 2020

## Postscript:

By 18 May a ‘brawl’ had broken out among Premiers regarding continuation of border closures. The NSW Premier argued State borders, including Queensland’s, should re-open to facilitate interstate travel and stimulate the economy. This was rebuffed by the Premiers of Tasmania, South Australia, Western Australia and Queensland.

Western Australia’s Premier claimed the NSW Government was confused: while it advises people not to catch public transport - and has tighter restrictions than Western Australia - it questions why they can’t fly interstate. He indicated he would not be ‘bullied’ or ‘listen’ to a State which had allowed the ‘Ruby Princess disaster’.[[73]](#endnote-73)

The Queensland Premier flagged a further delay to the reopening of that State’s border – initially put at July in her Government’s published ‘roadmap’ – *‘I would say that things would look more positive towards September*’. Tourism industry leaders expressed surprise at the comments.[[74]](#endnote-74)

On TV, the Premier complained about the attention being paid to Queensland, noting that most other States also had also closed their borders. Queensland’s health officer commented that she supported the Premier’s position.

This public spectacle further exposes further problems of different State – rather than regional risk based - responses to Covid. No State - least of all NSW - is in a strong position to appeal to a sense of Australia as a nation, to argue for consistency among States, or advocate risk rather than parochially based policies.

Queensland’s border closure was made by a direction from its health officer rather than the Premier – a matter of legislation. The Premier’s involvement in the debate, or any ‘roadmap’ about easing restrictions, raises questions about governance. The health official’s support for the Premier’s position - rather than saying that legislation gives decision making power to officials - underlines these questions.

A senior Commonwealth official said the border controls were not made on any advice from peak medical experts to the National Cabinet: *‘At the national level, we’ve never suggested internal borders … be closed’.* That at least two State health chiefs think otherwise implies those chiefs did not participate in advising National Cabinet.

Another Commonwealth official added the border closures are State matters. On that he must be corrected. State border closures are national matters of such great consequence they are specifically prohibited by the Constitution - except for the most serious reasons. The current closures, and brawl – with States undermining each other’s ‘health messages’, point to signal failures of the National Cabinet.

21 May

1. <https://www.thejadebeagle.com/tinpot.html> [↑](#endnote-ref-1)
2. <https://www.thejadebeagle.com/its-all-about-climate-change.html> [↑](#endnote-ref-2)
3. E.g. <https://www.theguardian.com/commentisfree/2020/apr/23/coronavirus-unity-global-crisis-generation-x> [↑](#endnote-ref-3)
4. <https://theconversation.com/eradicating-the-covid-19-coronavirus-is-also-the-best-economic-strategy-136488> [↑](#endnote-ref-4)
5. <https://www.theguardian.com/commentisfree/2020/apr/22/coronavirus-is-a-dress-rehearsal-for-what-awaits-us-if-governments-continue-to-ignore-science> [↑](#endnote-ref-5)
6. <https://www.aljazeera.com/news/2020/01/timeline-china-coronavirus-spread-200126061554884.html> [↑](#endnote-ref-6)
7. <https://thenewdaily.com.au/news/2020/03/17/australia-coronavirus-death-toll-could-hit-50000/>

   dailytelegraph.com.au/news/national/life-returns-to-normal-in-china-as-australia-announces-new-measures-to-stop-coronavirus/news-story/fb3c25dcdad10e59101bceb674b32d38 [↑](#endnote-ref-7)
8. <https://johnmenadue.com/michael-keating-good-health-policy-is-good-for-the-economy/> [↑](#endnote-ref-8)
9. <https://www.pm.gov.au/media/press-conference-australian-parliament-house-act-22march> [↑](#endnote-ref-9)
10. <https://www.pm.gov.au/media/national-cabinet-statement> [↑](#endnote-ref-10)
11. <https://www.abc.net.au/news/2020-03-19/coronavirus-tasmanian-premier-announces-border-restrictions/12069764> [↑](#endnote-ref-11)
12. <https://www.dailymercury.com.au/news/victoria-goes-into-lockdown-in-48-hours-premier/3978297/> [↑](#endnote-ref-12)
13. ‘*this is a very confusing situation’ which leads to ‘real problems in our sch*ools’ <https://7news.com.au/lifestyle/health-wellbeing/schools-will-remain-open-based-on-current-coronavirus-medical-advice-pm-says--c-757538> [↑](#endnote-ref-13)
14. Peak of crisis was from formation of National Cabinet 15 March, to 1 June(?)

    Sittings:

    Commonwealth: Representatives and Senate: 23 March, 8 April. Senate: 12-14 May. <https://www.aph.gov.au/News_and_Events/Events_Calendar/Events_Search_Result#range=yearly&display=calendar&from=2020-01-01&to=2020-12-31&senate=1&house=1&estimates=1&sb=1&sa=1&ss=1&committees=0&sh=0&hh=0&jh=0&sc=0&ir=0&visit=0&tr=0&se=0&ex=0&od=0&general=0&pubhol=1>

    NSW: Legislative Assembly and Legislative Council: 24 March, 12 May. <https://www.parliament.nsw.gov.au/Pages/sitting-day-calendar.aspx>

    Victoria: Legislative Assembly and Legislative Council: 17-19 March, 23 April, 2-3 June.

    parliament.vic.gov.au/about/daily-calendar/yearly-sitting-dates?showyear=0&section\_id=453&cat\_id=453

    Queensland: Assembly: 17-18 March, 22 April, 19 May. <https://www.parliament.qld.gov.au/work-of-assembly/sitting-dates>

    [↑](#endnote-ref-14)
15. <https://www.health.gov.au/news/modelling-how-covid-19-could-affect-australia>

    <https://www.doherty.edu.au/uploads/content_doc/McVernon_Modelling_COVID-19_07Apr1_with_appendix.pdf> [↑](#endnote-ref-15)
16. 17 weeks with uncontrolled spread to 43 weeks with isolation, quarantine and social isolation. The outbreak commenced end-January. The epidemic lasts for longer with restrictions: increasing from around 27 weeks (July 2020) to over 66 weeks (mid 2021). In conjunction with the lower infection rate this implies flattening the curve requires controls need to be in place for much of the duration – as up to 17 million people stand to be infected if controls are prematurely removed (89% \* 19 million). [↑](#endnote-ref-16)
17. <https://www.legislation.nsw.gov.au/#/view/act/2010/127> [↑](#endnote-ref-17)
18. <https://lawcasesummaries.com/knowledge-base/australian-communist-party-v-commonwealth-1951-83-clr-1/> [↑](#endnote-ref-18)
19. <http://www5.austlii.edu.au/au/journals/MelbULawRw/2010/9.html>

    And per Justice Jacobs in the AAP case:

    *‘whatever is within the competence of the Executive under s. 61, including or as well as the exercise of the prerogative … may be the subject of legislation of the Australian Parliament’*

    <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9596/96rp28> [↑](#endnote-ref-19)
20. <https://www.researchgate.net/publication/281637064_The_Australian_quarantine_and_biosecurity_legislation_Constitutionality_and_critique>

    <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0809/09rp36> [↑](#endnote-ref-20)
21. e.g. <https://www.abc.net.au/news/2020-04-23/fact-check-state-border-closures-australian-constitution-corona/12164440> [↑](#endnote-ref-21)
22. <https://theconversation.com/coronavirus-contact-tracing-apps-most-of-us-wont-cooperate-unless-everyone-does-135959> [↑](#endnote-ref-22)
23. <https://www.legislation.nsw.gov.au/_emergency/Public%20Health%20(COVID-19%20Restrictions%20on%20Gathering%20and%20Movement)%20Order%202020.pdf> [↑](#endnote-ref-23)
24. <https://www.health.nsw.gov.au/news/Pages/20200312_00.aspx> [↑](#endnote-ref-24)
25. <https://www.bbc.com/news/world-australia-51999845>

    <https://www.health.nsw.gov.au/news/Pages/20200403_01.aspx> [↑](#endnote-ref-25)
26. The Victorian order*, ‘Stay at Home Directions’*, was to expire on 13 April. Its operative provision was:

    *5. A person who is in Victoria during the stay at home period must not leave the premises where the person ordinarily resides other than for* (identified reasons*)….*

    The Directions outlined reasons allowing a person to leave residence e.g. necessary good or services, and then specifies them in some detail. [↑](#endnote-ref-26)
27. <https://www.legislation.nsw.gov.au/_emergency/Public%20Health%20(COVID-19%20Restrictions%20on%20Gathering%20and%20Movement)%20Order%202020.pdf> [↑](#endnote-ref-27)
28. *5. (4) Taking a holiday in a regional area is not a reasonable excuse.* [↑](#endnote-ref-28)
29. For example, in NSW at 9 April 2020, South Eastern Sydney had 641 cases at a rate of 66.8 per 100,000 residents or 3.1% of tests while frequencies in South West Sydney were around one third of these with 214 cases at a rate of 20.6 per 100,000 residents and 1.4% of tests. The Far West had 2 cases at a rate of 6.7 per 100,000 residents and 0.6% of tests.

    <https://www.health.nsw.gov.au/Infectious/diseases/Pages/covid-19-lhd.aspx> [↑](#endnote-ref-29)
30. <https://www.canberratimes.com.au/story/6707817/expert-pans-panic-decisions-that-dont-make-biological-sense/> [↑](#endnote-ref-30)
31. NSW authorities took the opposite view. The several golf associations had conflicting views: Golf Australia recommended courses close due to Covid risks; Golf NSW encouraged clubs to stay open. The situation reportedly caused ‘*confusion and anger around the country’*<https://7news.com.au/sport/golf/golf-aust-standing-by-no-play-virus-advice-c-949521>

    <https://www.abc.net.au/news/2020-04-09/golf-keeps-aussies-on-course-during-covid19/12119570>

    <https://www.abc.net.au/news/2020-04-09/coronavirus-stage-3-shutdown-in-victoria-crossbench-concerns/12133694>

    <https://www.portnews.com.au/story/6709175/government-green-light-for-recreational-fishing/>

    <https://www.wsfm.com.au/lifestyle/nsw-man-issued-1000-fine-for-eating-kebab-on-public-bench/>

    <https://www.beagleweekly.com.au/post/concerns-over-public-safety-and-the-corona-virus-regarding-touching-and-sitting> [↑](#endnote-ref-31)
32. <https://theconversation.com/can-i-visit-my-boyfriend-my-parents-can-i-go-fishing-or-bushwalking-coronavirus-rules-in-nsw-queensland-and-victoria-explained-135308>

    <https://www.sydneycriminallawyers.com.au/blog/man-fined-for-eating-a-kebab-alone-on-a-bench/>

    <https://www.dailyexaminer.com.au/news/premier-loses-it-over-kebab-question/3988941/>

    batemansbaypost.com.au/story/6709791/two-men-fined-after-leaving-home-drinking-alcohol-at-caseys-beach/

    <https://www.wsfm.com.au/lifestyle/nsw-man-issued-1000-fine-for-eating-kebab-on-public-bench/>

    <https://www.beagleweekly.com.au/post/concerns-over-public-safety-and-the-corona-virus-regarding-touching-and-sitting>

    Rates of Corona virus degradation:

    <https://www1.racgp.org.au/newsgp/clinical/warm-weather-may-have-helped-suppress-coronavirus>

    <https://www.politifact.com/article/2020/apr/24/what-government-study-suggests-about-sunlight-and-/> [↑](#endnote-ref-32)
33. <https://www.surfingaustralia.com/SurfingNewSouthWales/news/Surfing%20NSW%20-%20COVID-19%20POSITION%20UPDATE,%20THURSDAY%209%20APRIL,%203pm>

    <https://www.smh.com.au/national/surfers-in-sydney-s-east-are-not-criminals-but-they-re-being-treated-that-way-20200412-p54j5c.html>

    <https://www.dorsalwatch.com/report/> [↑](#endnote-ref-33)
34. <https://www.bbc.com/news/world-australia-52225031>

    <https://www.tracksmag.com.au/news/the-ugly-side-of-localism-500668> [↑](#endnote-ref-34)
35. . Were the intention just to discourage people from Sydney etc. travelling to a region to take a holiday the qualifier would have read: ‘travelling **to** regional NSW to take a holiday’ [↑](#endnote-ref-35)
36. In full:

    *“NSW Deputy Premier John Barilaro has today called on NSW residents to cut all travel to regional areas until we stop the spread of coronavirus.*

    *“The reality is that in the region we have an ageing population and fewer medical services than you have here in the cities, which means the virus could be deadly for our regional towns already doing it tough,” he said.*

    *“Now is not the time to capitalise on a cheap holiday and councils and regional communities have made themselves abundantly clear, they don’t want you at this time.*

    *“If you live in the regions you must make the tough call to tell any friends and family in the city you’ll see them at Christmas, no sooner.”*

    <https://www.dailytelegraph.com.au/newslocal/central-coast/coronavirus-bans-sydneysiders-visiting-central-coast-hunter-areas-told-to-stay-away/news-story/98e34fbeba9e54b8cbb1a89c2a1a857e?fbclid=IwAR2tgb1ZwSdX8906j-nXmokl3J9k73NapAGX_Itk-jytouZmTTQbcBoSdXs> [↑](#endnote-ref-36)
37. E.g. <https://www.ulladullatimes.com.au/story/6703306/mayor-urges-people-to-stay-at-home/>Stay away <https://www.canberratimes.com.au/story/6697283/no-intensive-care-beds-batemans-bay-doctors-beg-visitors-to-stay-away-from-the-coast/>E.g. virus ridden in <https://aboutregional.com.au/time-for-the-capital-region-to-act-like-a-community-and-leave-the-loathing-behind/>

    The official advice was mistaken in ignoring that the relevant provision of the *Order* applied only to regions and was not limited to movement between residences

    <https://preview.nsw.gov.au/covid-19/what-you-can-and-cant-do-under-rules> [↑](#endnote-ref-37)
38. Other Wollongong Councillors held similar concerns. Councillor Cox issued:

    ‘*a plea for the community not to become a vigilante mob’.*

    Backing this up with:

    *‘I have seen some ugly comments in our community about outsiders using beaches and whatever….my question is 'how do you know that someone is an outsider?*

    *I would ask people not to assume that they know where someone comes from, and to judge people by their behaviour not their appearance. If people are keeping to themselves and moving about in small family groups and observing social distancing, then it's important to give people the benefit of the doubt and treat out fellow humans with kindness.’*

    <https://www.illawarramercury.com.au/story/6705362/wollongong-beaches-a-no-go-zone-as-flags-come-down-to-curb-spread-of-covid-19/> [↑](#endnote-ref-38)
39. <https://www.greatlakesadvocate.com.au/story/6716890/surfers-stoked-to-still-be-getting-wet/>

    <https://www.illawarramercury.com.au/story/6714409/were-not-accepting-visitors-sydneysiders-warned-to-stay-off-illawarra-beaches/>

    The Eurobodalla Shire notice was:

    *‘Tennis courts are closed for casual hire, but if you notice someone having a hit, that’s because approved coaches are allowed to continue one-on-one lessons to maintain their livelihood.*

    *And when it comes to caravan parks and campgrounds, the people you see in them are approved to be there, mainly because they’re long term tenants or have nowhere else to go.*

    *Our region's mayors, members of parliament and health chiefs could not have done more to tell visitors to stay home, but if you're convinced someone is ignoring the advice, contact CrimeStoppers’*

    <https://www.beagleweekly.com.au/post/let-s-do-the-righty-and-keep-our-beaches-open> [↑](#endnote-ref-39)
40. Each of Bega Shire, Eurobodalla Shire and Shoalhaven local government areas had higher per capita rates of Covid than the ACT – the Shoalhaven 20% higher. The Shoalhaven’s principal centre, Nowra, was one of the NSW designated hotspots and had the highest number of fines for breaches of the *Order* in regional NSW. It would have made sense for Bega and Eurobodalla people to view their individual northern neighbours as riskier than Canberrans.

    <https://www.health.nsw.gov.au/Infectious/diseases/Pages/covid-19-lga.aspx>

    At 11 April the ACT had 102 Covid cases; <https://www.covid19.act.gov.au/> with a population of around 418,000 <http://www.population.net.au/population-of-australian-capital-territory/>.

    Eurobodalla Shire recorded 10 cases, population 40000 <https://forecast.id.com.au/eurobodalla>.

    Bega Shire had 9 cases, population 35000. Shoalhaven had 31 cases, population 106000 <https://profile.id.com.au/shoalhaven/population>.

    Highest number of regional breaches:

    <https://www.southcoastregister.com.au/story/6719366/shoalhaven-tops-nsw-as-regional-coronavirus-rule-breakers/> although the numbers were so low as to raise questions about their meaning.

    In the event there were 4 Covid cases identified in the ACT over Easter; indicating a per person probability of less than 0.0009%.

    Misinformation to get preferential treatment: <https://www.naroomanewsonline.com.au/story/6730012/is-it-time-for-small-towns-to-take-a-breath/?cs=1489>. The beagle commented: The article argued a low level of infection is a good case to ease restrictions, except visitors. The example, of risk from a suburb in Western Sydney, is curious. Infection rates there are only one third to one half those in Sydney’s South, East and North. They are below Illawarra Shoalhaven rates. And roughly in line with Southern NSW (which includes far south coast) rates. South West Sydney and ACT rates are below Southern NSW. Visitors? Councils in Sydney’s South and East – highest Covid rates in NSW – argue for the same thing: ease restrictions but no visitors. Government advice is against all visiting, not just visitors – i.e. stay home. The Covid spread risk of a person returning home after visiting another area – say Sydney’s South - is likely higher than from a ‘visitor’ e.g. <https://www.batemansbaypost.com.au/story/6733267/how-coronavirus-hitched-a-ride-to-regional-communities/?cs=7>. [↑](#endnote-ref-40)
41. <http://smh.com.au/politics/nsw/nsw-minister-don-harwin-apologises-for-relocating-to-central-coast-house-during-pandemic-20200409-p54ihz.html> [↑](#endnote-ref-41)
42. *‘Ms Berejiklian … said he had not broken the rules’.* [↑](#endnote-ref-42)
43. *‘A government spokesman said Mr Harwin had not breached …. health orders, and pointed to a clause .. which does allow moving ­between different places of residences of the person’.*

    It quoted the Premier: ‘*based on what he told me strictly he hadn’t breached the rules because they were prior to the restrictions’*

    The Telegraph also reported the results of a survey whether the Minister should be sacked ‘*for travelling despite lockdown rules’*. The majority - 72 per cent, 1900 people - said ‘yes’ with one comment being that the rules ‘*should apply to everyone’*.

    <https://www.dailytelegraph.com.au/coronavirus/senior-nsw-minister-don-harwin-busted-at-his-holiday-house/news-story/f01dff692600284c00629261d1fe1b31>

    The Telegraph claimed ‘senior ministers’ said the relevant clause was not intended to allow use of holiday homes, rather it allowed divorcees to share child custody. However, that explanation was irrational. First, that could not have been the intention of the ‘clause’ as it then would only apply to the children and not to the divorced parents - because each parent would have a separate residence. Second, an exemption for child custody was available without reference to the ‘clause’, because excuses in the *Order’s Schedule* were examples – not a definitive list - of what was exempt. Third, there was a clause in the Victorian *Directions* that specifically covered the custody issue, it was analogous to the one in the NSW Orders, and the clause entailed the ‘holiday house’ exemption [↑](#endnote-ref-43)
44. <https://www.abc.net.au/news/2020-04-10/coronavirus-nsw-minister-don-harwin-resigns-breaking-lockdown/12141532>

    <https://www.nsw.gov.au/your-government/the-premier/media-releases-from-the-premier/statement-minister-don-harwin/>*‘Whilst Minister Harwin…continues to assure me that he did not break the rules, the orders in place apply equally to everybody. Accordingly, Minister Harwin has appropriately resigned from cabinet.* [↑](#endnote-ref-44)
45. <https://www.abc.net.au/news/2020-05-07/nsw-police-clear-john-barilaro-over-coronavirus-farm-trip/12222726> [↑](#endnote-ref-45)
46. <https://www.legislation.qld.gov.au/view/html/inforce/current/act-2005-048#sec.362B> [↑](#endnote-ref-46)
47. <https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/superseded/border-restrictions-1> [↑](#endnote-ref-47)
48. <https://theconversation.com/how-australias-response-to-the-spanish-flu-of-1919-sounds-warnings-on-dealing-with-coronavirus-134017> [↑](#endnote-ref-48)
49. # This was called a common contention of two papers (Arrowsmith, R. (2007). A Danger greater than war: NSW and the 1918-1919 influenza pandemic. Blackwell, B. (2007) *Western isolation : the Perth experience of the 1918-1919 Influenza Pandemic* Australian Homeland Security Research Centre) by Hodgson, Patrick George(2017); *Flu, society and the state: the political social and economic implications of the 1918-1920 influenza pandemic in Queensland*, PhD Thesis, James Cook University <https://researchonline.jcu.edu.au/52042/>. See also <https://theconversation.com/how-australias-response-to-the-spanish-flu-of-1919-sounds-warnings-on-dealing-with-coronavirus-134017>

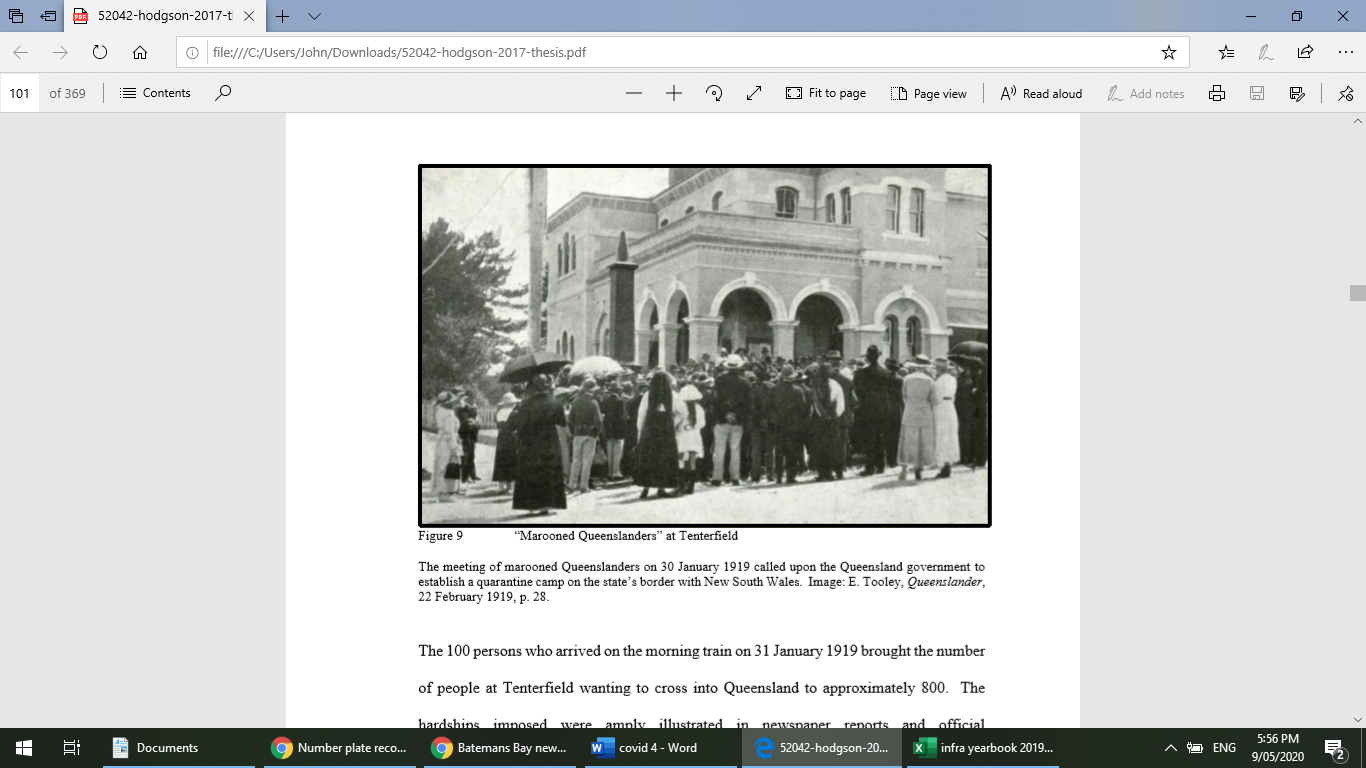
    [↑](#endnote-ref-49)
50. <https://www.rahs.org.au/wp-content/uploads/2019/03/Spanish-Flu-at-the-Twin-Towns.pdf> [↑](#endnote-ref-50)
51. <https://johnmenadue.com/lessons-to-be-learned-from-the-spanish-flu-pandemic-of-1919-part-2/#more-42605> [↑](#endnote-ref-51)
52. <https://labourhistorycanberra.org/2018/06/the-spanish-influenza-pandemic-in-australia-1912-19/> [↑](#endnote-ref-52)
53. <https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/border-restrictions> [↑](#endnote-ref-53)
54. Except Tasmania: essential travellers coronavirus.tas.gov.au/travellers-and-visitors

    <https://www.wa.gov.au/organisation/department-of-the-premier-and-cabinet/covid-19-coronavirus-wa-border-closure> [↑](#endnote-ref-54)
55. On 18 April the numbers were Gold Coast 184, Tweed 16. Statistics are at: <https://www.health.qld.gov.au/news-events/doh-media-releases/releases/queensland-novel-coronavirus-covid-19-update12> (and following)

    <https://www.health.nsw.gov.au/Infectious/covid-19/Pages/stats-nsw.aspx>; <https://en.wikipedia.org/wiki/2020_coronavirus_pandemic_in_Australia> [↑](#endnote-ref-55)
56. <https://concreteplayground.com/brisbane/travel-leisure/queenslands-borders-will-close-from-midnight-on-wednesday> [↑](#endnote-ref-56)
57. <http://www.mygc.com.au/police-get-even-tougher-at-queensland-border-crossings/>

    The hotspots identified by the Queensland Government were all in Sydney and Central Coast <https://www.qld.gov.au/health/conditions/health-alerts/coronavirus-covid-19/current-status/hotspots-covid-19> [↑](#endnote-ref-57)
58. <https://www.theguardian.com/australia-news/2020/mar/27/berejiklian-urged-to-close-nsw-border-after-queenslanders-continue-to-visit-states-north> [↑](#endnote-ref-58)
59. In full: *‘Councillor Wright said if the border was not shut then the area needed extra resources. "Easter here is normally crazy and I can see it this year — people in Queensland are told to stay at home, so they're going to come to NSW and do what they would like to do," he said.*

    *At the moment people from Queensland or people staying in Queensland have got free reign to come down here and they're not being checked on the way back.*<https://www.abc.net.au/news/2020-04-07/qld-holidaymakers-told-to-stay-away-from-nsw-amid-covid-19/12129470> [↑](#endnote-ref-59)
60. <https://www.smh.com.au/national/nsw/number-plate-recognition-and-cameras-to-identify-those-who-shouldn-t-be-out-over-easter-20200408-p54i5m.html> [↑](#endnote-ref-60)
61. If people in NSW and Queensland stayed home, they would not have crossed the border. <https://www.theguardian.com/australia-news/2020/apr/09/australians-warned-to-avoid-all-non-essential-travel-over-easter-amid-coronavirus-crisis> [↑](#endnote-ref-61)
62. <https://www.goldcoastbulletin.com.au/news/gold-coast/we-want-checkpoint-at-the-border-and-we-want-it-now/news-story/dc719b4c448c22973ca358b61524766a>

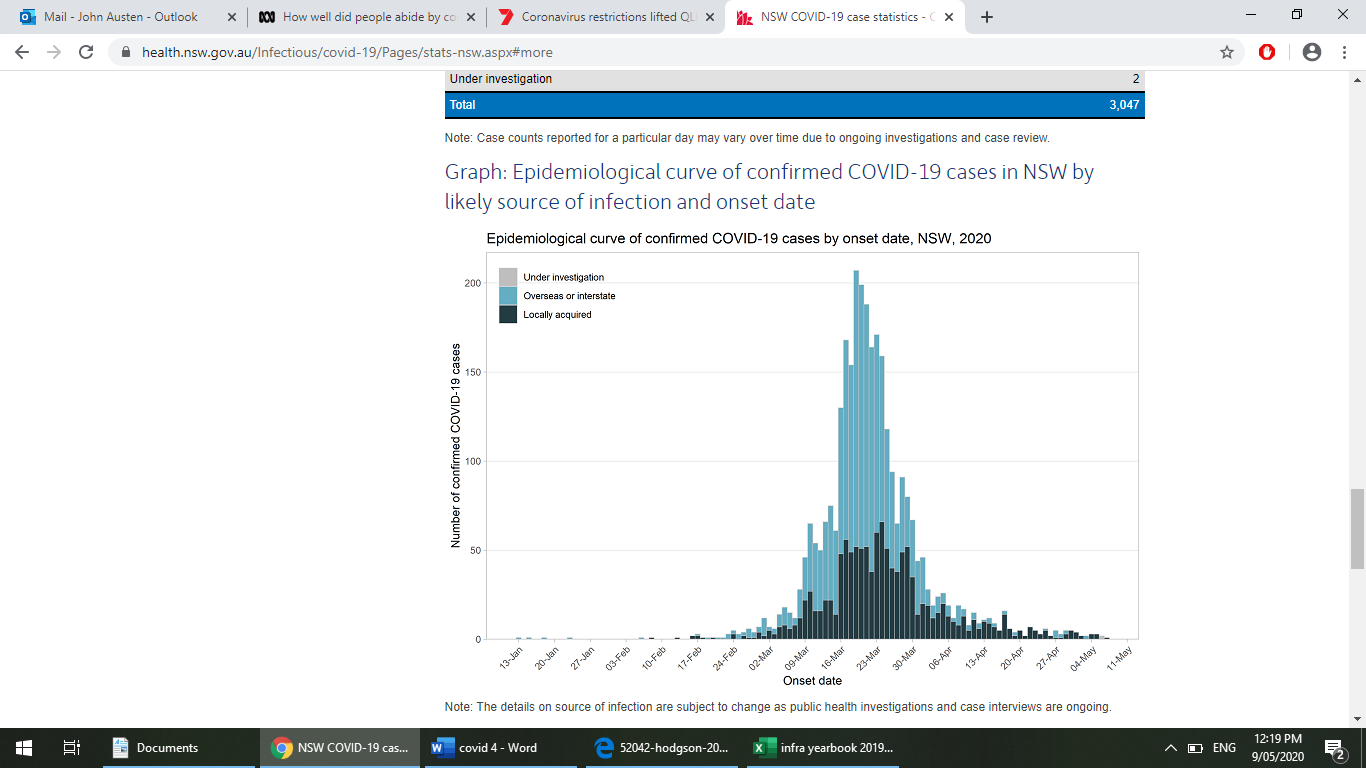
    

    From Hodgson, Patrick George(2017); *Flu, society and the state: the political social and economic implications of the 1918-1920 influenza pandemic in Queensland*, PhD Thesis, James Cook University <https://researchonline.jcu.edu.au/52042/> [↑](#endnote-ref-62)
63. *“It is going to depend on the level of community transmission that is happening in other states,” she said. “If there is large amounts of community transmission happening in Sydney, it would be irresponsible of us to have plane loads of tourists coming from Sydney, from a recognised hotspot, to the Gold Coast or Cairns.”*

    <https://7news.com.au/lifestyle/health-wellbeing/coronavirus-restrictions-lifted-qld-reopening-the-border-out-of-states-hands-says-premier-c-1025850>

    The following chart shows negligible community transmission in NSW since at least around 20 April – for more than 3 weeks before the Premier’s comments.

    <https://www.health.nsw.gov.au/Infectious/covid-19/Pages/stats-nsw.aspx>

    [↑](#endnote-ref-63)
64. *‘It is the Constitution that continues to sustain the legislative power of the States, including the power to legislate with extraterritorial effect. The extraterritorial operation of State statutes, including any amendment of the common law choice of law rules made by them, therefore binds the people and the courts of every State and every part of the Commonwealth’* austlii.edu.au/au/journals/AdelLawRw/2007/2.pdf [↑](#endnote-ref-64)
65. <http://www.austlii.edu.au/au/journals/UWALawRw/1948/14.html> [↑](#endnote-ref-65)
66. <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1992/46.html> [↑](#endnote-ref-66)
67. <https://theconversation.com/states-are-shutting-their-borders-to-stop-coronavirus-is-that-actually-allowed-134354> [↑](#endnote-ref-67)
68. See for example Deakin: <https://legalopinions.ags.gov.au/legalopinion/opinion-44>Simpson, Amelia *"The (Limited) Significance of the Individual in Section 117 State Residence Discrimination"*

    <http://www.austlii.edu.au/au/journals/MelbULawRw/2008/19.html>

    In a later case the High Court confirmed that outcome – if not the detailed reasoning. It rejected application of a statute that limited damages payable in a Queensland Court to a NSW resident to what could be awarded in NSW – a lesser amount than available to a Queensland resident. The limitation discriminated against residents of other States was held to infringe s.117. *GORYL v GREYHOUND AUSTRALIA PTY. LIMITED AND ANOTHER (1994) 179 CLR 463.*

    In *Sweedman v Transport Accident Commission [2006] HCA 8* the Court briefly considered s.117 again. There the Victorian Transport Accident Commission – relying on Victorian legislation - sought to recover from an ‘at fault’ NSW resident whose vehicle collided with a Victorian’s registered vehicle in NSW - the latter being compensated by the Commission. The majority held it did not apply as the discrimination in question was against a corporation rather than a person, and the operation of the Victorian legislation did not discriminate on the basis of residence. Rather the issue to be resolved was conflict between State laws. Christopher Kourakis *SWEEDMAN V TRANSPORT ACCIDENT COMMISSION: A SIMPLE CRASH AND BANG?* <http://www.austlii.edu.au/au/journals/AdelLawRw/2007/2.pdf> [↑](#endnote-ref-68)
69. <https://www.abc.net.au/news/2020-04-23/fact-check-state-border-closures-australian-constitution-corona/12164440>

    Professor Simpson also referred to United States Supreme Court jurisprudence not cited to in s.117 decisions: a footnote in *United* *States* *v* *Carolene* *Products* *Co* (‘*Carolene* *Products*’). In her view: *‘significant deference is due to laws generated by a democratic political process. Where a law impacts most harshly on people who had no say in its creation, the theory goes, it is legitimate to see that law as suspect and thus to subject it to extra scrutiny.’*  She appeared to doubt its relevance to Australia given the *Carolene* decision post-dated Australia’s Constitution and her view that s.117 is best seen as a federal-structure matter.

    However, the Supreme Court added there is no such a presumption of constitutionality *‘when legislation appears on its face to be within a specific prohibition of the Constitution’*. Moreover, a ‘*more searching judicial inquiry*’ may be in order for statutes directed at ‘*discrete and insular minorities’* who cannot use ordinary political processes.

    Of more interest is that *Carolene* concerned an impediment to interstate trade imposed by US Congress on public health grounds – adulterated condensed milk was not to be shipped. The case involved shipment of condensed milk combined with coconut oil - MilNut. Twenty years earlier a state law had prohibited sale of the product. Subsequent ‘accumulation of evidence’, extensive investigation and testimony by eminent scientists etc before committees were recorded in House and Senate reports which were relied on to make the law. That Congress had not similarly outlawed blended margarine was considered irrelevant – the law was a declaration of expert findings. The Supreme Court added even if there were no such findings the law would be assumed to stand as a rational action of Congress unless there was evidence to the contrary. <https://supreme.justia.com/cases/federal/us/304/144/> *United States v. Carolene Products Co., 304 U.S. 144 (1938)* [↑](#endnote-ref-69)
70. <https://7news.com.au/lifestyle/health-wellbeing/nsw-health-issues-coronavirus-alert-to-those-travelling-on-infectious-domestic-flight-c-1039020> [↑](#endnote-ref-70)
71. A result also of paradoxical pronouncements such as NSW easing of restrictions allowing visits by fewer people than before, and treatment of outdoor backyards as ‘indoors’. <https://www.liverpoolchampion.com.au/story/6756132/what-you-can-do-in-nsw-when-covid-19-restrictions-ease-from-friday/?cs=17267> [↑](#endnote-ref-71)
72. <https://johnmenadue.com/lessons-to-be-learned-from-the-spanish-flu-pandemic-of-1919-part-2/#more-42605> [↑](#endnote-ref-72)
73. <https://www.abc.net.au/news/2020-05-21/nsw-coronavirus-border-war-gladys-berejiklian-mark-mcgowan/12268412> [↑](#endnote-ref-73)
74. Sydney Morning Herald Tuesday May 19 2020, p.10 [↑](#endnote-ref-74)