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# **Covid update**

## 1. Introduction

Erosion of democratic principles, in the name of Government ‘responses to emergencies’, is a troubling trend. Recent articles on bushfires and Covid have been motivated by that.

Their interest is in national goals, how those goals are pursued and how they should be pursued. They are not so interested in how goals are set, nor in debates about the goals themselves – such as the balancing of environmental, health or economic objectives.

This article updates the May note on Covid for the period to early August 2020. That earlier article concluded several State Governments undermined a proper national approach to Covid and imposed capricious restrictions without Parliamentary oversight. It pointed to political opportunism based on divisive regional parochialism, in some cases egged on by hysterical media. The Commonwealth did little to counter this. Despite starting and chairing National Cabinet, it stood by while States publicly disputed key aspects of each-others policies.[[1]](#endnote-1)

This article follows up several of the matters raised then for the period May-August 2020.

Section 2 gives some background on aspects of Australia’s anti-Covid performance.

Section 3 looks in more depth at developments relevant to NSW. Given the fundamental policy change of closure of the border to people from Victoria, the section considers issues surrounding that in more detail.

The conclusion, Section 4, is: misbehaviour and debasement of proper governance, evident from the outset of the pandemic, continued to early August. While that is a concern in itself, it means Governments, no matter what they say and how often they say it - or how tough they act - have not taken the pandemic seriously enough. It can have more immediate consequences: community cynicism which can leak into disregard of good advice on safe practices.

After six months of the pandemic, the response of Governments in Australia is national shambles. The conclusion therefore refers to a thematic model for replacing the present policy chaos with a semblance of order.

As ever, corrections and comments are welcome.

## 2. Background

### 2.1 Covid

The understanding of the nature of Covid has not substantially changed since May. It is infectious and spread through respiration – virus (in breath droplets or on surfaces) ingested by another – with highest risk from prolonged personal proximity. Determination of infection is via a medical test. People can be infectious while asymptomatic. Mortality rates remain uncertain - while generally low they are much higher among the aged and those with underlying illnesses. A vaccine is not available.

### 2.2 Public health responses

Such factors guided primary public health responses. These include widespread testing to detect infection, quarantine/isolation of individuals suspected of infection from the rest of the population, and advice on ‘social distancing’. More drastic actions include ‘lock-downs’ – restrictions on personal movement of all individuals in/to/from an area such as ‘stay-home’ regulations.

Interplay among the factors is important for setting responses. A key is ability to ‘trace’ infection chains within the community i.e. of those not isolated. If this can be done, and if those suspected of infection are isolated, the health need for wider measures such as lock-downs is reduced. However, tracing is resource and expertise intensive. A given level of ‘resources’ will only be able to effectively trace a certain number of infected individuals. Beyond a certain number of infections, reliance cannot be placed on tracing/isolation and wide measures will be needed for public health purposes.

Attempts have been made to use electronic technology in tracing – ‘Apps’ for mobile phones. The effectiveness of this depends, among other things, on rate of use among the general population. Several countries have introduced Apps. Basic statistics imply an extraordinarily high take-up is necessary for sole reliance on these Apps, well in excess of the 40% - 6 million of so – download of Australia’s Covidsafe among its 25 million population. At present Apps like Covidsafe can assist but not substitute for tracing. It is unclear whether they should be relied on to lift the threshold beyond which community-wide counter measures are needed.[[2]](#endnote-2)

### 2.3 Infection cases

Reported global cases increased substantially from around 5.0 million (0.3 million deaths) in mid- May to 17.1 million (0.7 million deaths) at end July.[[3]](#endnote-3)

Reported Australian cases increased from 7,081 (100 deaths) in mid-May (100 deaths) to 16,000 (196 deaths) at end July. Compared with the peak of around 460 on 28 March, relatively few new cases were being reported during much of the period – less than thirty per day. A minimum of only five was reported on 7 June, of which many were already isolated – in contrast to a deteriorating situation internationally.

At end July, both global and Australian reported cases were a very small fraction of populations – 0.2% globally, 0.1% in Australia. This was also true for countries held to be badly affected e.g. the 4.5 million cases in the United States were 1.4% of its population. While it may indicate some success of suppression policies it may also indicate the pandemic has a considerable way to run.

### 2.4 Australian performance

As was the case in May, neither National Cabinet nor Governments stated an explicit policy objective for responses to Covid. The actions undertaken have been grouped together as an ‘aggressive suppression strategy’ which some sought to contrast with ‘elimination’ (raised later).[[4]](#endnote-4)

At the time the most restrictive measures were introduced, in late March, health ‘modelling’ released to the public indicated Governments sought to keep relevant Covid cases within hospital intensive care capacity – ‘health sector continuity’. The expectation was the then Australia-wide lock-downs would limit infections to 12% of the population. The peak would be in December 2020. Restrictions were expected to remain until mid-2021.

In the event, infection levels dropped much more rapidly than forecast, with a strong downward trend evident by late April. From early May, media reports pushed elements of self-congratulation about these results, including that Australia was in an ‘exclusive club’ of countries which had ‘moved early’ against the virus and were enjoying low infection numbers - the ‘first movers’. [[5]](#endnote-5)

However, from late June, new cases in Australia increased rapidly as outbreaks emerged in Victoria. On 31 July there were 602 new cases. ‘Second-waves’ were evident in all other members of the ‘first movers club’ with the (then) exception of New Zealand.[[6]](#endnote-6)

### 2.5 New Zealand comparator

New Zealand, population around 5 million under unitary government, was widely promoted as an international example of good management of Covid.

In late March, it introduced tighter restrictions and lock-downs than anywhere in Australia. By mid-May only a few new cases were being added daily to its 1,500 total. The low rate of increase had been sustained through July.[[7]](#endnote-7)

Some claim this to be ‘elimination’ of the virus, however, that is not true. What occurred was suppression of transmission within the community – outside of the quarantine set for international arrivals. New Zealand’s then current daily case numbers largely reflected cases detected within quarantine which, because they are isolated from the community, do not introduce community transmission.

However, there remains a risk of such transmission. There had been reports of several break-downs in quarantine – of ‘release’ of (potentially) infected individuals into the community. An element of good luck appears to have favoured New Zealand to the time of writing. Nonetheless, with a small number of arrivals, and negligible community transmission, infection tracing and therefore maintenance of this position is easier than in many other countries.[[8]](#endnote-8)

Australia - via its States - had achieved similar Covid infection results as New Zealand but with lower levels, later application and earlier easing of restrictions. New Zealand had only two days of a ‘level 3 lock-down’ – the equivalent to Australian States’ (then) toughest restrictions - before moving to the more drastic ‘level 4’. This is suggestive of a degree of worry that led to unnecessary economic damage. It has been speculated a realisation of inadequate tracing and health, e.g. hospital resources, led to a New Zealand over-reaction, and that pursuit of ‘elimination’ was not a real choice – because it did not have suppression options available to other countries:

*‘Its healthcare system was not in any shape to handle the coming surge of cases and its existing contact tracing teams were “woefully resourced”.’[[9]](#endnote-9)*

The essential difference between the Covid results of Australia and New Zealand appears outbreaks originating in Melbourne. The source of those outbreaks is the subject of an official inquiry. It is speculated they initiated from failures of quarantine, with subsequent growth and spread attributable to problems in ‘tracing’ and ‘isolation’. That will be raised briefly later.[[10]](#endnote-10)

### 2.6 The aged

Aggregated statistics do not show the far greater risks of Covid to the aged.

From the outset it seemed clear Covid mortality is far higher for people over 60. While a literature grew around debates on Covid death rates – such as estimates of ‘excess mortality’ – there was widespread agreement the elderly with Covid are far more likely to die than the young.[[11]](#endnote-11)

By early August, only eight of the 221 Australian deaths from Covid were aged less than 60 years old, twenty-eight less than 70 years.[[12]](#endnote-12)

Some of the most concerning issues about Covid and Government responses relate to aged-care residences – nursing homes. In NSW, Covid appeared in several nursing homes with resultant significant death rates. At the time of writing this was an issue in Melbourne.[[13]](#endnote-13)

What appeared to be less appreciated until recently – or risk mitigated – was that residents of these places can have a higher probability of catching the disease because of exposure to infected individuals. While the issues arising from that are under review, relevant aspects appear to include: co-location of many people in a relatively small area; in situ confinement/risks of moving the elderly to hospitals; contact with families; staffing levels, skills and equipment.

Also relevant is an apparent practice of some staff – doctors, nurses, cooks, carers, cleaners etc. – working at more than one such residence thereby being a potential avenue for infection across a number of facilities. Employment conditions – wages, job requirements and job security – are likely influences.

It is possible similar influences are at play elsewhere e.g. restaurants, food processing plants and construction sites. More broadly, weak employee conditions are said to contribute to breaches of the most fundamental Covid-counter measures - isolation of those suspected to be infected – sick people continue to go to work because they cannot afford not to.

Irrespective of such influences, it is clear there have been failures in protecting those most vulnerable to Covid. Such protection at present logically depends on shielding these people from risks of contracting Covid. The May article carried suggestions that ideas about isolation became skewed to asking ‘others’ to modify their behaviour - an example of the free-rider problem, seen elsewhere: ‘everyone stays home so I can go out’. In the case of the aged and vulnerable, it is arguable there was some expectation that reduction of Covid in the wider community would adequately reduce risk without very specific attention to the behaviour or environment of the vulnerable. Such an expectation has now proven to be seriously flawed, and it is necessary to have special risk mitigation for those environments.

The current plight of the vulnerable aged is consistent with the danger of woolly-minded populist policies leading to strategic failures and disastrous results. It is not the only example of that.

### 2.7 Parliamentary sittings, decision making on restrictions

The May article indicated Governments – including the Commonwealth, NSW and Queensland - were acting without direct Parliamentary supervision. Parliamentary sittings were minimal.

This situation has little changed. Fundamental decisions such as border closures are still being made by Ministers and Officials. Sitting days remain minimal: the Commonwealth had ten scheduled sitting days of either house in May, June and July; NSW eleven; Queensland nine.

Parliaments have established inquiries into Government responses to Covid in the Commonwealth and most States including NSW and Queensland.[[14]](#endnote-14)

Restrictions imposed on citizens, lock-downs and border closures, were generally made by ‘directions’ or ‘orders’ as, or under, delegated legislation after declaration of a state of emergency. The Table below provides an indication of those formally responsible for such decisions.

**Table: Counter-Covid decision makers**

|  |  |  |  |
| --- | --- | --- | --- |
| **Jurisdiction** | **Emergency declaration** | **State border closure/personal restriction** | **Government level (a)** |
| Commonwealth | Minister | Minister | 1 |
| NSW | Minister | Minister | 1 |
| Victoria | Minister | Chief Health Officer/Public Health Commander (b) | 4/5 |
| Queensland | Minister | Chief Health Officer | 3 |
| Western Australia | Minister | Emergency Service (Police Commissioner) | 2 |
| South Australia | Governor | State Coordinator (Police Commissioner) | 2 |
| Tasmania | Premier | Commissioner of Police. Director Public Health (b) | 2. 4 |

a. Level of seniority, rather than legislative delegation: Minister = 1, Departmental Secretary = 2, Deputy Secretary = 3, ‘Reports’ to Deputy Secretary = 4, Deputy to 4 = 5.

b. Has not made decision to close State border.

Sources:

<https://www.legislation.gov.au/Details/F2020L00480>

<https://www.legislation.nsw.gov.au/_emergency/Public%20Health%20(COVID-19%20Border%20Control)%20Order%202020%20-%20as%20amended%20200725.pdf>

<https://www.dhhs.vic.gov.au/sites/default/files/documents/202007/State%20of%20Emergency%20%28signed%29%2019%20July%202020.pdf>

<https://www.dhhs.vic.gov.au/sites/default/files/documents/202008/Stay%20at%20Home%20Directions%20%28Restricted%20Areas%29%20%28No%207%29%20-%202%20August%202020.pdf>

<https://www.dhhs.vic.gov.au/sites/default/files/documents/202006/DHHS%20Org%20Chart%20-%2015%20June%202020.pdf>

<https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/border-restrictions>

<https://www.health.qld.gov.au/clinical-practice/guidelines-procedures/service-delivery/cscf/maintenance-development>

<https://www.wa.gov.au/government/publications/western-australia-declaration-of-state-of-emergency-15-march-2020>

<https://www.covid-19.sa.gov.au/emergency-declarations/cross-border-travel>

<https://coronavirus.tas.gov.au/__data/assets/pdf_file/0022/91093/s15-Extension-of-Emergency-Declaration-6-Jun-20.pdf>

<https://coronavirus.tas.gov.au/__data/assets/pdf_file/0021/91137/Extension-of-Declaration-of-State-of-Emergency.pdf>

<https://www.health.tas.gov.au/__data/assets/pdf_file/0010/394750/New_Organisation_chart_as_of_28.02.2020.pdf>

Generally, the reason for legislative delegation is to facilitate rapid responses to dynamic situations without burdening Parliament with menial implementation tasks. Whether that reason holds for responses to Covid is doubtful. The Table indicates it is no reason for delegation of anti-Covid powers to Officials.

The word ‘emergency’ is generally taken to mean a serious and unexpected situation that requires immediate action. It has connotations of being transient.

While there is little doubt Covid poses serious problems, these have lasted for nearly six months and can no longer be called ‘unexpected’. Many directions and orders are very far from trivial and entail severe restrictions on freedom, which may make them analogous to actions usually requiring explicit Parliamentary authorisation. In most cases immediate action has neither been necessary nor undertaken, demonstrated by the frequent practice of a Premier announcing a measure to take effect in several days-time. [[15]](#endnote-15)

The fact that the delegations in the two largest jurisdictions, the Commonwealth and NSW, are to Ministers implies there is no administrative reason for other States to have delegations to Officials.

Further, where legislation involves delegations to Officials - the majority of States - announcements of measures by Premiers is problematic.

Legislation that delegates regulation making power to Officials - rather than to Ministers - implies Parliament wishes the exercise of those powers to be somewhat independent of day to day politics. A Minister, especially a Premier, announcing the intent of a regulation in advance of the Official responsible for making the decision (on whether to create the regulation) is the antithesis of independence of the Official and the decision. Such announcements – like comments that Premiers are ‘listening to the medical advice’ when in fact they are giving ‘advice’ to experts - may be seen as an attempt to avoid accountability, engendering public cynicism about the merits of measures.[[16]](#endnote-16)

Whether it is wise for Parliaments to delegate to Officials the types of powers used for anti-Covid measures in any circumstances is an open question. Officials are sometimes required by law to pursue only limited objectives without reference to wider circumstances. Their experience and access to expertise can be similarly limited.

The Table shows some delegations of regulation-making powers to Officials in charge of enforcement – police. It shows other delegations to Officials holding organisational positions below that of Departmental Secretaries, which raises the possibility of authority gradient type constraints on communication, implementation and enforcement.[[17]](#endnote-17)

### 2.8 National Cabinet

There is now a broad division of Commonwealth and State roles in policy responses to Covid. The division is consistent with that laid out in the Treasurer’s introduction to the Corona virus stimulus package legislation - a health crisis and an economic crisis.[[18]](#endnote-18)

The States are responsible for most restrictions on the community. The Commonwealth is focusing on mitigating economic damage caused by these restrictions. It also is providing on-the-ground support for States experiencing difficulties in resourcing their restrictions e.g. military personnel engaged in checking whether people under isolation orders are at home.

There are conflicts and complementarities in these roles. Some national meeting is logical. National Cabinet, comprising the Prime Minister and Premiers is an attempt at this. It continued to meet via video link. Its relationship with some decision makers (above table) remained unclear.

On 8 May, National Cabinet produced a national ‘roadmap’ – a plan to gradually remove restrictions in three steps to be taken individually by States when public health circumstances permitted. It was expected different States would implement the plan at different paces. The Prime Minister emphasised the plan depended on community observation of social distancing and hygiene after the restrictions were eased.[[19]](#endnote-19)

States subsequently developed their own ‘road maps’ indicating conditions or timeframes for easing of particular restrictions. More recently, timings have been delayed due to rises in infections.[[20]](#endnote-20)

A point of contention has been State border closures/opening, with debate about Queensland and Western Australia most intense. The underlying issues are discussed in Section 3 and Appendix A of this article. Differences in opinions of National Cabinet members were clear and publicly aired. NSW and Victorian leaders were much more sceptical about the closures than other Premiers. Despite the Commonwealth aligning with the two States, and publicly questioning Queensland, it has provided military personnel to assist enforcement of border closures.[[21]](#endnote-21)

National Cabinet does not include leaders of Opposition parties. Nor do Opposition parties – indeed Parliaments – play an overt or significant role in advice and decision making in any jurisdiction. The effect is an appearance of politicisation. It may have been thought participation of State Premiers from both major political parties would mitigate the negative connotations of that. However, positions of various Premiers at National Cabinet have been criticised by Oppositions at home, undoing whatever benefit a multiple party representation at National Cabinet might have.

Moreover, comments made by National Cabinet members on sensitivities in other jurisdictions have been portrayed – attempted to be deflected - as motivated by party politics rather than merit.

Frequent references by Government leaders to ‘the expert/medical advice’ – to support their positions in conflicts - and ongoing failure to publish any such advice, or advice on legalities or economic effects, invited public disbelief in National Cabinet and its State members.[[22]](#endnote-22)

While praising National Cabinet’s apparent early success re Covid, highly expert commentary remained sceptical about aspects of the group, claiming there were ‘fractures’ and structural flaws that inhibit its strategic decision making.[[23]](#endnote-23)

The Treasurer’s introduction to the stimulus package legislation claimed that time was ‘the ultimate Team Australia moment’. That was 8 April, and was no doubt, unfortunately, correct.

### 2.9 Media campaigns

As was the case with the 2019-20 bushfires, media coverage of Covid has been generally hyperbolic, sometimes hysterical and consistently saturating. Some members of the media appeared to be unsatisfied with seeking the spotlight via traditional fear mongering about health dangers, economic collapse and social woes. They extended beyond reporting and factual analysis and into seeking conflict and shaping public opinion along ultra-libertarian or crypto-fascist lines.[[24]](#endnote-24)

And as was the case with the bushfires, rival media organisations offered consistent but generally opposing views. One group ran commentary that tended to downplay direct health threats, doubt ‘the science’ of some counter-measures and point to economic costs such as of border closures.

It has been claimed there is a ‘party political’ dimension to some associated reporting. One commentary drew attention to claimed softer treatment of the conservative NSW Government over the ‘Ruby Princess debacle’ - compared with that given to the Victorian Labor Government over the ‘hotel quarantine debacle’. The article, headlined ‘*coronavirus coverage dangerous’*, alleged other problems with the coverage of Covid issues and concluded with:

*‘Media coverage of the kind described here exploits that anxiety and feeds those natural human impulses, leading to social division and resistance to medical advice.*

*Both these consequences work against suppression of the virus. That is why it represents a clear and present danger to society*.[[25]](#endnote-25)

The other camp ran several noticeable campaigns for changes to policy, including via ‘news’ reports – rather than commentary programs. One campaign, for an ‘elimination strategy’ was supposedly backed by experts.

However, other experts and Officials repudiated the notion as dangerous on the basis it would engender complacency. Contrary to that campaign’s presentation, elimination is not achievable while the virus is prevalent in the world and no vaccine – it is wishful thinking.

Moreover, the ‘elimination’ terminology is deceptive – ‘elimination’ is a goal, not a strategy (plan of action) - what was sought were more severe restrictions on individuals. As the example of Melbourne shows, severe restrictions and virtual elimination – zero cases for a time - cannot guarantee there will be no future outbreak.[[26]](#endnote-26)

Another campaign was for the widespread use, preferably enforced by law, of face masks. This was supposedly based on new research. Victoria’s mandating of face masks was seen as an opportunity to press the NSW Government to make similar laws. The reasons were Catch 22: masks are mandatory in Melbourne because of the relatively high number of untraced community transmissions, and need to be mandatory elsewhere lest those places become like Melbourne.[[27]](#endnote-27)

A characteristic of such campaigns, like the promises made about the Covidsafe App, is they invite belief in ‘silver bullets’[[28]](#endnote-28) allowing life to return to normal. That may be a satisfactory approach for a short-term crisis.

However, it appears the dominant risk factor – the global pandemic - has a long way to run. Pretending there are simple or quick solutions, particularly ones involving potentially needless inconvenience, is irresponsible and can contribute to public cynicism that may negate health measures. Acknowledged experts appear to take this view and continue to voice more considered analysis and advice.[[29]](#endnote-29)

## 3. NSW update

### 3.1 Harwin’s case

The May article’s illustrations of NSW’s policies included the case of Cabinet Minister Harwin.

To recap: travel between residences was exempt from the NSW ‘stay home’ rule, which he did after getting public service advice to ensure he complied with the relevant regulation. Yet he was criticised by the Deputy Premier and the media, issued a fine at the behest of the Police Commissioner, and resigned on 10 April. None of several opining Ministers nor the Commissioner were able to explain the fine – their comments about the regulation were wrong. The Premier gave four different, conflicting explanations. The Minister who made the regulation was neither asked for nor offered an opinion. Newspapers carried articles from criminal lawyers saying the fine was not lawful. Speculation arose Mr Harwin’s resignation was a result of internal Government factional fighting. Some weeks later the Deputy Premier – whose travel between his own residences was noticed – said the regulation always allowed such movement, throwing further doubt on the fine.[[30]](#endnote-30)

Mr Harwin challenged the fine. The fine was withdrawn just before the matter was to be heard in court – on 3 July - some twelve weeks after it was issued. That day, the Premier announced he would be reinstated to Cabinet, claiming resignation and reinstatement were ‘appropriate’.[[31]](#endnote-31)

The Police Commissioner stood-by the decision to issue the fine. The Premier and some media said the fine was dismissed by the court. The Sydney Morning Herald carried an article by a criminal barrister contradicting that, saying neither the Commissioner nor Premier gave an explanation of the fine – in conflict with earlier promises and it was difficult not to conclude this was ‘mob justice’:

*‘the idea that the apparatus of police investigations and criminal charges might be used as a mechanism to quell media attacks is even more disquieting’.[[32]](#endnote-32)*

That is an understatement. Potential inferences are not merely about quelling media attacks on Mr Harwin. Others include: the fine etc. aimed to quell discussion about the regulation which could turn to the Minister under pressure for the Ruby Princess debacle; the investigation, charge and publicity surrounding it was used to settle political scores and force resignation of a Minister.

These types of inferences warrant judicial investigation. Such an investigation should also review police understanding of the law because a further report in the Herald indicated the police did not properly know the laws they were supposed to enforce - the police hierarchy:

*‘encouraged police to seek legal advice and speak to their superiors before acting on alleged breaches of public health orders’.[[33]](#endnote-33)*

While police media claimed this was due to rapid changes in regulations, that could only have been relevant to situations other than Mr Harwin’s. The ‘Harwin regulation’ – and travel between residences exemption – had been in place for well over a week, and presumably the question of issuing the fine was considered by the top levels of the Police force.

The Harwin issues were soon overtaken by more news from the NSW Government – closure of the border with Victoria. Before outlining this, and some other border issues, it is useful to consider further background from the Ruby Princess inquiry and the Black Lives Matter demonstrations.

### 3.2 Ruby Princess inquiry

In mid-April NSW established a Special Commission of Inquiry into the Ruby Princess debacle. At issue are explanations for allowing several thousand people to disembark from a cruise ship in central Sydney despite a high potential of on-board Covid infection – potential which became actuality.[[34]](#endnote-34)

The Commission had not reported at the time of writing. Evidence given to the Commission suggested there should have been quarantine of at least some passengers and crew. Relevant authorities include NSW Health and the Commonwealth ‘Border Force’. It is possible failure to communicate and clearly assign responsibilities among and within agencies were contributing factors. Media reports referred to mistakes and Officials being distracted.[[35]](#endnote-35)

The Commission took evidence in public and examined witnesses. Questions posed to one witness were regarded by some as harsh. However, this arguably had a salutary effect in NSW where Officials then appeared to be more taciturn and focussed than colleagues in some other States. Treatment of proposals for demonstrations – mass rallies – in CBDs is evidence of such an effect.[[36]](#endnote-36)

### 3.3 Black lives matter

Recent attention to ‘Black lives matter’ movements originated with a death of an African-American during an arrest in Minneapolis in the United States. In Australia, the movements primarily relate to grievances about treatment of Aboriginal Australians.[[37]](#endnote-37)

‘Black lives matters’ protests – mass demonstrations - were scheduled to take place in the CBDs of Sydney, Melbourne and Brisbane on 6 June.

The focus of the demonstrations was to be ‘indigenous deaths in custody’ – a contentious issue, the factual basis of which is the relatively high rates of such custody. Rather than discuss the issues, the NSW Premier initially welcomed the rally as an expression of political freedom even though participants would breach the NSW anti-Covid regulations. However, within 24 hours – on 4 June - she reversed this opinion and opposed it.

The Prime Minister strongly advised against attendance at the demonstrations. The other relevant Premiers – from Labor Governments in Victoria and Queensland - also publicly opposed the proposed demonstrations, even if there had been earlier suggestions some Officials with health regulatory responsibilities had sympathetic views on indigenous issues.[[38]](#endnote-38)

However, only NSW took action to prevent the rally. The Police Commissioner sought an urgent injunction to remove the protections from organisers and participants that would allow the protest to proceed without prosecution. The injunction was granted in the Supreme Court– effectively stopping the protest. Protesters vowed to go ahead despite the ruling – indeed such vows were presented to the Court as reasons to allow the demonstration, reasons the Court chose to reject.[[39]](#endnote-39)

Organisers appealed the ruling. On the morning of the demonstration, that appeal was granted – the rally was authorised. The Court’s reasons hinged on the fact that police officers had effectively assisted organisation of the protest and the Commissioner could not then legitimately oppose it. A memorable turn of phrase – ‘commendable cooperation’ between police officers and organisers – summed up the reasons.[[40]](#endnote-40)

Reports had over 20,000 people attending the Sydney demonstration. Large crowds also gathered in Melbourne and Brisbane.[[41]](#endnote-41)

The Prime Minister and Premiers expressed disappointment that demonstrators did not heed their requests. Further protests were planned for later in June and in July. The NSW Police Commissioner sought and gained injunctions against these. In late July, an appeal was made, and lost, against such an injunction. A subsequent attempt at a mass protest in defiance of the injunction was broken up by police before protestors could assemble.[[42]](#endnote-42)

The attitude of NSW to these – and other - demonstrations was more formal and rigorous than other the States. Decisions were made at a far more senior level, reinforced through all available legal means and - apart from the Premier’s initial confusion - the ‘messages’ from throughout the Government and Officials had been unified, focussed and consistent.

### 3.4 Closure of NSW border with Victoria - initiation

On 6 July, the Premier announced the NSW border with Victoria would be closed – contrary to criticisms of previous closures in other States. The given reason: a spike in cases in Melbourne.[[43]](#endnote-43)

New cases in Melbourne increased from zero on 6 June to seventy-three on 1 July, most due to community transmission, with clusters in several suburbs. Media reports had the clusters initiated from hotels where returned travellers from overseas were quarantined.[[44]](#endnote-44)

Despite early claims the problems started from innocuous activities such as using cigarette lighters or car-pooling, reports soon pointed to more serious breakdowns in infection control. Moreover, reports suggested such breakdowns started a considerable time prior – even April. The claimed problems included mingling between the travellers and guards. There were claims guards were untrained in relevant procedures and risks. Later suggestions pointed to systemic issues including uncertainty about which Government agency was supposed to be in charge.[[45]](#endnote-45)

By 30 June, Victoria’s Premier started to announce progressive lock-downs of – stay-home orders for - suburbs where significant case numbers were identified. He claimed the number of infections – over one hundred per day - was at the limit of what Victoria could trace. Claims later surfaced that Victoria’s tracing capability was low due to inadequate resourcing and that protocols were weak. Little mention was then made of the tracing ‘App’ Covidsafe, which elsewhere had been called a failure including, implicitly, by Victorian authorities. Later, Commonwealth Officials advised that data from the App was not used for several weeks by Victorian tracing authorities.[[46]](#endnote-46)

Announcements of these lock-downs were made in advance.[[47]](#endnote-47)

On Thursday 2 July, the Victorian Premier announced a judicial inquiry into breaches of hotel quarantine, to report by 25 September.[[48]](#endnote-48)

That day NSW introduced severe penalties for Victorians who travelled from locked-down suburbs to NSW - $11,000 fines and/or six months in gaol. NSW residents who had travelled to those suburbs were to ‘self-isolate’ for two weeks or face similar penalties. Sixty-four Covid cases were reported in Melbourne the previous day.[[49]](#endnote-49)

On Saturday 4 July, the Victorian Premier ordered an immediate hard lock-down - with almost no exemptions – of nine high rise towers and further suburbs in Melbourne. Almost immediately there were complaints these unfairly targeted the poor and vulnerable.[[50]](#endnote-50)

On Monday 6 July, he said all Melbourne would be locked-down, for at least six weeks, from 8 July.[[51]](#endnote-51)

On the same day, but prior to that announcement, the NSW Premier decided to close that State’s border to all Victorians rather than just to the residents of, or travellers from, Melbourne. The closure was to take effect also on 8 July. This was supposedly on advice by the NSW Chief Health Officer given just after 8am. The Victorian Premier said he supported the closure – according to some reports he announced it, saying it had been discussed also with the Prime Minister.[[52]](#endnote-52)

The border closure was made with great fanfare. The NSW Police Commissioner said 600 officers were to be deployed to border patrols, supplemented by drones to prevent desperate escape attempts from Victoria such as swimming across the Murray River mid-winter. Almost on cue, passengers on one of the final flights from Melbourne were not tested in Sydney – a repeat of a previous failure.

Given her previous opposition to border closures, particularly those by Queensland, charges of hypocrisy were soon levelled against the NSW Premier. Among the Premier’s explanation of her seeming about-face was that NSW counter-Covid policies were made on a ‘no regrets’ basis. This seemed to plant a suggestion the Government should be free of normal constraints like coherence or consistency.[[53]](#endnote-53).

The decision was portrayed in a Sydney Morning Herald puff piece as being under consideration ‘for weeks’. Yet it appeared to be panic, given that the system of NSW severely penalising evasion of Victoria’s lock-downs had only been in place for three days. Support for the panic thesis also came from reports in which NSW experts only referred to daily numbers of new infections in Victoria - then below those in the ‘first wave’ of the pandemic. Weeks previously, when closure was supposedly under consideration, cases were less than a third of previous Victorian peaks.[[54]](#endnote-54)

Further circumstantial evidence of panic came from the fact that the first imports of Covid from Victoria were detected in NSW only on the day of closure. The immediate appearance was the closure was not motivated by relatively large case numbers in Victoria but apparently minor ‘leakage’ to NSW.[[55]](#endnote-55)

### 3.5 NSW border closure – and after

The closure affected over fifty border crossing points, most prominently at Albury-Wodonga. The absolute and relative sizes of these two centres, and location on Australia’s main interstate highway, meant the effect on normal life was greater than even the Queensland border closure. Some 125,000 border permits were issued in the first two days.[[56]](#endnote-56)

Disruption, including delays to exempt activities such as freight, led to suggestions of an Albury ‘bubble’. The proposal was to have the border control point either north of Albury or south of Wodonga, to enable better continuation of day to day activities in the ‘twin cities’. However, NSW and Victoria did not proceed with this. [[57]](#endnote-57)

The closure did not eliminate risks of NSW importing Covid. That was illustrated by an outbreak detected at the CrossRoads Hotel, at Casula, near the boundary of the Liverpool and Campbelltown local government areas. Infections were detected on 3 July. These were traced to an employee of a freight company who travelled from Melbourne at the end of June. While the border closure was later, it could not have prevented the CrossRoads infection as freight personnel were exempt.

The infection spread more widely and at end July NSW health Officials were suggesting all then ex-quarantine infections in NSW were from Victorian originated strains.[[58]](#endnote-58)

### 3.6 Some developments in Victoria

Infections in Victoria continued to grow despite reintroduction of a lock-down on 9 July when the State reported 165 new cases. It reported over 600 on 31 July. Its Premier and authorities said this was due to people not following instructions and advice, which was represented in some – News - media as the Government blaming the community. Independent commentary suggested the growth in numbers was being driven by people working while sick – because of insecure or multiple jobs.[[59]](#endnote-59)

It appeared some media turned against Victorian Premier Mr Andrews - a contrast to treatment of NSW Premier Ms Berejiklian for either the Ruby Princess or Harwin debacles. There were repeated suggestions the Victorian inquiry into hotel quarantine allowed Mr Andrews to ‘dodge questions’ even though he said he would ‘own’ mistakes the inquiry revealed. Similarly, criticism of Premier Andrews for not calling on the Commonwealth military earlier might be contrasted with the absence of comment that NSW did not enlist BorderForce for dealing with the Ruby Princess.[[60]](#endnote-60)

Reasons for such differences might include media outlet sexism, party political biases or personal dislike of the style of Victoria’s response to Covid. The word ‘arrogant’ had been used to describe that style.

From the outset in March, there were signs that could imply arrogance. For example, Victoria torpedoed the opportunity for a national approach to the pandemic. Officials’ public advocacy of a ‘go hard go fast’ restrictions conflicted with the proportionate response recommended by the rest of the national health advisers. Some Victorian restrictions appeared capricious. Participants in a mid-CBD mass demonstration were treated more leniently than fisherfolk on a suburban pier. The Prime Minister’s comment that certain ‘tweets’ by an Official didn’t inspire confidence was seemingly ignored. Officials made less than supportive comments about – and for a time stopped using data from - the Covidsafe App which was being strongly promoted, even advertised on mass media, throughout Australia by other Governments.[[61]](#endnote-61)

Given the Victorian Government’s public displays of such apparent confidence in itself, recurrence of Covid in the community must have been shock to Victorians, especially since recurrence was isolated to the State. Together with widespread speculation of the root cause being Government failures, it was little wonder reports talked of community anger - amplified by the necessity to re-impose and toughen restrictions which the rest of Australia was largely discarding.[[62]](#endnote-62)

The escalating number of cases caused alarm; however, the signal of real trouble came from army personnel who door-knocked homes. They were checking whether infected people were complying with the first and most important anti-Covid measure: to remain isolated from others. Reportedly 130 out of 500 - 26% - infected people were not home.

While such non-compliance might be partly attributed to the passage of time, disappointment and anger are also likely factors. If so, a result was insufficient community credit to - negating the efficacy of - counter-Covid measures. That problem could only be patched-over by more stringent measures such as compulsory wearing of masks, curfews, stronger penalties and heavy enforcement – all of which eventuated.[[63]](#endnote-63)

The rapid increase in case numbers and (necessary) policy reversal indicated pre-existing problems with Victoria’s pandemic response. Some of its apparent arrogance could be seen, in hindsight, as bravado consistent with reports pointing to problems in administration such as outlined in section 3.2 (above).

In this light, the NSW border closure may not have been a reactive panic to case numbers or minor ‘leakage’ even if resultant infections swelled such as from the CrossRoads Hotel. Rather it may reflect loss of faith Victoria’s ability to manage the outbreak by other than extraordinary means. That the Victorian Premier supported the closure suggests he had come to the same view.

### 3.7 Queensland reaction – border closure

After a May National Cabinet meeting, Queensland released a ‘road map’ to easing restrictions. However, by early-June there was confusion as to whether its border restrictions would be eased in early July or September - the latter suggested an outlook of at least fifteen weeks, around twice the duration of pandemic restrictions to then.[[64]](#endnote-64)

A week before NSW announced closure of its border with Victoria, on 30 June, Queensland’s Premier announced an intention to ‘open’ her State’s borders – ten days in advance – except to people from Victoria.[[65]](#endnote-65)

That was quickly modified. Queensland responded to the July 3 infection at the NSW CrossRoads Hotel by warning its residents who had visited the hotel.

It also re-closed its border to residents of the Liverpool and Campbelltown local government areas in NSW, presumably on some view that those areas were hotspots. That appears to have involved a misunderstanding of the situation – as any knowledge of the immediate hotel precinct might have suggested several other local government areas were likely to have more significant Covid risk from the outbreak. Those suggestions were quickly borne out.[[66]](#endnote-66)

While clusters linked to the initiation of infection in NSW emerged in South Western Sydney - and after some time eastern Sydney - NSW authorities appeared able to trace nearly all affected people. This was evidenced by a relatively steady number of daily new infections and very low infection: test ratio, quite different to the experience in Victoria.[[67]](#endnote-67)

Nonetheless, Queensland closed its border progressively to: areas in Sydney; all of Sydney; all NSW residents and the ACT. It denoted increasingly large geographic areas and populations as hotspots - an attempt to bring the actions within the authority of relevant legislation.

Somewhat curiously, Tasmania announced a border closure against all Queensland before limiting this to hotspots which were identified premises rather than geographic areas.[[68]](#endnote-68)

The Queensland Premier reportedly became ‘concerned’ people from hotspots would travel to Queensland via other areas – triggered by two Queensland residents returning from Melbourne. Her – or more accurately, the Queensland Chief Health Officer’s – idea of a hotspot was somewhat grander than the Tasmanian Premier’s. To the Officer, a local government area, a metropolis and indeed an entire State could be a ‘hotspot’. Hence, the ‘concerns’ about Victorians being ‘smuggled’ into Queensland. Possibilities included in the back of trucks and in trunks – the latter being a real case, albeit of a reported fugitive.[[69]](#endnote-69)

Addressing such concerns would require prevention of Queensland residents from leaving the State and declaring the rest of Australia a hotspot. Neither was done.[[70]](#endnote-70)

Less prominent among the Premier’s concerns was the reported 210 people who had been identified as ‘missing’ from quarantine since April. These were people who had breached requirements to self-isolate. The situation bore some similarity to the signal problem in Victoria referred to above, albeit without reference to whether any had known they were infected.[[71]](#endnote-71)

Following the reports of the proposed ‘bubble’ for the NSW-Victorian border communities, Queensland then made a similar proposal – apparently via text message – to NSW in relation to the Gold Coast-Tweed area. It claimed its border closure created traffic delays which could be avoided by moving control into NSW where the highway was wider. It emerged a similar proposal had been made in March, when local government politicians then proposed to move the border.[[72]](#endnote-72)

Reports did not have Queensland making a more obvious bubble proposal – to move the control point to somewhere in Queensland where the highway was wider still. Nor did reports indicate Queensland’s idea covered issues such as the legality of its Officials making directions and its police enforcing Queensland laws in NSW – a critical issue since NSW had not agreed on the closure, implying NSW Officials could not enforce it.

On that point alone, the Queensland situation was fundamentally different to the NSW-Victoria border – there was suspicion that at least its bubble proposal was related to the State election in late 2020.[[73]](#endnote-73)

### 3.8 Border closures – more general

Debate about State border closures continued. Other than in local cheer-squads, most of the prominent media opinions favoured the NSW border closure, were more ambivalent about Queensland, and considered Western Australia to be suspect.[[74]](#endnote-74)

Most participants in the debate assumed questions are limited to ‘necessity’ and that closures are popular – implying local popularity to be the determinant of legality and good public policy. The Appendices outline implications of the former.

Of these questions, the only information in the public domain relates to local popularity. As is the case for with-in State parochialism, such popularity can result from fear-mongering and be a form of barracking for the home-side, as if Covid kicks-off a competition to impose restrictions on people, ‘other’ people. Yet responses to Covid and community cohesion, are jeopardised by games.

In the more than five months since the closures started, no State has published any medical or legal advice on which decisions were purportedly made. Primary legislation is absent – all but one closure has been made by Officials purportedly creating regulations.

No State has referred the issue to independent legal determination such as a court - indeed several States used political and media manoeuvres to attempt to keep the questions away from courts. The Western Australia Premier went as far in his histrionics to claim a person testing a closure was an ‘enemy of the State’.[[75]](#endnote-75)

However, the issues transcend: those matters; (protecting) States ‘putting their people first’; the potential for over-confidence that may result. Border closures against areas not subject to isolation orders are an expression of ‘no confidence’ by one Government in another – a grave charge whose consequences can adversely affect economy, public health and society for a considerable time.

If there are significant public health failures in a State, a border closure may usefully signal the need for a lock-down – isolation of individuals by stay-home directions - in a target State. A consequence of that action will be a reduction in economic activity and work – the more effective the lock-down the greater the loss of work. There is a compelling case for greater and immediate Commonwealth assistance to people and communities targeted by border closures.[[76]](#endnote-76)

Otherwise, border closures will be seen as the protecting State Government engaging in political opportunism, administrative laziness and/or underlying arrogance. Proper co-operation among States, including sharing and using information about actual and suspected infection locations – hotspots – would limit the areas subjected to border closures. At present there are examples of this not being competently done for example, Queensland’s incorrect list of Sydney hotspots.

The Commonwealth – especially its Government - should be expected to take a very strong interest in State border closures. States, their borders, and any of their powers to act on borders arise only from the Constitution. Constitution s.61 gives only the Commonwealth Executive (Government) the power to maintain and execute the Constitution which includes preservation of the system of government - which an illegal border closure would clearly threaten.[[77]](#endnote-77)

Mr Clive Palmer initiated challenges to the Queensland and Western Australia border closures. The Queensland challenge was dropped on 17 July – a week after that State (initially) eased restrictions except for people from Victoria. The Commonwealth’s position on that remains unknown. [[78]](#endnote-78)

Mr Palmer’s challenge to Western Australia remained on foot. For some time, the Commonwealth Government advised it had an interest in participating in the case, as is usual for Constitutional matters. There are suggestions the Government was advised the border closure was illegal.

However, at the end of July, following the earlier mentioned histrionics, the Government changed its mind - the Prime Minister alleged this change had nothing to do with a potential electoral backlash on his party. Together with a Minister whose electorate is the State, he then took the extraordinary step of publicly ‘urging’ Mr Palmer to discontinue the action. He said discontinuance would ‘spare West Australians unnecessary anxiety’. He added his Government had (and does) ‘provided support for the outcomes that the Western Australian government is seeking to achieve.’[[79]](#endnote-79)

Those comments suggest a belief that at least the Western Australia closure is illegal but excused by the Prime Minister via an ends-justifies-the-means argument. This echoes his earlier wishes about powers to fight what he considers national emergencies.

The border closures have not been treated seriously for the near six months of the pandemic. On present settings – if given reasons are to be believed - they will continue indefinitely, until the international pandemic is over. On present expectations that may be many years. Despite any views on popularity, continuation of the present absence of legal authority is a threat to at least the Australian Federation.[[80]](#endnote-80)

## 4. Conclusion

In the absence of vaccine or antidote, public health advice is to the effect that anti-Covid measures are based on two tenets: detection of infection; isolation of the infected. This is known as: test- trace- isolate. Any anti-Covid strategy will hinge on the reliability of detection and isolation.

Unless detection and isolation of infected individuals is considered reliable, it can be necessary to isolate all those suspected of infection - which may be many people and all those from an area.

If it is assumed the current implicit balance of economic and health goals is appropriate, the key to limit the needless isolation of people – a proxy for needless economic, social and institutional damage – is to ensure the greatest reliability of detection, via testing and tracing, and of isolation.

In that context, after six months of infection, many meetings of National Cabinet, innumerably various impositions on the public, episodic fearmongering and continuous political grandstanding, Australia does not have a national strategy for dealing with Covid. There is no a ‘mixed message’. The message is clear and consistent: it is national shambles with at least some of the varying ‘performance’ across Australia due to differences in luck (so far) rather than to management.

The many indications of incoherence include: border closures to people who are not isolated; vastly different decision-making processes; military deployments to cover resource failures; disincentives for testing and isolation. Other severe problems include: lack of Parliamentary authority or appropriate support for decisions; inexplicable and possibly illegal restrictions; antagonism among Governments played out via the mass media; personalities running ‘silver bullet’ campaigns; lack of information pertinent to the public. All of which makes the Treasurer’s comment that 8 April was the ‘ultimate Team Australia moment’ unfortunately true. And all of which mean Governments have not taken the pandemic seriously enough.

It cannot be presumed members of the public limit their attention to the latest media opportunity for a State Premier and see themselves as a State-of-origin cheer squad. Rather they may be aware of wider events and are forming views similar to the above. The appalling non-compliance of isolation orders reported for Queensland and Victoria is likely evidence of this.

Covid health results are said to depend on responses of the public e.g. willingness to participate in testing and isolation. While some experts expect such responses to weaken over time, the national mess is likely to accelerate any decay. Given the pandemic may last for years, that may have very serious consequences.

A start to resolving this would be to focus on the duality of border closures and isolation. A decision regarding any borders of a State needs corresponding decisions of isolation of people in other States – and vice versa – quickly followed by significant Commonwealth financial assistance to affected people. None of those decisions should be made by Officials – unlike most cases at present.

Given States’ apparent inability to make complementary decisions on border closures and isolation, and the aversion of Governments to provide any public assurance on the legality of their actions, it is necessary for the Commonwealth to step in. That requires more than merely looking over a grandly titled rabble. It demands a far stronger presence of the Parliament, especially the Senate, to strictly limit the extent and duration of Government activities to what is absolutely necessary.

In the absence of continuous High Court litigation – impractical for nearly all Australians - only the Parliament has the authority to start to sort out this debacle. It should legislate processes to ensure the sound governance necessary for the sustainability of responses to Covid. It should act because the issues are too important to leave in the hands of the Governments Australia currently suffers.

J Austen

14 August 2020

Postscript:

Between writing (11 August) and posting five major developments were for:

Section 2.5, Appendix A1: emergence of community transmission in New Zealand, with speculation its origins might be cargo – i.e. a non-human initiation – e.g. <https://www.9news.com.au/national/coronavirus-australia-live-updates-august-13-victoria-outbreak-death-toll-aged-care-new-zealand-lockdown-cases-covid19/b1a06726-98e8-4583-9412-a71f6c334248>.

Section 2.6: debate about Governments’ aged-care Covid policies e.g. <https://www.9news.com.au/national/victoria-aged-care-covid19-outbreak-dr-nick-coatsworth-says-aged-care-claims-insulting/e9ba5b27-2bab-49f8-8ca5-d5a987d6395b>

Section 3.2: Ruby Princess inquiry has reported e.g. <https://www.dpc.nsw.gov.au/publications/special-commissions-of-inquiry/the-special-commission-of-inquiry-into-the-ruby-princess/>

Section 3.6: further restrictions in Victoria e.g. <https://www.abc.net.au/news/2020-08-12/coronavirus-stage-4-restrictions-in-victoria-unemployment-rate/12548688>

Generally: as yet untested claims of a vaccine, ‘cure’ e.g. <https://www.abc.net.au/news/2020-08-13/australian-experts-react-to-sputnik-vaccine-news-reckless/12552028>; <https://www.news.com.au/lifestyle/health/health-problems/coronavirus-australia-sydney-doctor-claims-cheap-head-lice-drug-could-cure-covid19-and-should-be-used-now/news-story/24b930fcec5e4ef33127b13d4356b0aa>

## Appendix A: Border closure – some issues

### A1. Legality and reasonable necessity

The May article noted that during the 1919-20 pandemic - of an illness apparently more virulent than Covid - Queensland closed its borders to outsiders and created public inconvenience by quarantine camps. It sought to contest the Commonwealth’s intention to land returned soldiers in the High Court and the court of public opinion. It failed to gain an interim injunction in the Court, and did not proceed further with the ‘equivocal’ advice it received.[[81]](#endnote-81)

The present understanding is: State border closures are not made legal by popular support. Prima facie they breach sections 92 and 117 of the Constitution. However, they might be valid if reasonably necessary for an important purpose. Where legislation or actions appear to breach these sections, it is up to those asserting validity to demonstrate reasonable necessity. Some of the issues are outlined in the May article.

The closures are not the direct result of legislation. Closures have generally been by regulations made by Officials. It is not entirely clear the legislation of every State intends for Officials to make regulations to close borders. While some legislation gives Officials power to make any decision to advance public health, the extent of such power is likely limited. For example, could it be contended that public health powers would enable Officials to prevent electors voting? Hence, ‘reasonable necessity’ may be essential for any valid regulation or decision.

If so, a question is: is it reasonably necessary for public health purposes for there to be a regulation that ‘infringes’ ss. 92 and 117.

Professor Dixon, of the Gilbert + Tobin Centre of Public Law, University of New South Wales, appears to hold such a view. On 7 July, the Sydney Morning Herald carried an article by her claiming the NSW-Victoria border closure was justified. In her view, the closure was reasonably necessary – a test she felt likely to be declared law by the High Court.[[82]](#endnote-82)

Professor Dixon’s reasonable necessity test had earlier been raised by a Gilbert + Tobin Public Law colleague, Ms Shipra. In early June, Ms Shipra argued border closures then in place - Queensland, Western Australia, South Australia, Tasmania - may not breach s.92 due to a landmark case, *Cole v. Whitfield*. In that case, the High Court said s.92 prohibited only those laws with protectionist trade and commerce intent or effect. A summary of that case is:

*‘Discrimination is now the sole test –*

*Local protection, implied or expressed.*

*Outside those limits, the State knows what’s best.’[[83]](#endnote-83)*

As the present border closures are said to aim at preventing infection, it is arguable they do not have a prohibited trade and commerce intent.[[84]](#endnote-84)

However, there are difficulties with that argument. Aspects of the closures – such as application to all non-residents independent of risk of infection, allowing freight, allowing residents to leave and return to the State, and exemptions for fly-in-fly-out workers with residence in the State - have discrimens other than public health. Delays in implementation – between announcement of a border closure by a Premier and the Official’s making the regulation – do not suggest an emergency and therefore do not suggest necessity.

Irrespective of what State Governments might say, these features point to a protectionist intent – of preventing competition in or enjoyment of a State by non-residents.[[85]](#endnote-85)

Another difficulty may be that *Cole v. Whitfield* related to trade and commerce rather than ‘intercourse’ - the movement of people. Colleagues of Dixon and Shipra argued that is not a problem. They said the High Court had treated interference with personal movement much as it treated interference in trade: interference in trade, even by protectionist means, is permissible if done for non-protectionist purposes.[[86]](#endnote-86)

However, that sentiment does not appear in *Cole* - which concerned lobsters. The Court there appeared to go out of its way to say trade and commerce is distinctly different from intercourse.

Rather the idea appears in a later case, *APLA Ltd. v. Legal Services Commissioner NSW* (2005) which dealt with lawyers advertising their services. That case has been assessed by a Commonwealth Solicitor General – Mr Bennett QC - as coming to a sensible conclusion: accepting a reasonable purpose of legislatures – to prevent ambulance chasing in NSW– does not infringe s.92.[[87]](#endnote-87)

There are reasons to consider freedom of personal movement, liberty, more important than free movement of goods and, therefore, apply stricter tests to proposals to restrict liberty. For example, a 1920 case referred to the intercourse provision of s.92 as ‘*so fundamental a provision of the Constitution*’. In an even an older case - *R v. Smithers* (1912), concerning provisions to protect public safety in a State by preventing the entry of certain criminals – three justices said the (former) ability of States to exclude undesirables had been reduced by the fact of federation, not just ss. 92 and 117. Justice Higgins cited the United States Supreme Court, Crandall v. State of Nevada:

*"We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States." This result of the Constitution is said to be implied in the American Constitution; it is expressed in sec. 92 of our Constitution, so far as regards State boundaries”.*[[88]](#endnote-88)

Yet, the circumstances of the pandemic might nullify the implications of personal freedom being more important than free trade. The fact Covid is spread largely by proximity of people means border closures against people are likely to be more reasonably necessary for health purposes than closures against goods. The net result: the relevance of *Cole* is in question at present. Hence, the test could be along the lines put by Justice Gummow in *APLA*:

*‘whether the impediment imposed on that intercourse is greater than that reasonably required to achieve the objects of the legislation in question’….traffic regulations as laws which did impede interstate intercourse but did not deny the freedom guaranteed by s 92’*.[[89]](#endnote-89)

If so, there may be a need to deal with a variety of matters to demonstrate reasonable necessity. One such matter could arise from the duality of closures and lock-downs. An illustration of duality is the complete ‘stage 4’ Melbourne lockdown: properly enforced this would obviate the need for a border closure – as the affected people would not be able to get near the border. To demonstrate reasonable necessity, it may be necessary to demonstrate absence or ineffectiveness of lock-downs.

Professor Dixon noted she had earlier, on 1 July, urged closure of the NSW Victoria border. Yet much of her argument hinged on facts known after that: other measures to ‘protect NSW’ had been attempted; infection had spread beyond containment suburbs; reports of associated cases in NSW.

Further, those new facts do not support claims of necessity: the other measures had only been in place for a few days and had not failed; the number of containment suburbs increased in line with infections; the cases in NSW would not have been prevented by border closure.

There is a question about the utility of legal academics recommending policies for public health via the mass media. If such advice is to be offered, consideration of the underlying logic may be in order. Some points on that follow.

### A2. Reasonable necessity

A foundation question must be: reasonable necessity for what purpose? The above referred to the objects of the legislation, however, that entails a circularity.

The arguments made to date assume an answer of ‘public health’ is conclusive. This is consistent with Mr Bennett’s suggestion and comments about the majority in *APLA* (above). He cited Justice Higgins’ warning that courts should not seem to be eager to judge Acts of Parliament.

Yet ‘public health’ might not be conclusive. Mr Bennett’s comments assumed purposes of legislation were reasonable. That may underpin his disapproval of contrary views, expressed in *Cunliffe v. Commonwealth* (1994) – a case concerning whether the need to register as a migration agent impinged on s.92 and freedom of political communication - as strange dicta:

*‘a law that incidentally imposed a burden on interstate intercourse would only be saved from invalidity if the burden was ‘reasonably necessary for the purpose of preserving an ordered society’ and was not disproportionate to that end or was necessary for the ‘government of the nation and its constituent parts’*.

He said the majority in *APLA*:

*‘decided that a test based on the requirements of an ‘ordered society’ was too uncertain and manipulable’*.

However, only Justice Hayne explicitly referred to and rejected that test. The assumed object of the law in *APLA* was far clearer than the *Cunliffe* (implied) goal of ‘freedom of communication’. The *APLA* object is also far clearer than terminology in public health legislation like: protection and promotion of health of the public. Even a purpose of ‘protect health, safety and welfare of persons affected by the Covid 19 emergency’ involves questions of content and degree greater than *APLA’s* prevention of ambulance chasing.[[90]](#endnote-90)

Justice Kirby, who dissented in *APLA* essentially on grounds of the necessity of access to legal advice, was troubled about regulations that over-reach the problem they supposedly address:

*"an extraordinarily crude instrument to achieve the claimed end……. Whilst such considerations relate to the merits, not the lawfulness, of the Regulation, they underline the indifference of those who made the Regulation to a nuanced, carefully targeted law, such as would be attentive to limitations deriving from the Constitution. In making, and maintaining, the Regulation, the State lawmaker was not troubled by any such delicacies”.*

There is no doubt Covid is a threat to public health, and can cause deaths. Evidence to date does not establish it to be the threat to public health posed in some other pandemics, for example Spanish Flu. Does it give rise to a potential threat to an ordered society and is that a relevant matter?

The issues in Tinpot might shed some light on this. That article noted the High Court’s more expansive view of threats to the system of government in recent years, and the assumed need to forestall danger. The Court’s treatment of Commonwealth anti-terrorism laws in the 2000s might be compared with its strict views of the 1940s and 1950s for example in the Communist Party case – and its earlier belief that threats to the system of government can come from within. [[91]](#endnote-91)

Shipra appeared to downplay such issues. She suggested they are related to ‘proportionality’, a matter considered in cases on impediments to another matter implied by the Constitution - freedom of political speech. The 2015 case High Court case of *McCloy v. NSW* had that freedom implied from the higher order but somewhat abstract goal of representative government set out variously in ‘the structure and text’ of the Constitution. The case held the implied freedom may be limited by a law, provided the law does not unduly impinge on the goal – one aim is to be balanced against the other.

Such balancing would take account the effect of the law, and the duration of that effect.

However, Shipra argued, s.92 cases are related to specific provisions of the Constitution which are not abstract, and hence for those the court should not engage in a balancing act. If correct, that view implies any purpose other than protectionism will support a law that on its face breaches s.92.

Similar reasoning then might be applied to implied powers, negating the relevance of threats to institutions and therefore accepting ‘public health’ is the only matter for which reasonable necessity might be relevant – similar to Mr Bennett’s view of *APLA*.

Yet matters might not be that simple. There was various reasoning in *McCloy*, one view referring to systemic risk a law may have on the higher order goal. Were s.92, and parts of the Constitution providing the Commonwealth with powers over interstate matters etc, viewed as indications of a higher order goal of creating a nation, there may be a question of systemic risk arising from – rather than being mitigated by - border closures. For example, border closures for trivial, yet non-protectionist purposes might present systemic risk if adopted widely or disruptively. Another example would be closures for non-protectionist purposes that actually or intended to undermine the character of Australia as a nation.[[92]](#endnote-92)

*Smithers* might be relevant to such wider considerations. The intent, and operation, of the challenged law was clear – it was to provide for the safety of the people in the protecting State. However, it was held to be invalid. The Court there distinguished between constraints on people and on their movement (‘intercourse’). A State could validly legislate to constrain people, for example criminals, within the State irrespective of their residence. However, constraint of their entry to the State raises a different question:

*‘Though (s.92 means) there is "absolute freedom" in every Victorian to cross into New South Wales and mingle with his fellow Australians there without the least hindrance or condition on the part of the State of New South Wales, it is his "intercourse" only which is unfettered, not the man himself under all circumstances. If the man, while in New South Wales, steals or cheats or begs, or injures persons or property, or disturbs the public peace, or is in such a condition as to constitute a danger to his fellows—matters wholly distinct from "intercourse"—he is as amenable to the laws of the State*on those subjects…..as *any permanent resident of the State*.[[93]](#endnote-93)

### A3. A logic of reasonable necessity of border closure?

The underlying logic of reasonable necessity for border a closure to ‘protect’ people of a State is along the lines: otherwise people crossing the border could spread infection to them.

Crossing a State border does not change a person’s ability to infect others. The risk of a person infecting another is the same on both sides of a border even if the consequences may differ.

Hence the public health purpose of preventing the entry of a (target) person into a (protecting) State implies:

* That person should not be allowed to move in any State. The target person should be in isolation; and/or
* The ability of the protecting State to mitigate risks of and associated with infection spread by that person is relevantly less than other States.

States’ border closures have been based on geographic criteria – people from target areas are not permitted to cross the borders. Application of reasonable necessity to this requires establishment of some link between the target person and target area.

Were inability of a protected State a relevant factor, there would be a reasonable necessity of it closing its border to all other States while there existed risk of infection in Australia.

A reasonable necessity of closing a border to a target area implies some people who have been in that area should be isolated, and either:

* They are not isolated; or
* There is an inability to determine which people from the target area should be isolated.

In the latter case, reasonable necessity means the target area and the people are from it should be isolated, and either;

* The target area is not under an isolation etc. order; or
* Some people are not observing the target area isolation etc. order, possibly including non-residents who have travelled to or from the area.

The nature of Covid - outlined in Section 2 (above) - implies the risk of an area is generated by the prior physical presence of a possibly infected person in that area. This is the reason for premises – clubs, hotels, restaurants etc. – being identified in health alerts. Those alerts can suggest people who have attended premises that had been visited by a possibly infected person should submit for medical testing and, in the interim, isolate themselves.[[94]](#endnote-94)

Statements by the Tasmanian Premier demonstrate a State’s border closure can be limited to identified premises, and do not need to be related to a wider geographic target area or State. Only premises, not areas or States, can be actual Covid hotspots.[[95]](#endnote-95)

Reasons beyond mere identification of Covid cases or hotspots are needed to demonstrate reasonable necessity for a border to be closed to people from an area or State. Those reasons must relate to a protected State being unable to adequately rely on a target State’s identification of Covid cases or hotspots. Examples of such reasons might include a target State’s: inadequate or unreliable testing; significant delays in making test results available; high percentage of positive tests, etc. These reasons are generally that infection is likely to be substantially more widespread throughout the target area than the target State is reporting.

However, failure of the protected State to act on reports of a target State is unlikely to support a claim of reasonable necessity. Convenience, laziness or arrogance are unlikely to be valid reasons.

### A4. Practical aspects of the logic of reasonable necessity

The above logic points to conclusions likely to be drawn by the public from border closures.

One conclusion is there are substantial failures of the public health system in the target area which, in the case of a closure affecting all people from a State, means those failures are State wide.

A second conclusion may be there are deficiencies in the protected State’s public health system, which has people in that State unusually susceptible to harm.

A reasonable necessity to close a border against an entire State effectively means there is a significant public health failure by a State Government.

A border closure against an entire (target) State may be seen as an allegation of such failure, rather than the protected State merely ‘putting its people first’. That is a grave charge to make, particularly by a Government or Officials with relevant powers. Consequences may extend into public confidence and then into compliance with necessary public health directions. In the longer term the problems created by such an allegation might only be addressed by demonstrating to the public significant improvements in public health management.

If a State is competently managing public health, it may be dangerous for another State to ‘protect itself’ by closing a border against it, unless the protecting State explains to its people the reason for the closure is its own public health failings and closes its borders to the rest of the country.

If there are significant public health failures in a State, a border closure may be useful to signal that the situation needs to be improved.

A first step is to impose a lockdown – isolation of individuals by stay home directions - in the State that has public health management problems. A consequence will be reduction in economic activity and work – the more effective the lockdown the greater the loss of work. There is a compelling case for greater Commonwealth assistance to people in a State with public health problems, not just for fiscal policy or equity purposes but to reduce incentives for them to breach stay-home directions. Consequently, States which close their borders should accept as a cost that their people will receive less Commonwealth assistance than areas and States they point fingers at. [[96]](#endnote-96)

Limiting Government actions on border closures to reasonable necessity leads to cooperation among the States and thereby likely improved national health outcomes. Proper consideration of risk leads to States sharing and using information about actual and suspected infection locations – hotspots. At present there are examples of this not being competently done – for example Queensland’s incorrect list of Sydney hotspots.

All of the above suggests it is inappropriate for Officials to order the closure of borders.

Commentary on whether border closures are legally valid has focussed on a narrow range of Constitutional issues, with an implicit view that ‘reasonable necessity’ solves all problems. The above suggests this is not the case. State border closures have been treated far too lightly.

## Appendix B: An indicative model

### Consider:

#### a. Legality

1. The States and Commonwealth exist only by reason of the Constitution.
2. Constitution s.61 gives only the Commonwealth power to maintain it.
3. The words of Constitution ss.92 and 117 prohibit border restrictions.
4. It is thought exceptional circumstances may override (3).
5. From mid-March 2020, States closed borders and partially reopened them.
6. The closures were announced in advance by the (protecting) State Premier.
7. Decisions on the closures were made by different Officials in different States.
8. The reasons for those decisions are unclear and inconsistent among the States and unclear.
9. There has not been any legal determination of the validity of any border closure.
10. There is no public medical or legal advice to Government that exceptional circumstances exist.
11. The Constitutional validity of one closure is being challenged by Mr Palmer.
12. The Commonwealth has withdrawn its interest in this challenge.
13. Among the reasons for [11] is the Prime Minister supports the outcomes sought by the closure.
14. The Prime Minister publicly ‘urged’ Mr Palmer to discontinue the case to reduce anxiety.
15. The Commonwealth s deployed the military to assist enforcement of border closures.
16. None of the relevant decisions (above) have been specifically endorsed by a Parliament.
17. [13] suggests belief the relevant border closure is illegal.

#### b. purported purpose of border closures

1. Protecting Premiers purport the purpose of border closures is to protect people of their State.
2. Such protection is to avoid infection by people from another, target, location - a ‘hotspot’.
3. Some Premiers have concerns people from hotspots may transit to their States via other areas.
4. Some closures did not reflect emergency, and some arose from misunderstandings.

#### c. central logic

1. A closure against people implies a view of the protecting State those people should be isolated.

#### d. other facts

1. There is no proper definition of a hotspot.
2. At present purported hotspots vary from single premises to entire States.
3. Hotspots vary from All people in Australia potentially come from every designated hotspot.
4. Hotspots will exist in Australia until the end of the international pandemic.
5. The international pandemic may continue for years.
6. Most cases of border closures have been against people who were not isolated.
7. It is apparent some people are breaching their legal obligation to be isolated.
8. It is claimed a reason for that breach is financial.
9. Financial assistance is not provided by the Commonwealth to people on the basis of isolation.
10. Financial assistance is provided by the Commonwealth to people out of work.

### Problems

The problems presented by these facts include:

* State border closures challenge Federal and Constitutional arrangements;
* the closures can and do reflect fundamental conflicts e.g. as to which people should be isolated;
* those conflicts have been introduced by Officials, possibly contrary to legislative intent;
* the closures do not properly reflect risk;
* the closures have been in place for five months, during which time the Commonwealth Government has not actively sought to maintain relevant aspects of the Constitution;
* by deploying the military, and urging against court determination, the Commonwealth Government exacerbated inter-state conflict;
* when combined with other Government actions taken without specific Parliamentary authority, these may undermine public confidence and thereby contribute to adverse health outcomes.

### Principles

a. Parliamentary supremacy;

b. Duration of arrangements only during emergency;

c. Geographic differences to reflect only risk;

d. Commonwealth financial assistance to support reduced risk.

### Suggested approach

i. Commonwealth legislation based on s.61

. only operative during emergency and to maintain Constitution

exclusive power for determination and order of border closures and isolation;

. inconsistent State arrangements negated

allows financial assistance

ii. delegation of exclusive power to Minister, subject to Senate allowance of orders

. Senate to consider within defined period e.g. 21 days

. ‘States’ house’ oversight of Minister

. potential for formal advisory committee

iii. Minister creates hotspot/isolation list

. draft list provided to Minister by own State, continuous update

. Minister can expand list and areas

. Senate can require addition to list and areas

iv. Minister to close all borders to hotspot, for duration of hotspot

. State can request exemption from having its border closed

v. Commonwealth financial support to hotspot

. periodic grants to all isolated people, possibly conditional on proof

. grant to assist State to test and trace

. grant to State determined by extent of hotspots

. further grant to all people who get tested in a State with hotspots.

1. <https://www.thejadebeagle.com/covid---may.html> [↑](#endnote-ref-1)
2. There has been considerable debate about technology aspects of Covidsafe. For purposes here the relevant statistical matter is probability of contact among holders of the App. A 40% take up among the population gives only a 16% probability of random contact (40% \* 40%).

   [↑](#endnote-ref-2)
3. <https://www.theguardian.com/world/2020/may/21/coronavirus-latest-at-a-glance-thursday> <https://www.statista.com/statistics/1103040/cumulative-coronavirus-covid19-cases-number-worldwide-by-day/> [↑](#endnote-ref-3)
4. <https://www.health.gov.au/news/eliminating-covid-19-a-false-hope> [↑](#endnote-ref-4)
5. <https://7news.com.au/lifestyle/health-wellbeing/pm-morrison-joins-club-of-virus-champions-c-1024291>

   <https://www.smh.com.au/world/europe/inside-the-first-movers-group-of-countries-that-turned-virus-around-20200619-p554ft.html>

   The first movers and their populations are: Australia (25 million); Austria (9 million); Israel (9 million); Norway (5 million); Greece (11 million); Czech Republic (10 million); New Zealand (5 million).

   Some ‘results’ are at

   <https://www.worldometers.info/coronavirus/country/australia/>

   <https://www.worldometers.info/coronavirus/country/austria/>

   <https://www.coronatracker.com/country/israel/>

   <https://www.worldometers.info/coronavirus/country/norway/>

   <https://www.worldometers.info/coronavirus/country/greece/>

   <https://www.worldometers.info/coronavirus/country/czech-republic/>

   <https://www.worldometers.info/coronavirus/country/new-zealand/> [↑](#endnote-ref-5)
6. Australian statistics:

   <https://www.health.gov.au/sites/default/files/documents/2020/05/coronavirus-covid-19-at-a-glance-21-may-2020.pdf>

   <https://www.health.gov.au/resources/publications/coronavirus-covid-19-at-a-glance-31-july-2020> [↑](#endnote-ref-6)
7. <https://www.who.int/westernpacific/news/feature-stories/detail/new-zealand-takes-early-and-hard-action-to-tackle-covid-19> [↑](#endnote-ref-7)
8. Risks are indicated at

   <https://johnmenadue.com/max-hayton-row-erupts-over-the-new-zealand-governments-covid-crisis-mistake/>

   <https://en.wikipedia.org/wiki/Timeline_of_the_COVID-19_pandemic_in_New_Zealand> [↑](#endnote-ref-8)
9. New Zealand restrictions:

   23 March: Level 3 restrictions (same as Australian States); 36 new, 102 total cases.

   25 March: Level 4 restrictions (stay-home, only essential businesses open); 50 new, 200 total (including probable) cases.

   27 April: Level 3 restrictions; 5 new, 1,469 total cases.

   13 May: Level 2 restrictions.

   Panic?: <https://www.smh.com.au/national/could-we-eliminate-covid-19-in-australia-and-how-would-it-work-20200721-p55e0k.html> [↑](#endnote-ref-9)
10. <https://www.bbc.com/news/world-australia-53259356>

    <https://www.bbc.com/news/world-australia-53604751> [↑](#endnote-ref-10)
11. <https://www.economist.com/graphic-detail/2020/07/15/tracking-covid-19-excess-deaths-across-countries> [↑](#endnote-ref-11)
12. <https://www.health.gov.au/resources/covid-19-deaths-by-age-group-and-sex> [↑](#endnote-ref-12)
13. <https://www.abc.net.au/news/2020-07-31/aged-care-the-lessons-for-victoria-from-newmarch/12505710> [↑](#endnote-ref-13)
14. Except Western Australia and South Australia. See for example: <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/COVID-19/COVID19> [↑](#endnote-ref-14)
15. Restrictions on freedom, see for example <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3035654>.

    Lack of urgency, see NSW or Queensland border closures in Section 3. [↑](#endnote-ref-15)
16. <https://www.abc.net.au/news/2020-05-19/tourism-anger-in-queensland-over-coronavirus-border-closure/12263502> [↑](#endnote-ref-16)
17. <https://medical-dictionary.thefreedictionary.com/authority+gradient> [↑](#endnote-ref-17)
18. <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansardr%2F247e20e8-7bbe-4712-afcb-c8833dc6a228%2F0019;query=Id%3A%22chamber%2Fhansardr%2F247e20e8-7bbe-4712-afcb-c8833dc6a228%2F0034%22> [↑](#endnote-ref-18)
19. <https://www.pm.gov.au/media/update-coronavirus-measures-08may20> [↑](#endnote-ref-19)
20. E.g. <https://www.wa.gov.au/organisation/department-of-the-premier-and-cabinet/covid-19-coronavirus-wa-roadmap> [↑](#endnote-ref-20)
21. <https://www.smh.com.au/national/morrison-pushes-for-end-to-virus-border-wars-20200701-p5584j.html> [↑](#endnote-ref-21)
22. Military personnel: <https://www.abc.net.au/news/2020-07-19/coronavirus-queensland-army-patrol-with-police-at-border/12466432>

    E.g. <https://www.news.com.au/national/nsw-act/news/coronavirus-nsw-labor-leader-jodi-mckay-calls-for-mandatory-masks/news-story/149f01d24d0ad45dd205083f5da6990e>

    Deflection: <https://www.news.com.au/travel/travel-updates/health-safety/theres-an-election-pm-responds-to-premiers-rhetoric-over-borders/news-story/c97209c9f64e185ea1ab1b259b7c4da5> [↑](#endnote-ref-22)
23. <https://johnmenadue.com/national-cabinet-fractures/>

    <https://johnmenadue.com/replacing-coag-by-michael-keating-part-2/>

    <https://johnmenadue.com/federalism-does-not-need-an-ongoing-national-cabinet/> [↑](#endnote-ref-23)
24. <https://www.thejadebeagle.com/its-all-about-climate-change.html> [↑](#endnote-ref-24)
25. <https://www.adelaidenow.com.au/news/national/border-closures-a-shocking-example-of-state-delinquency/video/f623e2c94b4381654e4f7c4b0dc22774>

    Alleged differential treatment of Governments: <https://theconversation.com/whether-a-ratings-chase-or-ideological-war-news-corps-coronavirus-coverage-is-dangerous-143003> [↑](#endnote-ref-25)
26. The campaign: <https://www.abc.net.au/news/2020-07-14/calls-for-coronavirus-elimination-strategy-replace-suppression/12452660>. The repudiation is at note iv (above) and <https://www.gladstoneobserver.com.au/news/why-nsw-is-reluctant-to-go-into-lockdown/4058916/> [↑](#endnote-ref-26)
27. E.g. <https://www.abc.net.au/news/2020-07-19/why-some-countries-are-more-willing-to-wear-masks/12420838> [↑](#endnote-ref-27)
28. From <https://www.lexico.com/definition/silver_bullet>: ‘*A simple and seemingly magical solution to a complicated problem’*, an expression based on the belief that ‘*A bullet made of silver, supposedly the only weapon that could kill a werewolf…….’. Some bloggers attribute this to 18th century stories of the beast of Gevaudan* <https://www.history.com/news/beast-gevaudan-france-theories>, others to earlier times and extending the bullets powers beyond werewolves. <https://bshistorian.wordpress.com/2018/11/12/on-silver-bullets-werewolves-and-gevaudan/>. Along with some others, noted arbiter of folk stories, Bob Dylan’s Theme Time Radio, included a critical caveat - the efficacy of the bullet depends on it being blessed or from a melted down crucifix. <https://www.themetimeradio.com/episode-64-travelling-around-the-world-pt-1/>  [↑](#endnote-ref-28)
29. <https://johnmenadue.com/john-dwyer-the-hindering-of-our-efforts-to-control-the-spread-of-covid-19/> [↑](#endnote-ref-29)
30. <https://www.thejadebeagle.com/covid---may.html> [↑](#endnote-ref-30)
31. <https://www.abc.net.au/news/2020-07-03/don-harwin-court-covid-travel-restrictions-fine-withdrawn/12419448> [↑](#endnote-ref-31)
32. Steven Boland, Harwin prosecution highlights flaws, Sydney Morning Herald 6 July 2020 [↑](#endnote-ref-32)
33. <https://www.smh.com.au/national/nsw/nsw-police-internal-directives-for-covid-19-fines-revealed-20200716-p55coc.html> [↑](#endnote-ref-33)
34. <https://www.rubyprincessinquiry.nsw.gov.au/> [↑](#endnote-ref-34)
35. E.g. <https://www.theguardian.com/australia-news/2020/jul/18/ruby-princess-inquiry-how-distractions-and-mistakes-led-to-a-catastrophic-covid-19-cluster> [↑](#endnote-ref-35)
36. <https://www.abc.net.au/news/2020-05-06/coronavirus-ruby-princess-inquiry-questioning-out-of-line-pm/12219026> [↑](#endnote-ref-36)
37. United States: starting in Minneapolis, 26 May e.g. <https://www.brookings.edu/blog/up-front/2020/07/10/from-the-george-floyd-moment-to-a-black-lives-matter-movement-in-tweets/>

    Australia: <https://www.abc.net.au/news/2020-06-22/how-to-engage-with-indigenous-content-black-lives-matter/12373408> [↑](#endnote-ref-37)
38. <https://www.aic.gov.au/publications/sb/sb17>

    Prime Minister: <https://www.facebook.com/watch/?v=546560939583754>

    Sympathies: There were two notorious cases. A late April ‘tweet’ from a Victorian official who had made anti-Covid regulations compared the impact of the disease with Captain Cook’s arrival. This earned a fatherly rebuke from the Prime Minister who applauded her work and suggested she concentrate on that because “*those sort of comments don't inspire confidence*". The tweet was investigated and the official was cleared of breaching her Department’s code of conduct. It remained public for some time <https://www.sbs.com.au/news/victorian-deputy-chief-health-officer-regrets-distractions-caused-by-captain-cook-tweet>.

    The other involved a Queensland Official who made rulings preventing an Anzac Day flyover directly involving a few separated people <https://www.abc.net.au/news/2020-04-24/coronavirus-queensland-deaths-updates-anzac-day-flyover-rejected/12177744> yet had allowed far larger gatherings, which (otherwise would have) breached Covid restrictions on apparently ‘cultural’ grounds, one being an approval for an indigenous funeral leaving a Mayor ‘gobsmacked’ because of the short notice given to his Council <https://www.abc.net.au/news/2020-04-17/coronavirus-queensland-why-indigenous-funerals-break-crowd-rules/12119446>

    [↑](#endnote-ref-38)
39. <https://www.afr.com/politics/federal/later-nsw-seeks-to-ban-black-lives-protests-20200605-p54zu1>

    <https://www.abc.net.au/news/2020-06-05/court-rules-sydney-black-lives-protest-unsafe-due-to-coronavirus/12324186>

    <https://www.facebook.com/watch/?v=546560939583754> [↑](#endnote-ref-39)
40. <https://www.caselaw.nsw.gov.au/decision/1729618adc0ef4ea5baa2bfc?fbclid=IwAR0uZklrag5XlJXY4QMj_aCMnmXw27x0-cIVkULsdBBm-4wtTP_J85fhHIE> [↑](#endnote-ref-40)
41. <https://www.theguardian.com/australia-news/2020/jun/06/australian-black-lives-matter-protests-tens-of-thousands-demand-end-to-indigenous-deaths-in-custody> [↑](#endnote-ref-41)
42. <https://www.abc.net.au/news/2020-07-26/black-lives-matter-protest-blocked-in-supreme-court/12489022>

    <https://www.news.com.au/lifestyle/health/black-lives-matter-sydney-protest-ten-intense-minutes-that-ended-rally/news-story/1ff96b63caf7128001b1c97bc15a6ec3> [↑](#endnote-ref-42)
43. <https://www.abc.net.au/news/2020-07-06/victoria-nsw-border-to-close-over-coronavirus-fears/12424686> [↑](#endnote-ref-43)
44. <https://www.abc.net.au/news/2020-07-20/victoria-coronavirus-hotel-quarantine-inquiry-day-1-in-melbourne/12471916> [↑](#endnote-ref-44)
45. Cigarette lighter: <https://www.abc.net.au/news/2020-07-01/victoria-coronavirus-hotel-quarantine-how-did-we-get-here/12408256>

    Systemic: <https://www.theage.com.au/politics/victoria/leaked-emails-show-victoria-s-hotel-quarantine-system-was-stretched-cobbled-together-20200804-p55ih1.html> [↑](#endnote-ref-45)
46. Stay at home order for particular Melbourne suburbs: <https://www.abc.net.au/news/2020-06-30/victoria-coronavirus-hotspot-local-lockdowns-in-melbourne/12407138>

    Tracing resources: <https://www.theage.com.au/politics/victoria/top-bureaucrats-warned-a-year-ago-victoria-s-key-public-health-team-was-starved-of-money-and-staff-20200729-p55ggh.html>

    Protocols: <https://www.afr.com/politics/federal/nsw-a-better-example-of-how-to-contain-an-outbreak-pm-20200716-p55chu>

    Victoria view of Covidsafe: <https://www.abc.net.au/news/2020-07-15/coronavirus-app-limited-use-in-victoria-200-contacts-found/12456454>

    Commonwealth view of Victoria re Covidsafe: <https://www.smh.com.au/politics/federal/victorian-officials-stopped-using-covidsafe-app-as-second-wave-grew-20200804-p55ihd.html>

    [↑](#endnote-ref-46)
47. E.g. <https://www.dhhs.vic.gov.au/updates/coronavirus-covid-19/updated-restrictions-1159pm-wednesday-22-july-2020> [↑](#endnote-ref-47)
48. <https://www.abc.net.au/news/2020-07-02/victoria-hotel-quarantine-breaches-inquiry-launched/12414612> [↑](#endnote-ref-48)
49. <https://www.abc.net.au/news/2020-07-01/nsw-government-closes-border-to-melbourne-coronavirus-hotspots/12409522> [↑](#endnote-ref-49)
50. <https://www.abc.net.au/news/2020-07-04/coronavirus-victoria-melbourne-public-housing-estates-lockdown/12423042>.

    Questions about fairness: <https://www.rmit.edu.au/news/all-news/2020/jul/melbourne-tower-lockdowns> [↑](#endnote-ref-50)
51. <https://www.abc.net.au/news/2020-07-07/coronavirus-australia-live-news-melbourne-lockdown-restrictions/12427970> [↑](#endnote-ref-51)
52. <https://www.abc.net.au/news/2020-07-06/victoria-nsw-border-to-close-over-coronavirus-fears/12424686> [↑](#endnote-ref-52)
53. ‘No regrets’ was represented as ‘doing whatever it takes’ - <https://www.sbs.com.au/news/a-no-regrets-policy-gladys-berejiklian-unveils-2-3-billion-coronavirus-stimulus-package> [↑](#endnote-ref-53)
54. 74 new cases were reported the previous day. The peak in the first wave was 111 on March 28. <https://theconversation.com/victoria-is-undeniably-in-a-second-wave-of-covid-19-its-time-to-plan-for-another-statewide-lockdown-142047> [↑](#endnote-ref-54)
55. Two cases were found in Albury – one a resident who had returned from Melbourne. A further case was notified at Merimbula – a Victorian teenager who had been wrongly informed his test, conducted in Melbourne before he went on holidays, was positive.<https://www.smh.com.au/national/drones-defence-force-police-from-across-state-how-border-closure-will-be-enforced-20200706-p559k6.html>

    <https://www.health.nsw.gov.au/news/Pages/20200707_00.aspx>

    <https://www.health.nsw.gov.au/news/Pages/20200708_00.aspx> [↑](#endnote-ref-55)
56. Populations: Tweed Heads around 8,000; Gold Coast 680,000 – however the population near Tweed Heads is much lower, perhaps in the region of 60,000 to Burleigh Heads 20 km away. Albury around 52,000; Wodonga around 40,000. [↑](#endnote-ref-56)
57. <https://www.bordermail.com.au/story/6839842/frontline-revised-border-community-map-emerges-as-confusion-reigns/> [↑](#endnote-ref-57)
58. <https://www.skynews.com.au/details/_6171895302001>; cluster of 57 cases by 1 August.

    <https://www.news.com.au/national/nsw-act/news/coronavirus-nsw-health-chief-says-new-virus-cases-linked-to-victorian-strains/news-story/b5aa08a31c0b8e7209d7c514ba528043> [↑](#endnote-ref-58)
59. Blaming: <https://www.dhhs.vic.gov.au/coronavirus-update-victoria-31-july-2020>

    <https://www.news.com.au/world/coronavirus/australia/coronavirus-victoria-premier-daniel-andrews-blames-creeping-complacency-for-virus-spread/news-story/162dbb8d6a07461c0365a58078816f36>

    <https://www.soundhealthandlastingwealth.com/covid-19/daniel-andrews-blames-everyone-else-for-coronavirus-disaster/>

    <https://www.dailymail.co.uk/news/article-8570593/Daniel-Andrews-blames-except-coronavirus-disaster.html> [↑](#endnote-ref-59)
60. Commentary: <https://www.bbc.com/news/world-australia-53604751>

    <https://www.news.com.au/lifestyle/health/health-problems/public-commentary-on-hotel-quarantine-allowed-government-set-to-face-tough-grilling/news-story/ed7e7227c8da6a2ce010e224ff3e9c1e>

    <https://www.theage.com.au/national/victoria/andrews-government-scant-on-adf-detail-as-opposition-slams-chaos-20200626-p556ig.html>

    <https://newsroom.abf.gov.au/releases/abf-statement-refuting-reporting-on-ruby-princess> [↑](#endnote-ref-60)
61. <https://www.thejadebeagle.com/covid---may.html>

    <https://www.abc.net.au/news/2020-03-26/victoria-records-first-coronavirus-deaths/12091594>

    <https://www.msn.com/en-au/news/melbourne/vic-police-close-popular-fishing-spots-over-social-distancing-concerns/ar-BB15dag9>

    <https://www.abc.net.au/news/2020-07-15/coronavirus-app-limited-use-in-victoria-200-contacts-found/12456454>

    <https://www.theguardian.com/world/2020/jul/04/victoria-contact-tracers-access-covidsafe-data-99-times-but-no-identified-close-contacts-reported>

    <https://www.gizmodo.com.au/2020/06/victoria-covidsafe-data-16-times-no-new-contacts/> [↑](#endnote-ref-61)
62. e.g. <https://www.news.com.au/lifestyle/health/health-problems/catastrophic-failure-melbourne-reacts-to-lockdown-return-with-upset-and-anger/news-story/f677c7938271cd068497133bb8977e64> [↑](#endnote-ref-62)
63. <https://www.abc.net.au/news/2020-07-31/one-in-four-not-home-covid19-positive-adf-door-knock/12511682>

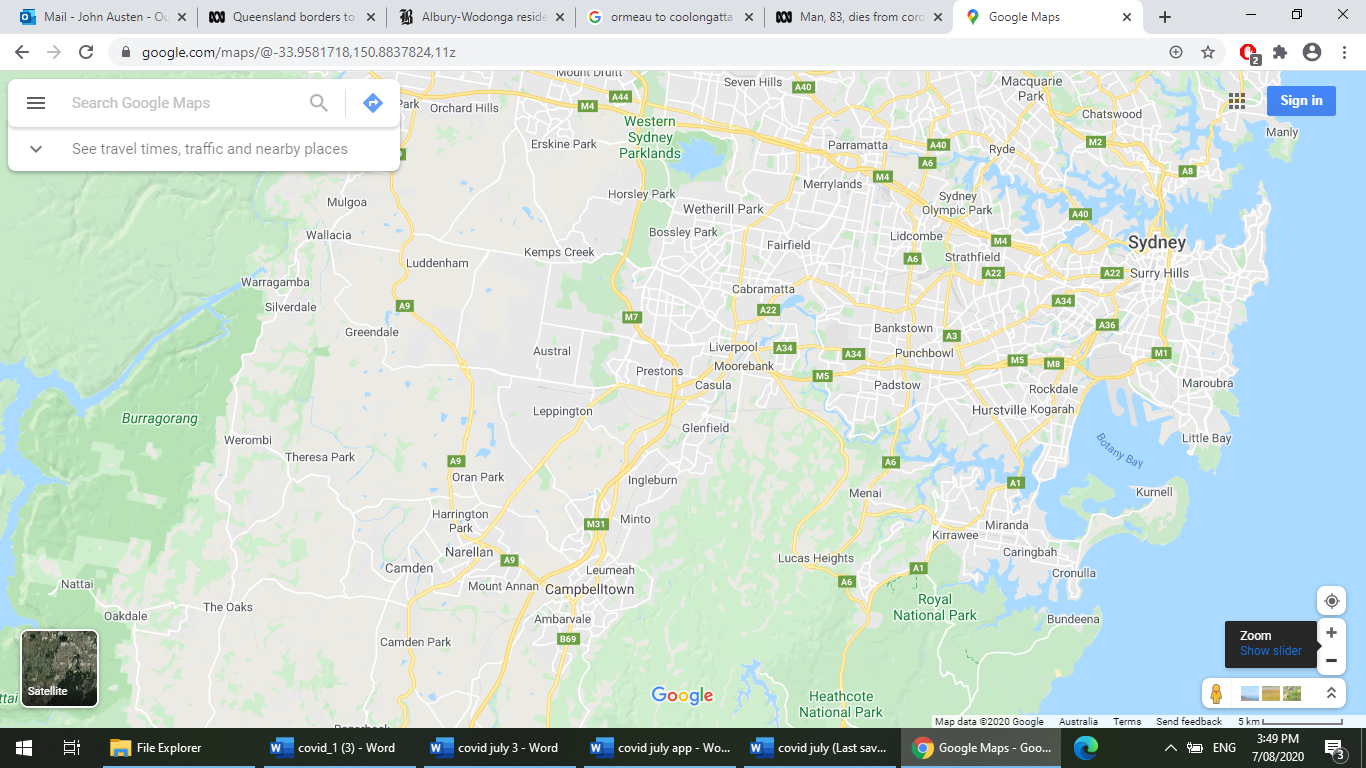
    Curfew: <https://www.abc.net.au/news/2020-08-03/stage-4-restrictions-curfew-melbourne-what-you-can-and-cant-do/12517796> [↑](#endnote-ref-63)
64. <https://www.abc.net.au/news/2020-06-13/premier-annastacia-palaszczuk-border-question-wage-freeze/12350868>

    <https://www.abc.net.au/news/2020-05-18/coronavirus-queensland-borders-closed-to-september-palaszczuk/12253442>

    <https://www.brisbanetimes.com.au/national/queensland/queensland-s-roadmap-to-recovery-has-speed-bumps-for-some-businesses-20200508-p54r9x.html>

    <https://www.covid19.qld.gov.au/government-actions/roadmap-to-easing-queenslands-restrictions> [↑](#endnote-ref-64)
65. <https://www.theage.com.au/national/victoria/why-our-second-lockdown-hasn-t-yet-flattened-the-coronavirus-curve-20200722-p55eg7.html>

    <https://www.abc.net.au/news/2020-07-09/coronavirus-queensland-closes-border-to-visitors-from-victoria/12429934> [↑](#endnote-ref-65)
66. The areas are Fairfield, Bankstown and Camden. These can be seen on the map below. Travel patterns suggest residents of these areas are more likely to visit the Crossroads Hotel than residents of Campbelltown. Also, population and densities are significantly higher in Fairfield: 210,000 20.8/ha. and Bankstown: 380,000, 34.3/ha. than Campbelltown: 170,000, 5.5/ha. Camden: 100,000, 5.1/ha. <https://profile.id.com.au/campbelltown>. Fairfield and Bankstown are also more ‘multicultural’ than Campbelltown (and Camden).

    The risk was confirmed by clusters emanating from the Thai Rock Restaurant in the Fairfield district with over 85 cases associated with it by end July.

    There is a differential in the timing of Queensland reactions announced by its Premier.

    The border closure to Liverpool and Campbelltown was reported on 13 July, to take effect the next day. <https://www.abc.net.au/news/2020-07-14/coronavirus-queensland-hotspots-declared-nsw/12445814>. Three days earlier, 10 July, NSW Health issued an alert for the CrossRoads Hotel on 10 July, <https://www.health.nsw.gov.au/news/Pages/20200710_01.aspx> followed by a ‘get tested and isolate’ warning on 12 July <https://www.health.nsw.gov.au/news/Pages/20200712_01.aspx>. The gap between this NSW ‘isolate’ and Queensland reaction was two days.

    The border closure for Fairfield district was reported on 23 July to take effect from 27 July. <https://www.abc.net.au/news/2020-07-23/coronavirus-queensland-border-restrictions-nsw-outbreak-hotspots/12481118> NSW had issued a ‘get tested and isolate’ warning on 17 July. <https://www.health.nsw.gov.au/news/Pages/20200717_02.aspx> The gap between this NSW ‘isolate’ and Queensland reaction was ten days. [↑](#endnote-ref-66)
67. Even by early August case numbers were around 10-15 per day with few untraced. See e.g. <https://www.health.nsw.gov.au/news/Pages/20200807_00.aspx> [↑](#endnote-ref-67)
68. <https://www.abc.net.au/news/2020-07-25/explainer-tasmania-border-announcement/12491244>

    <https://www.abc.net.au/news/2020-07-31/tasmania-bans-travel-from-queensland-coronavirus-hotspots/12512622> [↑](#endnote-ref-68)
69. <https://www.abc.net.au/news/2020-07-03/coronavirus-queensland-border-people-smuggling-concerns/12397726>

    <https://www.abc.net.au/news/2020-07-21/man-in-boot-at-qld-nsw-border-fined-$4003/12478668> [↑](#endnote-ref-69)
70. At 11am, 29 July, the Queensland Premier announced the border would be closed to anyone ‘from Sydney’ starting 1am on 1 August. This was represented as a result of the Premier’s ‘fury’ at the situation of two Queensland residents travelling to Melbourne and then, to avoid quarantine/isolation, returning via aircraft through Sydney on 21 July. They tested positive to Covid, apparently on 28 July. <https://www.theguardian.com/australia-news/2020/jul/29/queensland-on-high-alert-as-two-women-test-positive-for-coronavirus-after-failing-to-self-isolate> The possibility of this type of behaviour to occur and remain unnoticed exists whenever a State: allows its residents to leave; allows admission of people from any other part of Australia. The speed of the reaction-announcement and the failure to close the ‘loophole’ suggests panic. Such a suggestion is further supported by the significant gap between announcement and action which ‘front ended’ and may increase risk: *‘Thousands of people have made a last-minute dash for entry into Queensland before the border was officially closed to Greater Sydney just after midnight’.* <https://www.abc.net.au/news/2020-08-01/coronavirus-queensland-border-closure-impact-millions-locked-out/12512266>

    A week after that announcement, the Queensland Premier announced the border would be closed to all of NSW and the ACT from the following Saturday – again a significant gap between announcement and action. <https://www.abc.net.au/news/2020-08-05/coronavirus-queensland-border-closure-nsw-and-act/12518534> That report claimed it had been 28 days since the ACT recorded a Covid case, by far the longest duration in Australia. The explanation of the anomaly (of barring people from the ACT) was people had travelled from hotspots to the ACT to then transit to Queensland – confirming the possibility mentioned above.

    [↑](#endnote-ref-70)
71. <https://www.abc.net.au/news/2020-07-22/200-people-missing-from-coronavirus-quarantine-in-queensland/12472332> [↑](#endnote-ref-71)
72. <https://www.skynews.com.au/details/_6170895081001> [↑](#endnote-ref-72)
73. <https://www.bordermail.com.au/story/6839842/frontline-revised-border-community-map-emerges-as-confusion-reigns/>

    <https://www.abc.net.au/news/2020-07-21/queensland-coronavirus-what-does-moving-a-state-border-involve/12473162>

    In early August there were reports of a ‘Gold Coast bubble’ in which Queensland permitted freer travel for residents between Brunswick Heads 50km from the border (NSW) and Ormeau 60km from the border (Qld) <https://7news.com.au/lifestyle/health-wellbeing/tweed-heads-gold-coast-residents-among-those-included-in-queensland-nsw-border-bubble-c-1222789>. Travel north beyond Ormeau was restricted, indicating the feasibility of establishing border control well into Queensland.

    However, even then, initial reports were of significant delays and confusion with the bubble – Byron Shire being ‘cut in half’ <https://www.miragenews.com/border-bubble-is-big-trouble-for-byron-shire/> and various Queensland Departments giving conflicting advice. [↑](#endnote-ref-73)
74. NSW: <https://www.theage.com.au/national/border-and-tower-closures-still-the-lesser-of-two-evils-20200706-p559em.html>

    Queensland: <https://www.smh.com.au/national/border-trouble-as-more-cases-of-community-transmission-detected-in-nsw-20200729-p55ghw.html>

    Western Australia: <https://www.abc.net.au/news/2020-08-07/federal-backdown-on-palmer-wa-border-challenge-not-enough/12534104> (note Mr Cormann’s claim) [↑](#endnote-ref-74)
75. E.g. <https://www.abc.net.au/news/2020-08-07/federal-backdown-on-palmer-wa-border-challenge-not-enough/12534104>

    <https://www.news.com.au/national/politics/wa-premier-declares-clive-palmer-an-enemy-of-the-state/video/8ec4fa0afb147d25eb8025cbeeddb342> [↑](#endnote-ref-75)
76. Now recognised by the Commonwealth <https://www.abc.net.au/news/2020-08-03/key-points-andrews-morrison-coronavirus-august-3/12519468> [↑](#endnote-ref-76)
77. <https://www.law.uwa.edu.au/__data/assets/pdf_file/0010/3096748/06-Peter-Gerangelos,-Section-61-of-the-Constitution-and-an-Historical-Constitutional-Approach-COMPLETED-PDF.pdf> [↑](#endnote-ref-77)
78. <https://www.msn.com/en-au/news/australia/clive-palmer-backed-court-challenge-to-queensland-covid-19-border-closure-dropped/ar-BB174Kgm?li=AAgfYrC> [↑](#endnote-ref-78)
79. <https://www.abc.net.au/news/2020-08-02/government-removes-support-for-clive-palmers-push-to-open-border/12515948>

    <https://7news.com.au/lifestyle/health-wellbeing/palmers-wa-border-case-returns-to-court-c-1222300> [↑](#endnote-ref-79)
80. <https://johnmenadue.com/andrew-farran-section-92-of-the-constitution-lost-to-short-sightedness/> [↑](#endnote-ref-80)
81. <https://researchonline.jcu.edu.au/52042/1/52042-hodgson-2017-thesis.pdf>

    Justice Gavan Duffy heard the application for an interim injunction but rejected it, reportedly after hearing arguments about imminent danger and State sovereignty. The case is unreported. This might be contrasted with his attitude to s.92 see: <https://espace.library.uq.edu.au/data/UQ_189794/the4265.pdf?Expires=1597621770&Key-Pair-Id=APKAJKNBJ4MJBJNC6NLQ&Signature=SUeZWFkTlEr9BxaIYr2~~YEyNsV5qy4KiANDzRfiLCkSerlwdykUkHR7~M9CwSAoGgDAO~UU4oaxyE-xCdkiPcso-drYpI96l0PNRA39xMuk8Vo0UztUsLFIU82PZ06CsxgpGLxVa5IgvnQfK938hMY6LLX8i-khKG6icZRLQLjE7PH4asFn0uVAhy52ObaJLRTPkm-XJcecogahKajNuHw-rzZOSjbRwjyXT79jIljhqvzMsvRmbMqAVpVhB7o8RfmXyYHg0~U7z3neaqc4X1Lx6y1fje~OfH4DBj~Z5fIlFEj88-f7vFUsVrRnR7H1QqqBep4f8qdPe0aTv48f4Q__> [↑](#endnote-ref-81)
82. Rosalind Dixon, *Border closure is the right option*, Sydney Morning Herald, 7 July 2020.

    The challenge to Queensland’s border closure had been dropped after that State’s Premier announced reopening to all – except Victorians! [↑](#endnote-ref-82)
83. Justice Gagelar in: <https://cdn.hcourt.gov.au/assets/publications/speeches/current-justices/gagelerj/Patterns-in-Australian-Constitutional-Adjudication.pdf> [↑](#endnote-ref-83)
84. Shipra <https://auspublaw.org/2020/06/border-closures,-covid-19-and-s-92-of-the-constitution/> [↑](#endnote-ref-84)
85. The question of discrimen and legal or practical intent is outlined in <https://static1.squarespace.com/static/5888459be4fcb5cf28b0c3f8/t/5b8f7bae6d2a73c1c9a63926/1536129985832/Final+What%27s+left+of+Cole+v+Whitfield.pdf> [↑](#endnote-ref-85)
86. <https://auspublaw.org/2020/08/border-closures-and-s-92-clive-palmers-quest-to-enter-wa/> [↑](#endnote-ref-86)
87. In Cole v. Whitfield (1988) the unanimous court said:

    *‘The notions of absolutely free trade and commerce and absolutely free intercourse are quite distinct and neither the history of the clause nor the ordinary meaning of its words require that the content of the guarantee of freedom of trade and commerce be seen as governing or governed by the content of the guarantee of freedom of intercourse……*

    *it is clear that some forms of intercourse are so immune from legislative or executive interference that, if a like immunity were accorded to trade and commerce, anarchy would result…. there is no reason in logic or commonsense for insisting on a strict correspondence between the freedom guaranteed to inter-State trade and commerce and that guaranteed to inter-State intercourse’*. <http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1988/18.html>

    **The court was divided in APLA Limited v Legal Services Commissioner (NSW) (2005). This is discussed by a Commonwealth Solicitor General, David Bennett QC** <http://classic.austlii.edu.au/au/journals/UNSWLawJl/2006/20.html>.  [↑](#endnote-ref-87)
88. W & A McArthur Ltd v Queensland (1920) at <http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1920/77.html>

    R v. Smithers ex parte Benson (1912) <http://eresources.hcourt.gov.au/showbyHandle/1/15777> [↑](#endnote-ref-88)
89. # **APLA Limited v Legal Services Commissioner (NSW) (2005)]** <http://eresources.hcourt.gov.au/downloadPdf/2005/HCA/44>

    [↑](#endnote-ref-89)
90. Formulations from <https://www.legislation.qld.gov.au/view/html/inforce/current/act-2005-048#sec.6>

    <https://www.legislation.qld.gov.au/view/html/asmade/act-2020-013#sec.2> [↑](#endnote-ref-90)
91. <https://www.thejadebeagle.com/tinpot.html> [↑](#endnote-ref-91)
92. See: <http://classic.austlii.edu.au/au/journals/UQLawJl/2016/22.pdf> [↑](#endnote-ref-92)
93. Knox CJ, Isaacs, Starke JJ in at <http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1920/77.html> [↑](#endnote-ref-93)
94. For example: <https://www.nsw.gov.au/covid-19/latest-news-and-updates> [↑](#endnote-ref-94)
95. <https://www.msn.com/en-au/news/australia/tasmanian-government-to-ban-travel-from-queensland-hotspots/ar-BB17oSmC?li=AAgfYrC&ocid=mailsignout&fbclid=IwAR3a84NXIUTzsXqCUJzTcOtnxfnSO1eJ4GJXtD0Rnc5uy8_6R1Aaj2pSTpk> [↑](#endnote-ref-95)
96. Now recognised by the Commonwealth <https://www.abc.net.au/news/2020-08-03/key-points-andrews-morrison-coronavirus-august-3/12519468> [↑](#endnote-ref-96)