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## Summary

November 2020 saw claims that State border closures - in the name of fighting Covid – were ‘quite in order’. Support was said to come from several court cases including failed challenges to extension of the Melbourne curfew and to Western Australia’s border closure. This note considers those claims.

The Melbourne curfew challenge was rejected by Victoria’s Supreme Court. However, the Court offered scathing comments about the process for making anti-Covid restrictions in the State. It virtually recommended that process – involving officials below the most senior levels ordering closures of large sections of the State – be changed. The comments were to the effect that things were far from quite in order in Victoria.

Western Australia’s border closure was challenged by Mr Palmer in the High Court on Constitutional grounds. The High Court asked the Federal Court to rule on facts – the latter’s decision, August 2020, was deficient in respects. The High Court decision was in early November 2020. Reasons, published in late February 2021, ignored most of the Federal Court’s ruling, and pointed to a technicality – any challenge should have been about administrative law. The result supersedes some discussion in previous jadebeagle articles.

Yet, the High Court warned that anti-Covid restrictions must not discriminate among States unless reasonably necessary. Events over the Christmas-New Year period, which involved other border closures discriminating against NSW, may have been relevant. In any event, it means ‘all in order’ claims are wrong.

Some eminent health experts imply the urgency of vaccination is to immunise Australia from the potential for more State anti-Covid policies that are completely out of order. Others have observed a parlous situation – of virtual lawlessness by States since March 2020. Given the reluctance of courts to rectify this, changes to State and Commonwealth legislation are needed to stop the abuses of power seen during the pandemic. The importance of stopping that lawlessness extends beyond health and economy considerations.

## 1. Introduction

This note considers comments in two court cases concerning States’ anti-Covid policy.

It considers the accuracy of a November 2020, headline in the Australian - *‘It turns out that our State border closures were quite in order’.[[1]](#endnote-1)*

The article under the headline, by Professor George Williams, claimed several court cases demonstrated that. Decisions in those cases rejected challenges to State-based anti-Covid restrictions. Yet only one case related to a border closure. The Professor said reasons for that decision - then yet to be given - may or may not support other State border closure decisions.

Nonetheless, he said the courts’ upholding of the Covid rules:

*‘leaves premiers and chief ministers with a wide discretion to make tough decisions to protect their community from infection’.*

This was seen as consistent with:

*‘Australia’s courts have a long record of deferring to governments at a time of national crisis’*.

and:

*‘judges recognise our leaders need the leeway to make difficult and contentious decisions to protect the community from danger’.*

No doubt those sentiments are right.

This note goes beyond those sentiments to look at some details of two cases to ask: what other conclusions might be drawn? Do those cases provide endorsement for all related State actions?

The first case, in section 2, is Loeilo v. Giles. In that the Victorian Supreme Court considered the validity of extension of the Melbourne curfew.

The second case is Palmer v. Western Australia. It concerned a challenge in the High Court to legislation underpinning a decision by Western Australia’s Emergency Coordinator to prevent people from entering Western Australia in July 2020. This is considered in section 3.

The High Court decision partially supersedes issues raised in previous articles about specific anti-Covid policies. Those issues and articles are identified in section 4.

Section 5 draws some conclusions.

## 2. Loeilo v. Giles

### 2.1 The case

The case concerned extension of Melbourne’s curfew via public health directions signed by Associate Professor Giles.

The curfew started on Sunday, 2 August 2020, during the ‘second wave’ of Covid. That wave was initiated by failure of quarantine. Under the curfew, people were not allowed on Melbourne’s streets between 8pm and 5am unless authorised by the Government. It was unique among Australian anti-Covid measures.[[2]](#endnote-2)

Victorian legislation allowed the Chief Health Officer, or authorised official, to issue public health directions to restrict movement of people. The curfew directions were part of a raft of restrictions on personal movement, signed by Dr Romanes, Public Health Commander – an authorised official in the Victorian Department of Health and Human Services.[[3]](#endnote-3)

On 3 August, Associate Professor Giles joined the Department. On 11 September, Giles became an authorised official. On Sunday evening, 13 September, she extended the restrictions.

The Premier had already announced the curfew would be extended. There had been considerable negative comment about the curfew, including conflicting stories about whose idea it was. On 15 September, in response to criticism of the curfew the Premier reportedly said:

*‘Let me be really clear with you – the curfew position at the moment will not be changing’.*

Ms Loeilo’s business suffered losses as a result of the restrictions. She filed a lawsuit against Giles in the Supreme Court claiming the curfew to be illegal. The proceedings were to commence on 28 September. The day before, the Premier announced the curfew would end immediately:

*‘because the public health team no longer considered it a proportionate response’*.

Giles sought to have the case effectively terminated before it started. The court refused.[[4]](#endnote-4)

Loeilo’s claim had a number of grounds including: Giles was directed to extend the curfew; the curfew was not necessary; it infringed Victoria’s human rights legislation. The Court rejected all. However, the Court’s observations about anti-Covid policy are of interest.

### 2.2 Public policy

While the Court found Giles had qualifications adequate for her to sign the directions, it was critical of the process which put her in the position of making that decision:

*‘She …was only appointed an authorised officer, who could exercise emergency powers, on the Friday of the week concerned, two days before she made the Directions. She was appointed to fill in for another officer, who was going on leave. Giles had never made directions under the emergency powers before and has not since. She had not been part of the discussions in the Department’s Public Health Unit, which apparently initiated directions. I say apparently, because the Department’s organisational structure was unclear from the evidence and a chart could not be provided showing the departmental line of command of persons with responsibilities to make directions. Giles was appointed an authorised officer by Adjunct Clinical Professor Brett Sutton, who is the Chief Health Officer. It was unclear why Giles was chosen or why, for instance, Sutton did not make these Directions himself’*

The finding the curfew extension was ordered by Giles appeared to conflict with a common-sense view it was made by the Premier - who announced it before Giles signed the direction. Among the problems were that view correct: it was illegal for the Premier to so direct Giles. Some evidence supported the view - Giles was given a draft of the directions and:

*'She said that she had been told that if she had not signed the Directions, the matter ‘would be escalated to the Secretary and discussed with Strategy and Policy’.*

The Court noted the threat, but considered submitted evidence showed Giles’ decision was independent:

*‘I have considered whether Giles had any real choice to sign the Directions when she was informed that, if she did not, the decision about them would be elevated to higher authority. The defendant said that this gave her a choice, but it might also be considered as not much of a choice for an officer of six weeks tenure. However, again I am persuaded that Giles took the need to make an independent decision seriously and did in fact make such a decision.‘*

Nonetheless, the Court noted that the available evidence was incomplete in a key respect:

*'.. Mr Andrews was not a party to, or a witness in, this proceeding and therefore has not given evidence of the procedures adopted in the approval of the Curfew Direction or why he announced the Curfew’s continuation as modified before the Directions had been approved or signed by the authorised officer, Giles. So under legal procedure no finding adverse to him on the issue that he personally directed Giles in the making of her decision could be, or is, made.'*

The Court then took (what to me seems) the extraordinary step of criticising the legislation, Government and officials that together put Giles in an invidious position. It rejected the excuse that everything is rushed in an emergency by saying there should be more – not less - than usual attention paid to the propriety and legality of decisions during an emergency.

The legislation was considered problematic as it:

*'could potentially result in a person not accountable to Parliament and, perhaps not even a senior administrative officer, exercising powers to close all of Victoria during a state of emergency and confine all the people of Victoria to their homes. While it might be said that good sense would ordinarily prevail as to who would be authorised to exercise the emergency powers, the Victorian legislation is in contrast to England’s, where the Secretary of State makes regulations and New Zealand’s where the Director-General of Health issues significant orders. ....'*

That comment understated the reality. The potential identified by the Court – a person who was not a senior officer closing down the State - was actuality in this case. Good sense did not prevail. [[5]](#endnote-5)

Actions of the Government, Department and officials were also considered problematic:

*'This principle is more than ever important in an emergency, when decisions are made to restrict or remove basic liberties. It was unclear how decisions were made within the Department to choose the authorised officer to make directions. In this case Associate Professor Giles, who did have relevant qualifications, was appointed two days before she made the Directions. It was unclear why the Chief Health Officer did not make the Directions. The Department organizational structure concerned with exercising the emergency powers was unclear, no document could be produced explaining it and the role of officials such as Public Health Commander was not explained.’*

That suggested the Government did not appreciate the importance of the decisions, failed to cooperate with the Court and presided over a shambolic response to Covid in mid-September 2020. That time was months after the hotel quarantine breaches and establishment of the inquiry into it, and around the time relevant Departmental officials gave evidence to the inquiry.[[6]](#endnote-6)

The Court’s decision was handed down on 2 November. Ten days later the Secretary of the Victorian Department of Health etc. resigned. Media reports had the resignation associated with the quarantine inquiry. The Court’s comments in Loeilo were ignored.[[7]](#endnote-7)

### 2.3 Conclusions?

The Court’s remarks were extraordinary. They were scathing of Victoria’s approach.

Professor Williams’ comments would normally be read as meaning Premiers, Chief Ministers and leaders were making tough decisions. Loeilo v. Giles established otherwise. It found an official – not a Premier, Minister or leader - made the relevant decision.

That is also ostensibly the situation with border closures (other than for NSW). In Loeilo’s case, the decision was not made by a high-level official.

Despite that, the professor’s conclusion about judges recognising the need for leaders to make difficult decisions was supported by this case. The Court concluded such a need meant Victorian legislation should be changed to remove the power to make such decisions from officials:

*‘Parliament may wish to reconsider who should exercise these emergency powers and whether their exercise should be required to take into account matters such as the social and economic consequences of their exercise.'*

The headline of border closures ‘*quite in order*’? The arrangements and practices outlined in Loeilo v. Giles were, in an administrative sense, the antithesis of that. They suggested outrageously bad practices by the Government and Department. Both Ms Loeilo and Ms Giles were victims of poor behaviour all the way to and in the Court proceedings.

## 3. Palmer’s case

### 3.1 The case

Mr Palmer had challenged the validity of legislation enabling the Western Australian Emergency Coordinator in July 2020 to issue a direction closing the border. His argument was it infringed Constitution s.92 – that trade, commerce and intercourse among States is to be absolutely free.[[8]](#endnote-8)

### 3.2 Federal Court Findings

The Chief Justice referred some issues to the Federal Court for factual determination. Hearings, conducted by Justice Rangiah, were held in July. The Commonwealth had intervened to support Mr Palmer’s case but in early August withdrew from the case. The determination was handed down on 25 August, 2020.[[9]](#endnote-9)

The Federal Court accepted as a rule of thumb: 28 consecutive days of zero cases of community transmission indicates negligible probability of uncontrolled Covid. Other main findings were - at 29 July, 2020 - no other measures would have had the effectiveness of the border closure.

The Court did not specify whether the border closure was reasonably necessary. However, it did find the border should remain closed to Victoria, NSW and Queensland – to NSW because of a ‘moderate’ - 4% - probability of importing infection in any month. [[10]](#endnote-10)

Commentary suggested the findings were a win for Western Australia and judicial caution. Those views and some of the Court’s reasoning were challenged in a previous article. At least two of its important formulations appear to be wrong.[[11]](#endnote-11)

### 3.3 High Court hearings and decision

The High Court part of the case was heard by the full bench – five justices – over two days of hearings. Written submissions were received from Mr Palmer and all States but NSW.

As the matter was heard, Western Australia’s Premier announced that State’s hard border would be removed and replaced with a ‘nation-wide health-based threshold’. Nonetheless, Mr Palmer continued proceedings.

By the time of the hearings some States flouted what had been put to, and accepted by, the Federal Court as a central element of an argument of the reasonable necessity to continue border closures – 28 days of no detection of Covid in the community.

The decision was issued two days after the hearings – on 6 November 2020. It unanimously ruled against Mr Palmer. Reasons were published over three months later, on 24 February 2021.

The Court’s decision amounted to a summary dismissal of Palmer on grounds his lawyers may not have anticipated. This is not the first time Kiefel CJ’s Court surprised parties to a high-profile case – the ‘Palace Paper’ case was another decided on matters ignored by the parties’ arguments.[[12]](#endnote-12)

Given the speediness of the decision, the length of time before reasons were published is curious. Part of the explanation may lie in the case being decided on a technicality. Palmer may have challenged the wrong thing - the legislation rather than the emergency direction. Yet due to the topicality of border closures the justices may have wished to put their interpretations of the substantial issues.[[13]](#endnote-13)

### 3.4 High Court reasons

The Court unanimously held there was no Constitutional issue to be resolved. All justices referred to Wotton v. Queensland (2012). In that case, the High Court more or less held: if a statute can be read as complying with a Constitutional limitation, Constitutional issues do not arise. There is no need for the Court to interfere with the legislation.

The Court in Palmer decided the Western Australian legislation could be read as not infringing s.92. However, several justices said actions taken under the legislation must be limited to not (unlawfully) interfering with free trade, commerce etc. Otherwise, those actions would be beyond the power granted by legislation. The ‘remedy’ for that is via administrative law.

Members of the Court appeared careful to not express an opinion on whether public health directions other than the July border closure would be valid on administrative law tests.

Mr Palmer did not raise the administrative law argument. Nonetheless, the Court offered some thoughts about circumstances that might render a border closure beyond legislative power by breaching s.92. These thoughts centred on Cole v. Whitfield in which the Court determined the test for infringement of s.92’s trade and commerce ‘limbs’ to be whether legislation is protectionist. The Court in Cole had made an aside the ‘intercourse’ limb guaranteed freedom of personal movement.

In the present case, the Court was unanimous that s.92 prohibited legislation that discriminated among States – discrimination being:

*"the unequal treatment of equals, and, conversely, in the equal treatment of unequals".*

A law with such a discriminatory purpose would be invalid. A law which had a discriminatory (incidental) effect would be invalid unless that effect was reasonably necessary for a legitimate (non-discriminatory) purpose. A majority said reasonable necessity should be tested by ‘structured proportionality’. That involves considering: are there obvious options for achieving the purpose that do not involve such discrimination? Is the purpose so trivial to be outweighed by desirability of non-discrimination?

A (different) majority considered the process prescribed by legislation is relevant to establishing reasonableness. That Western Australian process involved: the Minister considering advice and being satisfied there is an emergency; the Minister being satisfied extraordinary measures are needed; the Minister making an emergency declaration of very limited duration; the Emergency Coordinator making directions for the sole purpose of dealing with the emergency.

Several justices acknowledged the Federal Court’s finding of there being no alternatives to Western Australia’s July border closure. None commented on problems with the Federal Court’s determination e.g., the latter’s providing policy advice to the Western Australian Parliament, nor on States ignoring what had been put to and determined by the Federal Court. Yet some justices appeared to lay out ‘markers’ – points of difference with their colleagues - not necessary to determine the case. Some details are at Appendix 1.

### 3.5 Warnings from the High Court?

Each justice gave what could be considered warnings: while the late July Western Australian border closure was likely valid, other anti-Covid measures and other border closures may not be.

Kiefel CJ and Keane J implied some restrictions may have so little purpose as to be invalid:

*‘in some cases the burden on a freedom will be very great and the measures permitted by the law of evidently little importance, which is to say the burden is out of proportion to the need for it’.*

Gagelar J implied that restrictions other than for emergency management may be challenged as a matter of administrative rather than Constitutional law:

*‘the purpose of emergency management is the sole purpose for which the power of direction can be exercised……’.*

While he said the Western Australian legislation was valid in all its potential applications, he was apparently careful to note a possibility that a particular emergency direction could be beyond such an application.

Edelman J was blunt. In his view, the discrimination prohibited by s.92 includes that among any States, not just preference for residents of the discriminating State. For example:

*‘a law … that imposes restrictions on entry into Western Australia upon residents of New South Wales but no such restrictions upon residents of Queensland ….. must be justified not merely by reference to the restriction upon New South Wales residents vis-à-vis Western Australian residents but also by reference to the restriction upon New South Wales residents vis-à-vis Queensland residents.’*

The extent of restrictions is also relevant. He said the Court did not decide:

*‘whether directions could be made in any epidemic …… to close all roads and access routes into Western Australia, without any exceptions, or ….. to direct the removal of persons infected with any plague or disease from Western Australia’.*

### 3.6 Conclusions?

The results of the Palmer litigation suggest at least the High Court suspects border closures were not quite in as much order as headlines suggested.

Despite the comment by Gordon J that laws protecting public health are unlikely to infringe Constitution s.92, Palmer’s case was decided on a technicality. The very length of the High Court judgements, and remarks from several justices, could be interpreted as suggesting challenges to anti-Covid directions, such as border closures, could – possibly should – be made in lower courts.

Challenges to border closures might not be limited to s.92. Gagelar J observed freedom of interstate intercourse would be implied in the absence of that section. Constitution s.117 – not mentioned in the case - is another potential source of problem for border closures.

The strong focus of the High Court on discrimination and warnings could suggest at least some justices saw apparent discrimination in border closures other than by Western Australia in July 2020.

Reasons for the decision were reported after the end of year outbreaks which involved what seemed to be discrimination against interstate travel: e.g. Queensland closed its border to Sydney etc, but not Victoria; South Australia closed its border to all of NSW for fourteen days after the end of Sydney outbreak, to Brisbane for only ten days since the end of its outbreak and not at all to Victoria.[[14]](#endnote-14)

To date there has been limited analysis of the decision. Most reports merely recited that Palmer lost the case. However, one article criticised the Court for fundamentally misunderstanding s.92.[[15]](#endnote-15)

In the three and a half months between publication of the High Court’s Palmer decision and reasons, some States became progressively more discriminatory. A schism opened between States like NSW and States like Queensland. Would this have occurred if the reasons were published earlier? Hopefully not. However, previous judicial reasoning – e.g. in Loeilo - had clearly been ignored with all States other than NSW persisting with decisions being made by officials.

## 4. Issues arising

### 4.1 Comments in Covid May

Legality of border closures was questioned in two articles: Covid May, and Covid July update.[[16]](#endnote-16)

Covid May suggested Constitution s.117 raised issues about border closures ordered by State officials. S.117 prohibits discrimination by one State against residents of other States. It was not considered in Palmer’s case. However, the High Court’s interpretation of s.92 in Palmer was virtually the same – a prohibition on discrimination. Raising a question about the purpose of s.117 which perhaps *‘should be seen as serving the object of nationhood and national unity.’*

Covid May noted some academic lawyers said: border restrictions are valid only insofar as reasonably necessary to prevent the spread of Covid-19; differences in State restrictions may present some difficulties for justification of more stringent border closures.

The article raised doubts about whether Queensland border closures were reasonably necessary.

The doubts arose from: border closures being ineffective in preventing the spread of the 1919-20 Spanish Flu; the presence of within-State restrictions; complementarity with stay home orders in other States. In the light of Palmer’s case, some of these are irrelevant.

Another argument in Covid May was: infections on the Queensland side of the border were far higher than in adjacent NSW. On a correct understanding of the ‘probability’ logic of the Federal Court, this would not be relevant. However, that Court did not appear to fully understand the logic - its determination suggested this matter was relevant.[[17]](#endnote-17)

A further argument was: the main risk of Queensland importing further infection was travel of its own residents. Queensland’s returning residents were not subject to the restrictions imposed on NSW residents. That appears to be discrimination, and a breach of the principles set out in Palmer.

### 4.2 Comments in Covid observations update – July 2020

The update looked at the question of reasonable necessity in more depth. It posed a question: is it reasonably necessary for public health purposes for a regulation to ‘infringe’ ss. 92 and 117?

It noted Professor Dixon, a then proponent of a NSW border closure, thought so. Yet her argument relied on facts known only after the border was closed. Comments from the Court in Palmer were to the effect that only facts known before or at the time of a border closure could justify it.

The update set out an argument by Ms Shipra: as laws to protect public health are not protectionist in nature, they do not infringe s.92. In her view this was because after Cole v. Whitfield, s.92 was to be interpreted only as being ant-protectionist. The update disputed that on the grounds the intercourse aspects of s.92 should not be considered the same as the trade and commerce aspects. The High Court in Palmer did not agree with either, and rejected Ms Shipra’s conclusion.

The update referred to an old case - Smithers – which also was discussed by the High Court in Palmer. However, the Court drew somewhat different conclusions. It considered Smithers to not be relevant to s.92. Most justices did not specifically discuss another aspect of Smithers – whether the act of federation, even without s.92 – is a guarantee of freedom of movement between States. Gagelar J agreed with that point, although his decision implied reasonable necessity would be grounds for exception to any implied guarantee.

The update noted – and disagreed with - Mr Bennett’s argument that legislation for ‘public health’ would be conclusive as demonstrating reasonable necessity. In the light of Palmer, Mr Bennett’s argument looks too broad. There are four reasons. First, Courts can look into the purpose of a statute and are not confined to accepting an ex-facie assertion of its purpose.

Second, in Palmer the High Court said challenges to such legislation should be against the exercise of discretionary powers – administrative law – rather than Constitutional validity. That implies courts will ask whether particular actions, rather than legislative provisions, are reasonably necessary.

Third, the majority in Palmer endorsed ‘structured proportionality’, which is to include considerations of options and whether the issue being addressed – like a public health threat – is trivial in comparison to the problem of discrimination. A claim that legislation is directed at public health is not a conclusive answer to administrative lawsuits – such as against border closures.

Fourth, several justices in Palmer talked of the significance of a multi-stage process part of which was a short duration – 14 days – of an emergency declaration enabling officials to issue directions. In other States the duration can be longer – for example, three and a half months in Queensland.[[18]](#endnote-18)

The update also ventured that reasonable necessity would involve demonstration that options other than closing a border to an entire State were not available. For example: the closing State did not have adequate public health resources to conduct track-trace-isolate controls, and that the State being closed against had not confined disease to a smaller area.

The High Court did not address this, except to note structured proportionality requires some consideration of options. It relied on the Federal Court’s determination of there not being any options other than a border closure to an entire State. In my view, that determination was based on convenience rather than necessity, meaning the reasoning is open to challenge.

The update concluded with a suggestion of Commonwealth legislation to place the power for internal border closures with the Commonwealth during emergencies declared by the States. That suggestion noted irregularities with border closures other than by Western Australia in July – notably Queensland. Subsequent events, and the High Court’s decision, do not convince me to change that.

## 5. Conclusions

By late 2020 some legal academics appeared to side with Governments in debates about whether anti-Covid arrangements, including border closures, were justified. Despite careful caveats in texts, headlines suggested all was in order. The currency of those articles hinged on there not being any official opinion of legality of any anti-Covid measure in any State - a fact highly problematic in itself. ‘De facto lawlessness’ - including attempts to stop legal challenges – was led by Governments.[[19]](#endnote-19)

The ‘everything in order’ headlines were wrong. The High Court apparently has concerns – even if it did excuse the July 2020 Western Australia border closure. It is not alone. The New Zealand High Court and Victorian Supreme Court expressed major reservations about anti-Covid decision making. Of particular concern are Premiers’ public claims of (unlawfully) making public health decisions.

Beagle articles considering anti-Covid administration identified instances of apparent discrimination against States – via border closures and restrictions. NSW residents were singled out for adverse treatment. Simultaneous instances of discrimination in favour of Victoria and Queensland may give context to Justice Edelman’s comments about the breadth of practices prohibited by s.92. None of these prima facie breaches of the law have been publicly justified as necessary.[[20]](#endnote-20)

Rather, the ability of some States to assess public health necessities was thrown into question in late 2020 and early 2021. Officials locked-down cities for a trivial number of Covid cases. Queensland and Western Australia beat-up a story of a ‘hyper infectious mutant’. That tale undermined credibility further as the mutant did not infect the public despite a number of days and multiple locations of exposure. Its simultaneous spread within Queensland quarantine looked even worse.

The national plan is to have vaccines available to all Australians by end October 2021. As vaccines are rolled out, the need for restrictions on movement – including border closures - will decline.

Indeed, eminent health experts imply that, rather than protecting public health, is now the primary purpose of vaccination. For Australia to be ‘immune to lockdowns and the like’.[[21]](#endnote-21)

Such a comment, points to a parlous situation - a legal/policy vacuum into which States’ officials stepped to impose extremely narrow views on society via actions of doubtful legality. States with the more suspect practices are yet to commit to modifying restrictions as vaccines are rolled out. There is speculation Western Australia’s Premier and police wanted to go further - by exploring more permanent border restrictions in the name of slowing the flow of illegal drugs.[[22]](#endnote-22)

The Commonwealth is seeking to draft guidelines to link vaccination with nationally consistent restrictions on personal movement. National cabinet’s failure to agree on anything substantial to date does not augur well for progress. Yet Courts do not want to be drawn into Covid restriction controversies.[[23]](#endnote-23)

The situation means changes to State and Commonwealth legislation are needed to stop the abuses of power seen during the pandemic. The importance of stopping that lawlessness extends beyond health and economy considerations.

A similar ‘disregard the law’ ethos is visible in infrastructure policy. Is it too far a stretch to say such attitudes are also visible in topics du jour – including claims of illegal behaviour in Parliament House?

Properly explained legislation to restore trust in anti-Covid measures would signal to misbehaving members of political and bureaucratic classes: your days of abusing others are numbered.

15 March 2021

**Appendix 1: some further details of judgements in Palmer’s case**

Four separate judgements were delivered.

**Kiefel CJ and Keane J** dismissed the guarantee of personal movement identified in Cole.

Rather, they pointed to s.92 as preventing discrimination:

*‘a law which is directed to discriminating against, or in fact discriminates against, interstate movement is invalid as contrary to s 92 unless it is justified by reference to a non-discriminatory purpose. It may be justified if it goes no further than is reasonably necessary to achieve a legitimate object’.*

In their view, demonstration of going ‘no further’ is a matter of ‘structured proportionality’. That includes considering whether there are alternative measures to achieve the legislative object with less restrictive effects on the freedom. Even if there are not:

*‘in some cases the burden on a freedom will be very great and the measures permitted by the law of evidently little importance, which is to say the burden is out of proportion to the need for it’.*

They did not think that the situation for Palmer. The law did not have a discriminatory purpose for interstate travel, but the directions showed it could have such an effect.

Their honours considered the findings of the Federal Court showed there were no equally effective options. The purpose of the law was to prevent loss of life during a pandemic, and a burden on travel is not out of proportion to that.

**Gagelar J**said s.92 is directed against legislation, rather than establishing individual rights. If s.92 did not exist, freedom of interstate intercourse would be implied by the Constitution.

That freedom means interstate intercourse must be absolutely free from discriminatory burdens of any kind imposed by legislation. Discrimination is:

*"the unequal treatment of equals, and, conversely, in the equal treatment of unequals".*

This requires statutes to pursue non-discriminatory ends. It also requires the means of pursuing those ends, if discriminatory, must be reasonably necessary.

A Constitutionally significant relevant matter for reasonable necessity is

*‘critical constraints built into the scheme of the Act which sustained the Directions’.*

In this case, those constraints include the Minister declaring an emergency.

*‘Reposing a power of that nature in a Minister reflects the reality that, within our constitutional system of representative and responsible government, at the State level as at the Commonwealth level, "[t]he Executive Government is the arm of government capable of and empowered to respond to a crisis"’.*

The Minister’s power was limited by conditions; considering advice of the Emergency Coordinator; is satisfied an emergency exists; a state of emergency declaration has a short, finite, duration. Most importantly:

*‘the purpose of emergency management is the sole purpose for which the power of direction can be exercised……it can only ever be exercised by the authorised officer reasonably on the basis of the information available to the authorised officer’.*

And:

*‘The cumulation of those statutory constraints means that a differential burden on interstate intercourse that might result from an exercise of the power of direction is justified ….. across the range of potential exercises of the power.’*

He did not agree with ‘structured proportionality’ as the way to assess ‘reasonable necessity’.

**Gordon J**like Gagelar J, emphasised the legislation’s prescriptive and cumulative pre-conditions for, and short duration of a state of emergency.

An issue arises where a law imposes a discriminatory burden on interstate trade, commerce or intercourse. In such a case, it is necessary to identify the law's purpose. If the law has a ‘legitimate’ – not discriminatory - object, the question then is:

*‘whether the differential burden imposed by the impugned law is reasonably necessary to achieve a legitimate object of that law’.*

Like Gagelar J, she rejected ‘structured proportionality’ which is not only concerned with identifying the objects of the law but:

*‘a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom’.*

Conditions to the Minister's power to declare a state of emergency, and the limited duration of that state are relevant to whether a differential burden is reasonably necessary. She added:

*‘s 92 will likely not be infringed by a law which has the object of protecting the citizens of a State from disease or some other threat to health’.*

Her concluding comment was Delphic, relating either to a criticism of Palmer’s lawyers for instituting a Constitutional challenge but not challenging the laws; or to an invitation for the future.

*‘It was open for the plaintiffs, when the Minister issued the state of emergency declaration and every 14 days when it was renewed, and when the State Emergency Coordinator issued the Directions and each time the Directions were amended, to challenge one or more of the exercises of those statutory powers on the grounds that the relevant actions were beyond power. No such challenge was ever made.’*

**Edelman J** said s 92 is concerned with freedom from unjustified discrimination concerning trade, commerce, or intercourse in Commonwealth or State legislation, with justification to be assessed in a transparent way.

He did not agree it was appropriate for the Court to adjudicate upon the validity of every application of the legislation in question and said the Court’s decision did not do so.

He said protectionism is too narrow an interpretation of s.92:

*‘protectionism is only one form of discrimination in trade and commerce that imposes burdens on persons in one State compared with another……*

*For instance, State legislation might have the unintended effect of conferring a competitive disadvantage upon local trade and commerce when compared with another State. Or the Commonwealth might confer a competitive advantage on one State to the disadvantage of another. Or a State might confer a competitive advantage on one foreign State over another in an industry in which there is no competition in the local State.’*

In context:

*‘Hence, a law enacted in Western Australia that imposes restrictions on entry into Western Australia upon residents of New South Wales but no such restrictions upon residents of Queensland involves a burden upon intercourse among the States by two types of discrimination. The law must be justified not merely by reference to the restriction upon New South Wales residents vis-à-vis Western Australian residents but also by reference to the restriction upon New South Wales residents vis-à-vis Queensland residents.’*

He implied purposes of s 92 include stopping: Commonwealth law from discriminating between States or State laws from discriminating between other States; a State law from discriminating against the interests of the local State; a Commonwealth or State law from discriminating in favour of one State by conferring advantages upon that State other than competitive or market advantages.

He agreed with ‘structured proportionality’ which

*‘makes explicit and transparent the only three independent grounds upon which a law might be held invalid as contrary to s 92. First, …if its very purpose is to undermine the freedom guaranteed by s 92. Secondly, its means of achieving its legitimate purpose are not "reasonably necessary", in the sense that those means burden the freedom guaranteed by s 92 substantially more than obvious and compelling alternatives which could achieve the purpose of the law to the same extent. Thirdly, and in absolutely exceptional cases….. if its legitimate, but trivial, purpose is inadequate to support the extent of the burden placed upon the high constitutional purpose of s 92.’*

In considering reasonable necessity he considered limits to the power: the Minister has declared a state of emergency after considering the advice of the State Emergency Coordinator and is satisfied that an emergency in the nature of a plague or epidemic has occurred and that extraordinary measures are required; the limited duration of the state of emergency; directions must be for the purpose of emergency management.

1. <https://www.theaustralian.com.au/subscribe/news/1/?sourceCode=TAWEB_WRE170_a&dest=https%3A%2F%2Fwww.theaustralian.com.au%2Fcommentary%2Fcoronavirus-why-state-border-closures-passed-court-test%2Fnews-story%2F9b9cd9a8a78a9586e9d7a4e894d5256b&memtype=anonymous&mode=premium> [↑](#endnote-ref-1)
2. <https://www.abc.net.au/news/2020-08-07/will-melbournes-stage-4-curfews-be-effective-against-coronavirus/12520994> [↑](#endnote-ref-2)
3. <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> [↑](#endnote-ref-3)
4. <https://www.supremecourt.vic.gov.au/sites/default/files/2020-11/Loielo%20v%20Giles%20%5B2020%5D%20VSC%20722_0.pdf> [↑](#endnote-ref-4)
5. Deputy Public Health Commander; the position appears to be 4 levels below the Secretary of the Department of Health (Deputy Secretary, Chief Health Officer, Public Health Commander are in between). [↑](#endnote-ref-5)
6. <https://www.quarantineinquiry.vic.gov.au/hearings-schedule> [↑](#endnote-ref-6)
7. E.g. <https://www.abc.net.au/news/2020-11-12/kym-peake-resigns-as-secretary-of-victorian-health-department/12877876> [↑](#endnote-ref-7)
8. <https://www.thejadebeagle.com/happy-new-fear.html> [↑](#endnote-ref-8)
9. <https://www.theage.com.au/national/western-australia/commonwealth-s-withdrawal-from-palmer-challenge-an-egg-that-must-now-be-unscrambled-20200807-p55jjt.html> [↑](#endnote-ref-9)
10. The Federal Court findings included:

    a. a combination of exit and entry screening, face masks on planes, testing and mandatory mask wearing for 14 days would not change risk assessments;

    b. border closure could not be replaced by hotel quarantine managed by Western Australia;

    c. hotel quarantine and “hotspot” regime combined would be less effective than closure;

    d. a precautionary approach should be taken to decision-making; [↑](#endnote-ref-10)
11. <https://www.thejadebeagle.com/tinpot-update.html>

    One wrong formulation was related to the finding of 28 days of zero community transmission indicated Covid was absent:

    *‘there have been no reported cases of community transmission with an unknown source of infection for 28 days’.*

    The rider ‘with an unknown source’ makes a sensible proposition wrong. It changes the meaning to: there is low probability of uncontrolled Covid one day after identification of any number of cases moving freely in the community, provided those cases have a known source. The matter is significant as some States re-phrased their announced criterion for border closures/openings consistent with this defective formulation.

    Another formulation was used to argue against limiting border closures to hotspots. It said:

    *‘Underlying State-wide and Territory-wide restrictions is an assumption that COVID-19 may have spread into unidentified parts of the State or Territory in circumstances where the extent of any spread cannot be known for some time. Therefore, State-wide and Territory-wide border restrictions act prophylactically.’*

    Presumably what is relevant is unidentified spread of Covid rather than the spread of Covid into unidentified areas. On that understanding the claim that the wider the hotspot area the more ‘effective’ a hotspot regime will be is facile, invites inefficiency and has no relation to necessity – as necessity involves identifying the minimum areas to be restricted. Moreover, it is not just State-wide border restrictions that act prophylactically – every State-wide restriction does so. The underlying argument is: stop movement from wherever there is uncertainty of infection. That is not merely an argument to stop movement between States but to stop movement within States. It is an argument to stop movement from areas where there is little Covid testing.

    The Court’s anti-hotspot arguments are not accepted elsewhere or as a matter of public health. The very purpose of the primary anti-Covid measure – testing – is to identify hotspots. Despite the Court’s criticisms of hotspots, testing and tracing remain the primary defence to Covid, with wider closures brought into play if and only if that approach is expected to fail.

    Hence, in its absence of determining ‘reasonable necessity’, the crux of the Court’s findings look like a predisposition to border control as a matter of convenience. That appearance is in the argument:

    *‘State borders are a useful delineation between populations for the purposes of managing the transmission risk of COVID-19. …. borders are well understood by the general population, there are established legislative and administrative foundations for their control and, in the Western Australian context, they are generally separate from major communities and possible hotspots’.*

    Other evidence of a predisposition towards border controls appeared in the Court’s acceptance of an argument that the ACT’s open border with NSW was irrelevant to its zero cases:

    *‘…the Australian Capital Territory in fact had a higher rate of interstate importations than … would expect for its size…. the reason it did not experience a large outbreak is due both to chance and factors that decrease risk of spread in the Australian Capital Territory, such as an educated and wealthy population, less high-density social housing and the absence of risky industries such as abattoirs’.*

    That argument appears to be rubbish. By end September, the ACT had not reported – and therefore not imported – any Covid case for more than 60 days. The ACT is surrounded by NSW and its transactions with NSW vastly exceed those between NSW and Western Australia – meaning the probability of NSW export to the ACT must be substantially higher than export to Western Australia. Yet the Court recommended the Western Australian border remain closed to NSW. The relevance – if any – of the social factors cited presumably lies in difference between places/persons in the ACT and particular places/persons in NSW which, in many cases, is zero. [↑](#endnote-ref-11)
12. <http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2020/19.html> [↑](#endnote-ref-12)
13. |  |  |  |  |  |
    | --- | --- | --- | --- | --- |
    | **Justice** | **State** | **Qualifications** | **Speciality** | **Prior employment** |
    | Kiefel (Chief) | Qld | Law | - | Barrister |
    | Keane | Qld | Law | - | Solicitor General Qld |
    | Gordon | WA | Law | Commercial law / equity | Barrister |
    | Gagelar | NSW | Law/Economics | Constitutional / Administrative law | Solicitor General Commonwealth |
    | Edelman | WA | Law/Economics | Commercial / Criminal law | Professor |
    | Rangiah (Fed Ct) | Qld | Economics/Law | Adminstrative law | Barrister |

    [↑](#endnote-ref-13)
14. <https://www.thejadebeagle.com/happy-new-fear.html> [↑](#endnote-ref-14)
15. <https://quadrant.org.au/opinion/qed/2021/03/how-the-high-court-redefined-absolutely/> [↑](#endnote-ref-15)
16. <https://www.thejadebeagle.com/covid---may.html>

    <https://www.thejadebeagle.com/covid---july-2020.html> [↑](#endnote-ref-16)
17. Because any infection crossing the border would add to Covid cases.

    [↑](#endnote-ref-17)
18. <https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers> [↑](#endnote-ref-18)
19. <https://johnmenadue.com/behind-the-scenes-section-92-the-high-court-and-state-coronavirus-border-closures/> [↑](#endnote-ref-19)
20. <https://www.thejadebeagle.com/happy-new-fear.html> [↑](#endnote-ref-20)
21. <https://johnmenadue.com/vaccination-controversy-shouldnt-compromise-efforts-to-protect-australians/> [↑](#endnote-ref-21)
22. <https://www.abc.net.au/news/2021-03-03/police-call-for-more-powers-to-search-vehicles-at-wa-border/13211014> [↑](#endnote-ref-22)
23. <https://nz.news.yahoo.com/australias-coronavirus-free-run-extended-163017592.html> [↑](#endnote-ref-23)