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# **Tinpot update**

## Isn’t that now?

*‘The dealing with climate etc. includes a Prime Ministerial hope.*

*For him to be able to declare a national state of emergency enabling him to send in the military. Presumably to restore the natural order…..*

*…..the plan – perhaps subject to what the Commission says – is likely to be to seek a transfer of powers from the States. Which avoids asking your opinion via referendum.*

*But it does require some groundwork – of showing State failures so their parliaments are sufficiently cowed to hand-over relevant powers to the Federal Government. Between end-August and end-September.’[[1]](#endnote-1)*

## 1. Introduction

This article is an update to Tinpot (January 2020) which raised concerns about calls for more Commonwealth Government power.[[2]](#endnote-2)

The concern arose out of calls for Prime Ministerial actions during the 2019-20 bushfires including to declare a ‘climate emergency’. In response to the calls, the Prime Minister said he wanted to be able to declare a national state of emergency to enable him to decide what action – including use of the military - to take. Tinpot suggested the Home Affairs portfolio, a source of recent relevant controversies, could be the beneficiary of any increase in such Commonwealth powers.

In February 2020, the Government established a Royal Commission on natural disasters to look at this and other issues. It is chaired by a former Chief of Defence, assisted by a former judge.[[3]](#endnote-3)

The Commission issued two relevant papers in May – on Constitutional issues. It published Interim Observations on 31 August – just in time for declaration of the fire season in parts of NSW. The papers are summarised in Appendix A.[[4]](#endnote-4)

Briefly, the Commission’s papers confirm what was already known, if not well understood.

## 2. Key issue

The Commission’s papers confirm the crucial question arising from any declaration of emergency is: what next? What does a declaration allow?

Typically, emergency declarations allow Governments - or officials - to take certain actions normally only available to Parliaments. Included are unusual, even drastic, regulations severely impacting on human rights. Examples are to:

* exert control over – to force or prevent - movement of people and goods;
* direct people to undertake or cease certain activities;
* close premises, roads etc;
* prevent trade, communication;
* outlaw peaceful protests;
* commandeer property;
* use force to ensure compliance.[[5]](#endnote-5)

To be lawful, the purpose of such actions must be to protect lives and property. Any such actions that go beyond ‘reasonable necessity’ to achieve those purposes may be invalid.

The rationale for a declaration allowing such actions is that emergency events may move too quickly for Parliament to consider and determine what to do. As such, emergency declarations are usually short term and made under the authority of specific legislation. Declarations are initiated by Governments rather than Parliaments – even if Parliaments retain power to countermand them.

Certain State Government actions during the natural disasters of 2019-2020 bushfires and current pandemic rely on emergency declarations. Their pandemic actions, which are increasingly stringent and of indefinite duration are promoted by States in the name of an emergency – a name usually reserved for much shorter term, more transient events.

Given that, the key issue is: what, if anything, should a Commonwealth declaration allow?

## 3. Current Commonwealth power

A Division in the Home Affairs portfolio, ‘Emergency Management Australia’ – along with the Australian Defence Force - is the shopfront for the Commonwealth’s role in natural disasters. However, these shopfronts lack authority over substantive issues – they lack power to initiate interventions in natural disasters.

At present, the Constitution does not specifically equip the Commonwealth - Parliament or Government - with the natural disaster emergency powers available to the States. Partly in consequence, the Commonwealth and its officials are not indemnified for actions they may undertake in such an emergency.

The Commonwealth Government can announce a ‘national emergency’ in response to a natural disaster etc. However, for most purposes the announcement would merely be symbolic. It would not permit the Government – or its officials – to undertake the type of actions outlined above. As the reason of Commonwealth incapacity is the Constitution, legislation would not change that.

Similarly, facts such as natural disasters occurring in several States, inadequacy or lack of co-ordination of State emergency measures, or popular calls for Commonwealth intervention do not give rise to power for the Commonwealth to take the types of actions outlined above. Assertion of Commonwealth roles does not provide any basis for power.

Nonetheless, the Commonwealth can undertake actions to respond to a natural disaster e.g. to:

* defend its own property;
* meet international obligations such as protect world heritage sites;
* make its resources available to States.

A declaration of a national emergency is unnecessary for such actions.

Notwithstanding its limits, there are circumstances where the Commonwealth can take extraordinary actions. These arise from Constitution s.61 Executive powers, which allows the Government to maintain and uphold Commonwealth laws and the Constitution.

The Government can act against threats to Australia’s system of government. A corollary is that any such actions cannot undermine the Federal nature of this system.

In the case of a natural disaster or other threat, the Government can act to the extent necessary to preserve the system of government. It can do so without an emergency declaration.

Expanding Commonwealth power beyond that requires referendum or referral of powers from the States. Contemplation of expansion of Commonwealth power might be usefully informed by State practice. The type of behaviour currently on display by State Governments and officials might be seen as benchmarks to be later used by their Commonwealth counterparts in different circumstances.

## 4. State use of emergency powers

State responses to Covid 19 pandemic have ‘relied’ on emergency powers. Generally, Premiers declared a state of emergency under pre-existing legislation.

In most States, this has enabled officials to then made regulations variously:

* preventing movement of people – stay home orders;
* order people to move out of public and private areas including parks, beaches and homes;
* directing people to cease certain activities – meeting others;
* directing people to undertake certain activities – submit to testing and wear face masks;
* closure of premises and cessation of business activity;
* making certain communications unlawful as incitements to breach other regulations.

The reasonableness of some of these actions is open to question. There have been criticisms of arbitrary or capricious restrictions. There are claims of extraneous motives, evidence of which includes preferential treatment to certain community segments and ‘celebrities.[[6]](#endnote-6)

The practice of Premiers announcing and ‘owning’ measures well in advance of decisions to be made by others is a bad look at the least. Particularly when they later disown the measures. The gross, ongoing confusion in several States as to who is making decisions to radically restrict freedoms and to arbitrarily and insensitively treat individuals ought to be extremely concerning. NSW, where the legislation has the Minister making relevant decisions is the exception.[[7]](#endnote-7)

To date, there has not been any demonstration of the legality of these actions. State Governments have not provided the public with legal advice supporting the actions. In at least one high profile case legal opinion is to the effect charges laid under a regulation – leading to a Cabinet Minister resigning - were illegal. There also are reported instances of aversion to legal review, which might be compared with Governments seeking advice on the popularity of measures in the electorate.[[8]](#endnote-8)

A New Zealand court upheld restrictions similar to those imposed by States. However, that was on the basis that all parties accepted the restrictions were reasonable - and with exceptionally careful language to avoid reflection on the legality of Ministerial involvement in officials’ decision making.[[9]](#endnote-9)

Some regulations – border closures - conflict with express provisions of the Constitution. In only one case, Western Australia, is this being tested. Much to the chagrin of State and Commonwealth Governments, the complainant is Mr Palmer. The High Court requested the Federal Court to rule on facts and the reasonable necessity of the closure.

The Federal Court ruling, in late August 2020 by Justice Rangiah, did not address the ‘reasonable necessity’ of the closure but found it has been effective in preventing the re-introduction of Covid-19 to the State. Despite media reports and analysis to the contrary, the reasons for the findings are not clear - discussed in Appendix B. Among the sidelines to the case is Mr Palmer suing Western Australia’s Premier for calling him an enemy of the State, and the Western Australian Parliament passed retrospective legislation to prevent it being sued by Mr Palmer. Expect more of such legislation to shield decision makers from the consequences of their actions.[[10]](#endnote-10)

The key point is: despite popularity of State anti-Covid measures, particularly those that discriminate against people from other States, there are concerns about abuse of emergency powers. There also are concerns about: Premiers’ pretending that Parliament has entrusted such powers to them; the use of ‘independent’ decision makers as apparent cats-paws; aversion to Parliamentary and judicial scrutiny. That parochial myopic monomania dominating debates and inspiring some decisions is a major national problem.[[11]](#endnote-11)

## 5. National agency for bushfires, cyber-attacks?

A week after release of the Commission’s Interim Observations, the media reported a draft proposal for the Commonwealth to lead national responses to emergencies such as bushfires, pandemics and large-scale cyber-attacks.[[12]](#endnote-12)

It said responsibility for emergency management has been a ‘*massively fraught area*’, noting disputes between about things such as the Commonwealth not informing NSW about the deployment of the military to the firegrounds, responsibility for the Ruby Princess debacle, and responsibility for quarantine.[[13]](#endnote-13)

The report suggested options include a new Commonwealth agency - or an expanded role for the Emergency Management Australia Division - in the Home Affairs portfolio.

The Commission’s Interim Observations commented on the Division and on potential roles for the Commonwealth. It argued these largely arise from its resource capabilities. It suggested

*‘There may be benefit in a single, scalable standing body responsible for natural disaster recovery and resilience at the Australian Government level.’*

The later media report said the Government would await the findings of the Royal Commission ‘*before announcing the new agency’*.

It has been suggested draft legislation would be presented to Parliament on the matter.[[14]](#endnote-14)

## 6. Comments

The hysteria and shrieks of ‘emergency!’ in early 2020 created fertile ground for a radical expansion of Commonwealth Executive Government power. This is being further seeded by State Governments and officials creating a national shambles in the name of responses to Covid-19 and by some appalling stories of abuses of their emergency powers.

However, these are not good reasons to increase governments’ powers by adding to those of the Commonwealth.

Any debate about expanding Commonwealth Government power should pay very close attention to Commonwealth Government behaviour. There are worries here. The reported pre-emption of the present Royal Commission – by proposal of a new agency - is one.

Another is the purview of its proposed agency is considerably wider than matters the Government referred to the Royal Commission – it is to include cyber. There is even speculation of some quasi-military function such as a civilian defence force. The Commonwealth Government’s refusal to allow its officials to give evidence at State Royal Commissions – most recently that for the Ruby Princess – also raises concerns about a predilection for power without responsibility.[[15]](#endnote-15)

Expansion of power needs to be seen against pre-existing powers. In the present pandemic the Commonwealth Government has not properly exercised its own functions at least in relation to quarantine and maintaining the Constitution. It has needlessly sat on its hands and watched State over-reach and bungles. Such failures are hardly reasons to entrust it with wider responsibilities.

In other areas, there are arguments Commonwealth Executive ambition already oversteps appropriate marks. These include: wishes to militarise domestic matters including emergencies; activities undertaken in the name of national security; some activities of the Home Affairs portfolio – the portfolio most likely to amass more powers under the proposals being mooted.

Contrary to publications of the Royal Commission, the primary issue is not the interaction between Commonwealth and State emergency agencies. It is whether the Commonwealth Government should have any emergency powers beyond those current – quarantine, to protect its laws, properties and the system of government. That is the issue remitted to the Commission.

Australia’s system of government entails a Federation with separation of judicial, legislative and executive organs in both Commonwealth and State tiers. Representative government has the executive Governments answerable to their legislating Parliaments. Neither Commonwealth nor State tiers are answerable to each other.

Any concern about State Government failures or excesses – even in emergencies - is unlikely to be addressable by transfer of their powers to the Commonwealth Government. Nor vice versa.

There is no reason to suppose present excesses of State Governments under the guise of ‘emergency’ would not be replicated were similar powers available to the Commonwealth. Indeed, temptations facing Commonwealth Ministers and officials to indulge themselves in ego trips may be exacerbated by co-location of emergency functions within a financially powerful central Government which controls national security, border control and military apparatus. Unlike other common law countries, Australia’s Governments are not constrained by a Bill of Rights, and express obligations are imposed only on citizens not institutions of state.[[16]](#endnote-16)

In Australia’s system of government, failures of Executive Governments are best corrected by other organs. Correction of abuse of Executive power can be by the judiciary. Correction of policy failures should be by relevant Parliaments and ultimately electorates.

The Commonwealth Government, as guarantor of the system, already can act to remedy States’ failures in emergencies. The Commonwealth can and should ensure alleged State abuses are referred to the Courts. The Government can submit draft legislation to the Parliament to nullify and prevent State incompetence, stupidity and overreach for example on quarantine matters. Mr Morrison’s Government has deliberately eschewed these roles, preferring instead to engage in private conversations and convene a ‘National Cabinet’ – a body without any proper status, which has not only overseen a debacle creating anger in the community, but given State Premiers a bully pulpit to encourage division, evade accountability and degrade the Federation.

Until the Commonwealth takes its safeguarding role seriously, an increase in its Government’s power to deal with emergencies should not be contemplated. And if it ever does its existing job, consideration of expanding its role should be put to the people via referendum.

To return to the question: what, if anything, should a Commonwealth declaration of national emergency allow? Actions allowed by a declaration should be limited to those necessary to protect the system of government from immediate and grave threat.

Other declarations and actions – even symbolic ones - would create confusion and further undermine the accountability on which the effectiveness of the system of government depends.

J Austen

17 September 2020

## Appendix A: Commission papers summary

### Agency coordination

The Royal Commission into Natural Disasters recognised preparation, mitigation, response and recovery is primarily a State responsibility.

However, it asserted Commonwealth roles arise from greater capability and capacity than the States. These roles are: national coordination for a national crisis, such as a pandemic; encourage and facilitate consistency across States; providing information via e.g. the Commonwealth Scientific and Industrial Research Organisation, the Bureau of Meteorology.

It said the centre of the Government’s coordination of natural disasters is Emergency Management Australia. That is a division in the Home Affairs Department.

The Commission suggested there are gaps in coordination between the States’ emergency agencies, and a variety of groups have sought to plug these. These groups emanate from a non-government, not-for-profit company formed by Australian and New Zealand emergency services agencies. The company was intended to be the national facilitator of common standards, doctrine and resource sharing. It was formed in 1993.

In 2013, the relevant Ministerial Council rejected a proposal for formation of a group comprising operational emergency management leaders. However, by the end of that year, the company had in effect established such a group.

The group makes ‘preliminary decisions’ about fulfilment of requests for agencies to share resources. In 2016, the company established a centre to implement these decisions.

The Commission observed different views about the authority of the company and group. It said and the arrangements:

*‘were not intended, and may not be well-suited to, determining or giving effect to what is in the national interest in preparing for, and responding to, all natural disasters……..*

*(are) not subject to the organisational governance principles and public accountability requirements that apply to government agencies…*

*do not provide a clear mechanism to elevate matters to national leaders—that is, the Prime Minister and other First Ministers of states’.*

The Commission said it is examining whether *‘more suitable arrangements can be made’.* Among the options is an intergovernmental body along the lines of National Cabinet which could take advice from the Ministerial Council which in turn could be informed by an expert group. The Commission was sceptical about ‘recently created disaster-specific recovery agencies’:

*‘rapidly establishing new agencies as a natural disaster is unfolding can be disruptive, delay necessary and immediate assistance, and create confusion…….*

*There may be benefit in a single, scalable standing body responsible for natural disaster recovery and resilience at the Australian Government level.’*

### Australian Defence Force

The Commission noted the:

*‘contribution of the Australian Defence Force (ADF) in supporting state and territory governments during response and recovery efforts during the 2019-2020 bushfires was without parallel in peacetime.’*

While the Defence Force does not fight fires, it can offer special support, for example via ships. Its involvement in natural disasters is contemplated in plans which set thresholds for it to act. However, there is uncertainty about the thresholds, what tasks the Force might undertake and how State authorities interact with the Force once deployed.

Further, the Commission noted questions were raised about legal authority for Defence Force – including Reserve – involvement, and indemnities for personnel.

### Emergency powers

The Commission recognised the essential issue is not whether the Government can declare an emergency. Rather, it is about the consequences – and powers – to follow from such declaration:

*‘we continue to consider this issue’*.

The Commission recognised several possible purposes of a national emergency declaration, to: emphasise the gravity of a situation and galvanise the population; seek a better coordinated national approach. Beyond this a declaration might facilitate the securing of international resources.

At present, the Constitution does not specifically equip the Commonwealth - Parliament or Government - with the emergency powers available to the States. However, the Commonwealth has implicit powers to deal with particular types of emergencies. These arise from three sources: requests from States; matters related to specific Commonwealth powers, such as external affairs; matters that relate to it as a (national) Government – ‘non-statutory Executive power’.

### State requests

The Commonwealth can assist States to deal with natural disasters with present mechanisms being a Disaster Response Plan and Defence Force Aid to Civil Community. At present these are not supported by legislation, and Commonwealth actions need authorisation by the Executive e.g. Governor General.

For the Disaster Response Plan, a requesting State need not have an emergency declaration. However, the State must have “*exhausted all government, community and commercial options*”. Requests are assessed by Emergency Management Australia.

Defence deployments are governed by a different process – not detailed by the Commission - which includes graded responses.

Commonwealth officials deployed in response to State requests do not have specific powers or legal protections. They often rely on the powers of the authorities they are assisting. The Commission noted their legal status in exercising those powers is often unclear.

A State request for assistance does not give rise to a power for the Commonwealth to declare a national emergency.

### Commonwealth legislative powers

Subjects of Commonwealth power are mostly set out in Constitution s.51. These permit the Commonwealth Parliament to legislate over subjects and incidental matters. Such legislation may allow the Government – the Executive – to undertake certain actions.

It is conceivable legislation might allow a declaration of a national emergency – however, the validity of any such declaration will be limited to the subject of the legislation, in turn limited by s.51.

An example given by the Commission is External Affairs. The Commonwealth has entered international treaties, for example, for world heritage areas and has consequently legislated to designate such areas in Australia. It is conceivable a natural disaster – like a bushfire – could threaten a designated area. If so, the Commonwealth may have power to declare a national emergency for the sake of preserving the area via dealing with the fire.[[17]](#endnote-17)

Other specific subjects of s.51 include: interstate trade and commerce; navigation; telecommunications; corporations. Of particular interest in the current pandemic is the Quarantine power.[[18]](#endnote-18)

### Non-statutory Executive power

Non-statutory Executive powers arises from Constitution s.61. Limits are undefined; however, the current view is the powers are those:

(i) of capacities of the Commonwealth as a legal person;

(ii) of Crown prerogatives attributable to the Commonwealth;

(iii) from the character of the Commonwealth as a national government.

The Commission regarded (i) as irrelevant to the issue of emergency declarations.

While (ii) and (iii) may be relevant, they are limited by other constraints on Commonwealth Executive power. These limits include: the doctrine the Commonwealth cannot undermine the existence of the States; specific provisions in the Constitution such as providing just compensation for property acquisition and not discriminating between States on taxation.

The Commonwealth cannot spend public monies except for purposes within legislative or Executive competence, or via grants to the States.

Item (ii) includes Commonwealth Executive power to maintain the Constitution. Item (iii) covers powers necessary for ‘the protection of the body politic or nation of Australia’. The Government may therefore act where an emergency threatens institutions of government in Australia. That potential has been noted by several High Court justices. Also noted is that exercise of such power must be consistent with Australia’s Federal structure.[[19]](#endnote-19)

The Commission claimed this power may not support coercive action affecting the rights of individuals. It further claimed the High Court may approach questions of this nature conservatively, presumably based on views expressed in cases such as M68. The basis of these views is unclear, but if correct would severely limit current Commonwealth powers to deal with emergencies.[[20]](#endnote-20)

### Outcome

At present a Commonwealth national emergency declaration would have limited effect. It could:

* be purely symbolic;
* enable it to defend its property, laws or international obligations such as for world heritage;
* signify it will make its resources available to States;
* allow it to undertake activities peculiarly within the Commonwealth’s capabilities.

The Commission noted State Parliaments could refer powers to the Commonwealth to allow it to undertake more substantive actions.

The Commission concluded it is (still) considering how any national declaration would interact with State emergency management, and whether the Government should have ‘clearer authority’ to take action ‘in the national interest’.

## Appendix B: Palmer v State of Western Australia[[21]](#endnote-21)

### Background

Mr Palmer is seeking to have the High Court declare the Western Australia border closure to be in breach of the Constitution s.92.

The Chief Justice referred some issues to the Federal Court for factual determination, to prepare for hearings in the High Court - the question was whether the border closure was reasonably necessary:

*‘Pursuant to section 44 of the Judiciary Act 1903 (Cth) so much of this matter as concerns the claim by the defendants of the reasonable need for and efficacy of the community isolation measures.’*

The Federal Court matter was dealt with by Justice Rangiah. The Commonwealth intervened and produced two witnesses to support its case against the border closure – Professors Collignon and Blakely. Hearings were held in late July and involved three other experts – one for Mr Palmer and two for Western Australia. In early August, the Commonwealth withdrew from the case.[[22]](#endnote-22)

The Federal Court’s determination was handed down on 25 August, 2020.

### Findings

The Court accepted as a ‘rule of thumb’: 28 consecutive days of zero cases of community transmission indicates negligible probability of Covid 19. It did not add the caveats relating to the numbers of Covid tests or people in the population. Among its findings were that at 29 July:

a. Western Australia had no community Covid-19.

b. Its border restrictions reduced the numbers of people entering from interstate to approximately to 9% – 13% of the previous level.

b. Border restrictions have been effective to a very substantial extent to reduce the probability of COVID-19 being imported into Western Australia from interstate.

c. Probability of persons infected with COVID-19 entering Western Australia if border restrictions were removed cannot be accurately quantified.

d. Probability that virus would enter Western Australia if restrictions were removed - from:

i. Australia as a whole — high, reflecting Victoria’s probability.

ii. Victoria — high.

iii. New South Wales — moderate. 4% (upper limit 14%) chance of an undetected infected traveller in a month - possible underestimate.

iv. Queensland — uncertain.

v. South Australia, the Australian Capital Territory, the Northern Territory — low.

vi. Tasmania — very low.

e. If border closure was replaced by the combination of exit and entry screening, face masks on planes, testing and mandatory mask wearing for 14 days, those ratings would not change.

f. If closure was replaced by hotel quarantine, Western Australia could not safely manage quarantine.

h. If the above was supplemented by a “hotspot” regime, involving either quarantining or banning persons entering from designated hotspots, it would be less effective than closure.

i. If persons enter while infectious, there would be a high probability the virus would be transmitted and at least a moderate probability of uncontrolled outbreaks.

j. A precautionary approach should be taken to decision-making

k. The border should remain closed to Victoria, NSW and Queensland.

The Court did not make a finding of whether the border closure was reasonably necessary.

### Comments – overview

Commentary suggested the findings were a ‘win’ for Western Australia and that the Court was cautious. Twomey added:

*‘the important aspect of the Federal Court’s ruling is the assessment about whether other approaches could equally protect public health while still allowing the movement of people across state borders. Once you remove hotel quarantine and hot spot exclusions as effective alternatives, this really only leaves the “travel bubble” idea of permitting entry of people from those states or territories where the risk of transmission of COVID-19 is low or very low’. [[23]](#endnote-23)*

However, as:

* some findings are questionable;
* some arguments behind the findings are not clear;
* the Court did not address the matter remitted to it;
* the Court made findings beyond what it was asked, pre-empting the High Court and pre-empting Government decisions in saying the border should remain closed;

it is difficult to discern judicial caution.

### Questions on findings

Examples of questionable findings:

* *there is no Covid-19 in Western Australia*. Should this finding have referred to, and been qualified by, statistical accuracy given the low rate of testing for Covid in the State?
* *a probability of 4% (even 14%) is ‘moderate’*. In most fields such a probability would be considered very low or low;
* *the border closure gave a very substantial fall in the probability of importing infection*. Should the finding have stated the probabilities? The figures indicate a fall possibly in the region of 90% of the previous probability. However, were the previous probability say 4.0%, the closure would have reduced it to 0.4% a change of 3.6 percentage points - usually considered insignificant;
* *the probability of Western Australia importing Covid from everywhere in Australia would be the same as from Victoria*. Should the finding have been the nation-wide probability is higher because there would be more travellers to Western Australia?
* *the probability of importing Covid from NSW is so much higher than the ACT as to warrant border closure against the former and not the latter*. Should the finding have recognised the open border between NSW and the ACT implies the same probability for each?

The ‘logic’ accepted by the Court, appears incontrovertible: as Covid is transmitted by people, limiting the number of people will limit the virus; border closure limits the number of people hence will limit the virus. However, this may be too simplistic to support findings.

The findings rest on a basic assumption: the only relevant goal is prevention of Covid-19 within the State closing its border. The findings ignore, assume the irrelevancy of, or assume the measures under debate have no impact on:

* Covid-19 outside the State; and
* any other aspect of health inside the State or anywhere else in Australia; and
* any other aspect of social, environmental or economic interest inside the State or in Australia.

### Views about experts

An influence on the findings may be the regard of the views of various experts. Professor Collignon, who was the most cautious about border closures, appeared to be treated more strictly than other experts. The Court’s reference to his self-regard was needless. Its claim words such as “my view” ‘*mask(ed) the basis for his opinions*’ appeared to be assumption rather than fact.

The Court seemed to presume he had a bias for open-borders. It cited his: *“view these outbreaks or clusters are better handled by targeted community and regional interventions rather than State-wide interventions”* as implying he strayed from the purely medical considerations of the issue at hand into economic, social and individual impacts. However, that overlooked two matters.

First, the phrase may have reflected a view that medical effectiveness of pandemic measures hinge on community responses and such responses may be better – over a pandemic’s duration - under specific measures than under general closures of society. The Court elsewhere noted his argument:

*‘if people think the virus has been eliminated where they live, there is a desire and expectation to go back to “normal”…… if the virus is then reintroduced into the community, it may then be rapidly spread. He states that this is why the most important aspect of control is not closing State borders, but for the population as a whole to follow practices that decrease the risk of the virus spreading’.*

Second, all the experts and the Court may have similarly ‘strayed’ from pure medical considerations. The findings do not go far enough on such considerations. For example, the agreement closures are important where there are differential rates of infection is less than the logic suggests - any potential of importation of infection must increase risk whether or not infection was already present.

The Court elsewhere argued there was potential for people to: avoid testing; travel contrary to medical advice; engage in criminality. From that, logically it might have:

1. agreed with Professor Collignon that *‘the most important aspect of control is not closing State borders’ (*because such closure can be circumvented by individual criminality etc))*, but for the population as a whole to follow practices that decrease the risk of the virus spreading’*
2. concluded that the presence of infection – whether community transmitted or not – should require border closures.

The Court was more willing to accept more views of Associate Professor Lokuge, even though these seemed to be based on an a priori position - that border closures are necessary.

Her practical experience in epidemics was held to be a strong point. The Court appeared to simply assume relevance of that experience although that reported related to epidemics with substantially higher mortality rates, less developed countries and presumably less-capable health systems beset by humanitarian crises. Consistent with that appearance, the Court did not refer to any evidence of closure of internal borders in countries thought to be comparable to Australia such as in the Americas or Europe and its references to international examples appear to relate to closure of national, rather than provincial, boundaries.

The Court accepted a preference of ‘qualitative’ over ‘quantitative’ analyses accepted decision tree- ‘algorithm’, akin to a probability/consequence matrix whose cells indicate risk for assessing disease impact. It accepted some quantitative estimates – such as uptake of testing for symptomatic Covid 19 - without evidential data. However, analyses – and estimates - based on qualitative information can be opaque and embody unexamined assumptions and hidden biases. That is not to say qualitative evidence should have been ignored, but it is to say a preference for ‘logic’ over data or fact can give rise to strange conclusions such as: 4% is a moderate probability.

A premise of the Court’s conclusions was internal restrictions (‘Common Measures’) and border controls are complementary rather than substitutes. The former deals with Covid within an area, the latter seeks to preclude it from the area. The Court’s argument, citing Professor Lokuge, is logical. However, the comments went beyond logic:

*‘…effective and early border closures would have prevented the resurgence in Victoria …all other States and Territories have now closed their borders to Victoria….. this is consistent with border controls being an essential component of public health measures for controlling COVID-19’.*

Those comments appear inaccurate. First, reports have Victoria’s resurgence resulting from a failure of international quarantine wholly within Victoria. A State border closure could not address that.

Second, the closure by other States of their borders to Victoria is consistent with border control being used but does not demonstrate necessity. Indeed, necessity is refuted by NSW and the ACT not instituting border controls other than for Victoria - a fact not mentioned here.

The Court also noted:

*‘Associate Professor Lokuge …. states that* *all places which have achieved good control of COVID-19 have had border controls as an integral part of their response.’*

That statement may be exaggerated. Some countries have reportedly achieved ‘good control’ without internal border controls New Zealand for example. Some Australian States have achieved good control without internal, and in some cases with little external, border control – NSW and the ACT being examples.

In relation to the ACT, the Court saw its open border with NSW as irrelevant to its zero cases:

*‘Associate Professor Lokuge disagrees with the view that the Australian Capital Territory is a good example of open borders not increasing risk. She states that the Australian Capital Territory in fact had a higher rate of interstate importations than she would expect for its size. In her opinion, 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’.*

It is unclear how that view can now be sustained. First, the ACT has not reported – and therefore not imported – any Covid case for more than 60 days. Second, the ACT is surrounded by NSW - a State the Court recommended Western Australia close its border against. Third, the ACT’s 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 the ‘moderate’ rating for export to Western Australia. Fourth, the relevance – if any – of social factors cited presumably lies in difference between the ACT and relevant places/persons in NSW which in many cases may be zero.

### Crossroads Hotel outbreak

The Court suggested that NSW’s open border, and Western Australia’s closed border, accounted for a significant part of the difference in their Covid cases. In support of this it noted the:

*‘Crossroads Hotel outbreak in early July 2020. There have been at least 56 cases associated with that outbreak to date. The cluster commenced with a single traveller from Victoria. Dr Robertson’s opinion, which I accept, is that the traveller would not have been permitted to enter Western Australia under the border restrictions’.*

That the outbreak started with a single traveller from Victoria is correct. However, the inferences drawn from that may not be.

While, the outbreak initiated prior to NSW closing its border to Victoria, an earlier closure would have been unlikely to ‘protect’ NSW as the traveller was reputedly exempt – being from the freight industry. At the time of the Crossroads outbreak – early July - Western Australia also exempted freight from border control, tightening the criteria six days after the outbreak. Hence in relation to risk arising from that traveller, Western Australia appeared to be in the same position as NSW.[[24]](#endnote-24)

As such, the Court’s simple acceptance of the contrary assertion of Dr Robinson - a Western Australian official with some self-interest in defending the closure – is open to question.

### Hotspots

The Court considered a ‘hotspots’ approach to be less effective than border closure. Its idea of a hotspot was based on Government decisions to isolate areas where infection had been detected.[[25]](#endnote-25)

The Court argued the lag between detection and isolation/quarantine – possibly up to one or two weeks - created susceptibility to outbreak that would be avoided with a border closure. It noted:

*‘Dr Robertson considers that if public health officials concentrated on hotspots, they would be well behind where the epidemic actually is’.*

The Court raised other arguments against hotspots: in Victoria they were being added daily; when a hotspot is identified, it is done on data that reflects transmission in the past; geographical identification of a hotspot, for example, by reference to a suburb or region can be difficult; restrictions for hotspots may more readily be circumvented by people providing misleading information as to where they have travelled. It argued:

*‘Border measures which restrict travel on a State-wide or Territory-wide basis offer greater protection than narrower hotspots’.*

The Court concluded:

*‘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. They are consistent with a precautionary approach.’*

That conclusion is broadly correct, provided it is intended to mean Covid may have spread unidentified, rather than into unidentified areas. The Court’s reasoning that the wider the area of the hotspot the more ‘effective’ it will be, means that a border closure is the same as identifying an entire State as a hotspot.

However, as the Court assumed the only relevant issue to be Covid health, and as it advanced the precautionary principle, border closure against another State does not go far enough.

It is not merely border restrictions that act prophylactically – it is all State wide restrictions. The argument put by the Court is to stop movement from wherever there is uncertainty of infection. That is not merely an argument for State border closures to stop movement between States but to stop movement within States by erecting borders internal to them. It is similar, but more extreme, than my duality argument.[[26]](#endnote-26)

Put that way, the argument is facile and does not assist in determining what is reasonably necessary – whether for Covid, for public health within a State, for wider public health or for a balance of wider public health and other activity. It merely informs what minimises Covid.

The argument does not appear to have been accepted elsewhere, as evidenced by the use of test-trace, the purpose of which is to identify hotspots. Concerns with hotspots logically are concerns about test-trace.

While the Court’s criticisms of hotspots may have some theoretical validity, they have not stopped that approach being a primary defence to Covid, with other mechanisms 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 might be convenience. Along these lines it argued:

*‘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’.*

This was raised to support the claim:

*‘Assuming that a targeted quarantine regime or a hotspot regime does not cover the whole of a State or Territory in which there is ongoing community transmission, it would be less effective in preventing infected persons from travelling into Western Australia than the existing border restrictions.’*

Again, the conclusions stop short of where the logic leads. The Court noted the potential for quarantine to fail – as in the case of Victoria. It noted examples where community transmission had not been detected, or even suspected, with consequential major outbreaks. Hence if the Court was limiting itself to dealing with Covid, and ignoring opinions coloured by other health or social considerations, it should have concluded that all identifiable administrative boundaries – including local government ones - should be closed to every other area, because every other area has the potential to harbour detected or undetected Covid.

### Conclusion

Given the Court did not answer the question referred to it, raised some questionable arguments and the underlying logic leads to a facile result – because it does not define an ‘areas’ - it is arguable whether its determination has advanced the debate.

Its finding that the Western Australia border should remain closed to NSW, Victoria and Queensland is difficult to understand.

The matter to be determined by the High Court is whether, in light of Constitution s.92, Western Australia has power – the option - to close its border (to Mr Palmer). The High Court is not being asked to adjudicate whether Western Australia should close its border.

That question can only arise if Western Australia has relevant power. If it does have power, such a question should usually be one for the Western Australian Parliament.

It is disappointing, but perhaps not surprising, such matters have not attracted attention.

1. <https://www.thejadebeagle.com/its-all-about-climate-change.html> [↑](#endnote-ref-1)
2. <https://www.thejadebeagle.com/tinpot.html> [↑](#endnote-ref-2)
3. <https://www.thejadebeagle.com/its-all-about-climate-change.html> [↑](#endnote-ref-3)
4. <https://naturaldisaster.royalcommission.gov.au/publications/issues-paper-1-constitutional-framework-declaration-state-national-emergency>

<https://naturaldisaster.royalcommission.gov.au/publications/background-paper-constitutional-issues-and-national-natural-disaster-arrangements>

<https://naturaldisaster.royalcommission.gov.au/publications/interim-observations-1>

<https://www.smh.com.au/national/nsw/fast-moving-fire-in-north-east-nsw-marks-first-big-blaze-of-the-season-20200819-p55nc2.html> [↑](#endnote-ref-4)
5. <https://johnmenadue.com/war-defined-the-scope-of-emergency-powers-but-now-we-may-discriminate/> [↑](#endnote-ref-5)
6. Examples of seemingly arbitrary and capricious restrictions are in <https://www.thejadebeagle.com/covid---may.html>; and <https://www.thejadebeagle.com/covid---july-2020.html>.

More recently, Queensland achieved additional notoriety in this regard for its border closure. Among potential misuses of (any such) power were:

. repeated failure to allow movement over the border for significant health needs;

. refusal to grant exemption for a person (from a jurisdiction which had 0 cases for more than twice duration of the ‘criteria’ for border opening) either see a dying parent or to attend the later funeral - while earlier the Chief Health Officer had allowed a large funeral during a lockdown;

. Government statements and comment e.g. that Queensland hospital are for Queenslanders with the effect if not intention of discouraging people from seeking medical attention;

. prevention of movement of people wishing to visit their gravely ill children or parents;

. concurrent exemptions from border closure - and less oversight of quarantine - for non-urgent non-critical movements of ‘celebrities’;

. arbitrary application of criteria for border closure e.g.:

<https://www.abc.net.au/news/2020-08-19/double-lung-recipient-misses-check-up-due-to-border-closure/12573234>

<https://www.abc.net.au/news/2020-08-17/qld-hospital-rejects-nsw-mother-of-sick-newborn-amid-covid-fears/12564936>

<https://www.abc.net.au/news/2020-08-10/queensland-border-bubble-causes-chaos-for-nsw-health-workers/12541064>

<https://www.dailymail.co.uk/news/article-8641343/Comrade-Anna-blasted-saying-Queensland-hospitals-people.html>

<https://www.ausdoc.com.au/news/doctors-slam-border-politics-after-unborn-babys-death>

<https://www.9news.com.au/national/coronavirus-border-restrictions-canberra-woman-sarah-unable-to-see-dying-dad-fighting-queensland-to-attend-funeral/6439f010-02e0-40b8-b507-a5a754c2d076> compare with <https://www.abc.net.au/news/2020-04-09/coronavirus-queensland-funeral-mourners-indigenous-significant/12132614>

<https://www.abc.net.au/news/2020-09-08/border-closure-separates-families-from-hospitalised-children/12637642>

<https://9now.nine.com.au/a-current-affair/coronavirus-hotel-quarantine-under-fire-after-popstar-dannii-minogue-exempted-from-process-but-critically-ill-australians-refused/e779d430-3ac2-4ead-b475-97597ae72cc4>

<https://www.theage.com.au/sport/afl/coronavirus-richmond-afl-players-caught-in-brawl-outside-quarantine-bubble-20200904-p55sff.html>

<https://thenewdaily.com.au/entertainment/celebrity/2020/09/09/tom-hanks-exempt-qld-quarantine/>

So notorious are such matters, Queensland’s restrictions are becoming the stock of national amusement e.g.: <https://www.abc.net.au/news/2020-09-09/covid-rules-allow-sex-parties-but-wedding-dances-banned/12637640>

Apparent arbitrariness in border closure arises from the 3 September statement by Queensland’s Chief Health Officer that the NSW border will reopen when there are two incubation periods of zero community transmission: <https://7news.com.au/lifestyle/health-wellbeing/queensland-gives-clearest-explanation-as-to-when-border-restrictions-will-be-eased-c-1288718>. The report claims this contradicts the Queensland Premier, inferring it is unclear who is making decisions in Queensland (and on what criteria) which may also entail misuse of power. The statement is inconsistent with:

. the ‘border’ with the ACT being closed after 29 days of zero community transmission there;

. the border with the ACT remains closed even though there are more than 60 days of zero community transmission there;

. the fact of ongoing community transmission in Queensland without concomitant ‘stay-home’ orders;

. exemptions of people from a State which has very substantial community transmission and a quarantine period of only 14 days;

. enforcement officials apparently not considering Covid transmission risks at the border to be so high as to wear masks or other protective equipment.

The provenance of the 28 days is likely the 25 August findings of the Federal Court in Palmer’s case (see Appendix 2). There the 28 days was suggested by experts as a duration beyond which the probability of undetected and un-isolated infection is negligible. However, there should be two caveats to this – it is valid only if:

. there is adequate testing for infection. Some States have very much higher rates of testing than others – for example on 7 September NSW conducted 12,494 tests (which is unusually low for it – it averages around 20,000), Queensland 7,660 tests and Western Australia 460 tests;

. there is no exogenous source of virus, including current cases, people in quarantine and people from other States. [↑](#endnote-ref-6)
7. Among the questions is: whether regulations fully conform with their ostensible purpose. Arising from this is controversy over the arrest, search of premises and charging of a Ballarat housewife for inciting a small protest against the Victoria lockdown. At issue is whether regulations are being used to silence debate <https://johnmenadue.com/freedom-and-protests-in-2020-australia/#more-51916>.

A more recent reported example of questions about purpose is the Melbourne curfew. The curfew appears to have been set by regulation (Direction) made by the Deputy Public Health Commander, an official of the Department of Health subordinate to the Chief Health Officer e.g.: <https://www.dhhs.vic.gov.au/sites/default/files/documents/202008/Stay%20at%20Home%20Directions%20%28Restricted%20Areas%29%20%28No%2014%29%20.pdf>.

The Direction, 27 August 2020, has the Deputy Commander:

*‘consider it necessary to eliminate or reduce the risk to public health – and reasonably necessary to protect public health – to give the following Directions pursuant to section 200 (1)(b) and (d) of the Public Health and Wellbeing Act 2008 (Vic) (PHW Act): ….*

*(1AF) A person must not leave their premises between 8.00pm and 5.00am……’*

 Section 200 (1)(b) and (d) of the Act allows the Chief Health Officer (or delegate) to:

 *(b)restrict the movement of any person or group of persons within the emergency area;*

 *(d)give any other direction that the authorised officer considers is reasonably necessary to protect public health.*

Under that Act, an emergency and emergency area are declarable by the Minister for the purposes of public health. That the emergency area in (b) relates to a serious health risk, reinforces that a Direction needs to be considered by the Chief Health Officer (or delegate) as being reasonably necessary for public health etc.

However, the Chief Health Officer reportedly said the curfew was not based on medical advice. Rather he implied it may have been a decision by the Premier, which made enforcement – policing - easier e.g. <https://www.news.com.au/lifestyle/health/health-problems/coronavirus-victoria-brett-sutton-says-he-did-not-recommend-curfew/news-story/43e246ebaf7e5a63286084209d0f0291>. Yet, shortly thereafter, according to reports the Police Commissioner ‘all but accused (him) of lying’ – which appears to be a gross exaggeration! <https://www.goldcoastbulletin.com.au/news/world/coronavirus-victoria-greg-hunt-says-melbourne-curfew-should-end-if-not-based-on-medical-advice/news-story/7be0b5a67fe58cec4136cfeeda9e1396>.

That report further confounded the ‘whodunnit’ question by citing the Premier:

*‘Mr Andrews again dodged questions over exactly who came up with the idea – but said he rejected the notion that “the only decisions the government can ever make about any matter are those that have been advised by the chief health officer”.*

*“The government reserves the right to make decisions to operationalise advice from the chief health officer,” he said.*

*“The notion that the government can’t do anything whatsoever unless the chief health officer provides it in detailed advice, that doesn’t make any sense.”*

Which also doesn’t make sense as the actual decision appears to have been made by the Chief Health Officer’s delegate – the public record and the law does not show a Government decision – which was confirmed by the Police Commissioner:

*“But the reality is we, from a Victoria Police perspective, enforce and support the directions that the CHO (Chief Health Officer) makes,” he said.*

*“We don’t do that until we see a signed and endorsed document from either the CHO himself or one of his deputies, and if it’s signed by his deputy it also has the imprimatur of the CHO, obviously, and we absolutely support all of those directions – this was one of those directions.”*

 At least one State Member of Parliament claimed there was no issue in this:

“*The state of emergency is done by the Minister Health and the state of disaster is overseen by the Minister Police so why would Sutton have anything to do with that (curfew).*”

To which the answer is: Professor Sutton’s delegate signed a 27 August instrument for the curfew i.e. he was responsible for it, as is set out in the Act, and as stated by the Police Commissioner.

The Premier also explained:

*“It’s consistent with the health advice These are decisions ultimately made by me, so the answer to the question (of why there is a curfew) is, I’ve made that decision.”*

Which may be true, but it is not what the Direction says and need is a somewhat higher standard than ‘consistent’. <https://www.adelaidenow.com.au/lifestyle/health/labor-mp-danielle-green-says-brett-sutton-comments-about-melbourne-curfew-arent-an-issue/news-story/f5dcf9bebe68dea7b70153efe332e77f>

This might be compared with the New Zealand challenge (note vii). The controversy is neatly summarised in the New Daily headline: Whose rules are they anyway? Confusion reigns over Victoria’s curfew. <https://thenewdaily.com.au/news/coronavirus/2020/09/11/confusion-victoria-curfew/?utm_source=Adestra&utm_medium=email&utm_campaign=Morning%20News%20-%2020200911> [↑](#endnote-ref-7)
8. <https://www.abc.net.au/news/2020-09-16/coronavirus-queensland-annastacia-palaszczuk-election-survey/12668196> [↑](#endnote-ref-8)
9. See: <https://www.thejadebeagle.com/covid---july-2020.html>.

The (subsequent) New Zealand case <https://www.courtsofnz.govt.nz/assets/cases/Borrowdale-v-D-G-of-Health-V_1.pdf> was a challenge to the ‘lock-down’ restrictions of March and April 2020. It is generally reported by SBS at <https://www.sbs.com.au/news/first-days-of-new-zealand-s-coronavirus-lockdown-were-unlawful-but-necessary-court-finds>. The case did not concern the reasonable necessity of the restrictions – the complainant accepted the restrictions as necessary, reasonable and proportionate. Of interest are:

. the findings the restrictions did not infringe New Zealand’s Bill of Rights;

. Cabinet discussions and documents were reviewed by the Court;

. New Zealand as a national government relying on international obligations including matters emanating from the World Health Organisation and the United Nations Human Right Committee.

In this case, only the Director General could lawfully make the restrictions (‘Level 4’). However, the Government announced them nine days before the Director General’s decision. It did this after considering health advice from the Director General (Dr Bloomfield). Of particular significance is the following from the judgement which may at first glance imply it would be appropriate for the Government to instruct the Director General:

*‘[207] Although we accept that the move to Level 4 would obviously need to be discussed by Cabinet due to its significant social and economic implications, the statement here is still a clear indicator that Level 4 decision-making was not thought to be Dr Bloomfield’s.’*

The above suggests the Government had a (false) view it, rather than the Director General, had relevant powers. If so, the Government may have thought it was instructing the Director General. However, the wording in the judgement appears to be particularly careful and implies the Cabinet discussion that was ‘obviously’ needed should not have been about whether the restrictions should be made, or whether the Director General should be instructed to make the restrictions. Rather it was or should have been about the consequences of such a decision by the Director General:

*‘[208] Consistent with that is the Prime Minister’s post-Cabinet press conference announcing the move to Level 4…. But there is no evidence that the decision about the Restrictive Measures had been made by Dr Bloomfield and was merely being conveyed by the Prime Minister with his agreement.’*

On such a reading, the question of Government instruction to the Director General never arose, because the Director General had told the Government what should be done and later did so with the Government’s decision-making concerning matters prior to and after – but not about – the lockdown:

*‘[215] It is clear to us that Dr Bloomfield’s advice was critical to the Government’s decision-making before and after Lockdown. He had advised Cabinet that Lockdown was required. He had the power under s 70(1)(f) to impose the Restrictive Measures, and he later exercised that power.’*  [↑](#endnote-ref-9)
10. <https://www.abc.net.au/news/2020-08-25/wa-loses-bid-for-fresh-trial-in-clive-palmer-hard-border-battle/12592524>

Enemy of the State comment: <https://www.watoday.com.au/national/western-australia/wa-premier-could-face-high-court-contempt-case-as-palmer-opens-yet-another-legal-front-20200826-p55pfl.html> and https://www.abc.net.au/news/2020-09-01/clive-palmer-defamation-claim-says-mark-mcgowan-brought-ridicule/12616826 [↑](#endnote-ref-10)
11. Mr Waterford put it: *‘constituencies will forgive (perhaps applaud) discrimination against other Australians, if they perceive themselves as being more safe as a result’*: <https://johnmenadue.com/war-defined-the-scope-of-emergency-powers-but-now-we-may-discriminate/> [↑](#endnote-ref-11)
12. *National agency for bushfires, cyber-attacks,* Sun Herald, September 6, 2020. [↑](#endnote-ref-12)
13. Stephanie Brenker of the Gilbert + Tobin Centre Of Public Law, University of NSW considered the Commonwealth’s Quarantine power in a May 2020 article concerning certain provisions of the BioSecurity Act (2015). Those provisions purported to enable Commonwealth officials to override State legislation – via an ‘Henry VIII’ clause (a clause which has Executive orders negating, for some time, other legislation): <https://auspublaw.org/2020/05/an-executive-grab-for-power-during-covid-19/>.

She noted the predecessor to the BioSecurity Act, the Quarantine Act (1908) was never legally tested, and the scope of the power remains uncertain. She cited [Reynolds](https://www.researchgate.net/publication/8152950_Quarantine_in_times_of_emergency_the_scope_of_s_51ix_of_the_Constitution) (2004) who considered the power in depth, to propose exercise of the power needs to establish: a

*“public health need, detention or isolation for a specific period on the basis that a person has or might have a particular disease”.*

She argued:

*‘restricting an individual to their place of residence squarely fits within this definition. Providing contact details so that officers can find at-risk individuals to quarantine may be considered incidental to detention and isolation.’*

That is, the Commonwealth has power to pass laws for – including those which enable its officers to make - lock-down and isolation orders of the type made by the States during the present pandemic. However, she suggested this does not enable the Commonwealth to make the full range of public health regulations:

*‘…requiring an individual to wear protective items, be decontaminated, undergo examinations and receive vaccinations or medication, appears to be more to do with sanitation and public health generally – matters regulated by the states …… Indeed, in a rare discussion of the quarantine power, Latham CJ held in obiter that the power*would not support a Commonwealth law requiring citizens of the states to submit to vaccination or immunisation ([Attorney-General (Vict) v The Commonwealth (“Pharmaceutical Benefits Case”)](http://www.austlii.edu.au/cgi-bin/download.cgi/cgi-bin/download.cgi/download/au/cases/cth/HCA/1945/30.pdf)’

She concluded:

*‘Under s 51 (ix) the Commonwealth Parliament has power to make laws with respect to quarantine….It can not only provide that money shall be spent upon quarantine, but it can devise and put into operation a whole compulsory system of quarantine under which duties can be imposed upon persons and penalties inflicted…’*

The most recent discussion of arrangements made under the Commonwealth’s Quarantine power is in the 14 August 2020 report of the Special Commission of Inquiry into the Ruby Princess <https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/publications/The-Special-Commission-of-Inquiry-into-the-Ruby-Princess-Listing-1628/Report-of-the-Special-Commission-of-Inquiry-into-the-Ruby-Princess.pdf>. Again, this turns to the BioSecurity Act (2015) which concerns diseases with potential to harm animals, plants, the environment or humans, including the economic consequences of the spread of disease. Administration of the Act is split between the Department of Agriculture, Water and Environment and the Department of Health. The former Department deals with most matters – biosecurity, including ship arrivals – and responsibility for these lies with its Secretary. The latter Department deals with human biosecurity and responsibility for that part of the Act lies with the Commonwealth’s Chief Medical Officer.

The Act allows for the Commonwealth enter into arrangements with States to further allow the Chief Medical Officer to appoint State officials as human biosecurity officers.

The overarching agreement with NSW was titled ‘Standing Funding Agreement’ – I have raised issues about funding agreements previously. In turn, this covered another “*Agreement with the States and Territories for the provision of Human Quarantine Services.*” The latter Agreement requires States to ensure appointment of Chief and other Human Biosecurity officers. The Chiefs’ activities are subject to direction by the Commonwealth’s Chief Medical Officer.

Services to be provided include: ∙ screening travellers at Australia’s international border for listed human diseases; managing the treatment of travellers at Australia’s international border for such diseases; medical advice to Biosecurity Officers (Department of Agriculture etc) assessing ill travellers at Australia’s international points of entry; integration into State public health systems of particular travellers; control orders on individuals who may have a listed human disease; advice to Biosecurity Officers concerning measures to be taken to treat a vessel etc . suspected to have a communicable disease onboard; a conduit between Commonwealth and State on human biosecurity matters; support assessment of travellers who are at higher risk of developing a listed human disease; ensure that response procedures to health emergencies are documented in the [seaport] emergency planning.

That is, the services represent a reasonably comprehensive coverage of quarantine matters, and the agreement ‘contracts-out’ those matters to the States.

The Commission noted the latter Agreement’s recital of Commonwealth Constitutional responsibility for quarantine and that the Commonwealth’s objective in relation to human biosecurity matters. It further noted a recital: of responsibility of the Commonwealth Department of Health for administering the human health aspects of the Biosecurity Act, but that the Department of Health does not have officials at Australia’s First Points of Entry to perform human biosecurity services, and that *“These activities are performed by [Department of Agriculture etc. Biosecurity Officers] supported by State and Territory health departments and the Department of Health*.”

The Commission identified communications and competency issues to be among the causes of the Ruby Princess debacle – including communications between and within Commonwealth agencies and between those agencies and States. However, it regarded the Commonwealth-State arrangements as ‘workable’ – ‘faint praise’ – and the delegations were subject to some ‘not major’ criticism. The principal causes of the debacle were within State agencies:

*It was the State’s Expert Panel that made the operative decision, relayed accurately (if by a clumsy means) to the …. Biosecurity Officer who granted pratique’.* (pratique being allowing disembarkation of passengers.

Media speculation about the culpability of the Australian Border Force was dismissed:

*‘the Australian Border Force (ABF), despite its portentous title, has no relevant responsibility for the processes by which, by reference to health risks to the Australian community, passengers were permitted to disembark from the Ruby Princess, as they did, on 19 March 2020. The absence of any such duty no doubt explains why the ABF is not granted specific powers in relation to pratique, and why there are no appropriate postings of medical practitioners or epidemiologists in the ABF ranks.*’

For purposes here, while the State may be the proximate cause of the Ruby Princess debacle, the responsibility of the Commonwealth is not changed by contracting-out quarantine functions to the State. To the extent failure of those functions contributed to the fiasco, the Commonwealth should not escape responsibility – it has a duty to ensure the functions are properly conducted. [↑](#endnote-ref-13)
14. <https://johnmenadue.com/government-must-stop-militarising-our-biggest-challenges/> [↑](#endnote-ref-14)
15. From the Report <https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/publications/The-Special-Commission-of-Inquiry-into-the-Ruby-Princess-Listing-1628/Report-of-the-Special-Commission-of-Inquiry-into-the-Ruby-Princess.pdf>:

*‘the assertion on the Commonwealth’s part of an immunity from any compulsory process of a State’s Special Commission of Inquiry. A Summons to a Commonwealth officer to attend and give evidence about the grant of pratique for the Ruby Princess was met with steps towards proceedings in the High Court of Australia. Quite how this met the Prime Minister’s early assurance of full co-operation with the Commission escapes me.*

*…..a determination never to concede, apparently on Constitutional grounds, the power of a State Parliament to compel evidence to be provided to a State executive inquiry (such as a Royal Commission or a Special Commission of Inquiry) by the Commonwealth or any of its officers, agencies or authorities. 1.55 This is also not the place to set out arguments for and against this Commonwealth position….*

*I continue to believe that this difference about something as fundamental as a State’s legislative power to bind the Commonwealth to assist in a State inquiry just as every other legal person in Australia would be obliged to do, disfigures the area of co-operative federalism’.* [↑](#endnote-ref-15)
16. <https://johnmenadue.com/australian-values-what-are-they-and-what-has-covid-done-to-them/> [↑](#endnote-ref-16)
17. <https://www.environment.gov.au/heritage/about/world/management-australias-world-heritage-listed> [↑](#endnote-ref-17)
18. See note ix (above). [↑](#endnote-ref-18)
19. From the Royal Commission’s Interim Observations:

*‘In Pape v Commissioner of Taxation (Pape), Gummow, Crennan and Bell JJ relevantly said (emphasis added): 33 The Executive Government is the arm of government capable of and empowered to respond to a crisis be it war, natural disaster or a financial crisis on the scale here. This power has its roots in the executive power exercised in the United Kingdom up to the time of the adoption of the Constitution but in form today in Australia it is a power to act on behalf of the federal polity. … The present is an example of the engagement by the Executive Government in activities. This aspect of the non-statutory executive power (sometimes referred to as the ‘implied nationhood power’) is not unlimited – and it can only be invoked in a manner consistent with Australia’s federal structure.34 Accordingly, ‘[the] existence of powers deduced from the establishment and nature of the Commonwealth as a polity is clearest where Commonwealth executive action involves no real competition with the States’.* [↑](#endnote-ref-19)
20. See for example: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3035654> [↑](#endnote-ref-20)
21. Palmer v State of Western Australia (No 4) [2020] FCA 1221 [↑](#endnote-ref-21)
22. <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-22)
23. <https://theconversation.com/federal-court-finds-border-closures-safest-way-to-protect-public-health-in-clive-palmer-case-145038> [↑](#endnote-ref-23)
24. Crossroads outbreak was initiated 3 July: <https://www.health.nsw.gov.au/news/Pages/20200710_01.aspx>

Six days later, on 9 July Western Australia announced ‘tougher’ border measures on arrivals from Victoria. <https://www.mediastatements.wa.gov.au/Pages/McGowan/2020/07/Tougher-regime-on-Victorian-arrivals-into-WA.aspx>: *‘The number of exemptions will be reduced significantly, meaning only specific essential workers, transport and freight workers and those persons approved by the State Emergency Coordinator, on the advice of the Chief Health Officer, will be permitted to enter WA….In addition, effective from today, everyone who is permitted to enter WA, who has been in Victoria for the previous 14 days, will be served with a notice on arrival compelling them to take a COVID-19 test on Day 11 of their time in WA or at any point when symptoms develop.’* That is, the initial test to identify freight personnel infection would be 20 July. [↑](#endnote-ref-24)
25. Later it was reported the Australian Health Protection Principal Committee proposed a *“COVID-Free Zone as an area that has no locally acquired cases that pose a risk to the community in the previous 28 days.*”. implying other areas would be considered ‘hotspots. <https://7news.com.au/travel/coronavirus/health-panel-backs-qld-hotspot-definition-c-1320383> The report added: *‘This is similar to the current Queensland model, which has resulted in a hard border closure.*

*‘It means NSW will continue to be classified as a hotspot and travel into Queensland will not be permitted unless an exemption is granted.’* The Queensland Health Minister chimed in: *‘Mr Miles said the criteria used by Queensland authorities in deciding hotspots and restricted locations was that of the Australian Health Protection Principal Committee (AHPPC). He said the Government was considering health advice on whether to allow those living in the ACT to enter Queensland’.* Those inferences are misleading, false and self-contradictory. All cases – whether locally or not – pose a risk because of the potential of quarantine failure, as demonstrated in Victoria and Queensland. Western Australia may meet the definition of a Covid-Free Zone yet its community still faces risks. Queensland has not used such criteria for its border closures, demonstrated by the case of northern NSW. The Minister’s statement about the ACT – which has long been a Covid-Free Zone highlights the falsity of his claim.

The Sydney Morning Herald, Sept 17, carried a different, draft, formulation: a *‘Covid-community-transmission zone – akin to a hotspot – would be defined as an area where the virus is spreading, cases were locally acquired from an unknown source and a “proportion” of locally acquired cases had no known source in the previous 28 days. The risk of exportation of disease by individuals in this zone who travel to other areas is high’.* That formulation is internally inconsistent – demonstrated by the situation of NSW which would be considered a transmission zone on the first sentence, but not on the second; the finding of the Federal Court being the probability of transmission to another zone is moderate.

Neither report of the proposal gets to the essential issue: how an area is to be defined. To illustrate: neither Australia nor Queensland is a Covid-Free Zone, although parts of these areas are.

 [↑](#endnote-ref-25)
26. <https://www.thejadebeagle.com/covid---july-2020.html> [↑](#endnote-ref-26)