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# Will Democratic Freedoms and Human Rights Survive a Second Pandemic in Australia? A Case Study of the Legal Foundations and Mechanisms of Implementation of Australia's COVID-19 Response

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*This article is a case study of the laws and regulations at both the Commonwealth and State level that were relied upon to uphold Australia's COVID-19 response, and the behavioural mechanisms used by governments in Australia to implement these regulatory policies. The question will be posed now that borders have been re-opened and normality restored in a "we will have to live with COVID-19" environment, whether the draconian restrictions on democratic freedoms and human rights could reoccur unless Australia changes the manner in which these laws and regulations are imposed by governments and interpreted by the courts, especially given the High Court's decision in *Palmer v Western Australia*. This question is particularly important given the announcement on 21 September 2023 that the Commonwealth Government was setting up a COVID-19 Response Inquiry to identify lessons learned to improve Australia's preparedness for future pandemics.*

## I. INTRODUCTION

*Victorians cheering on the Andrews government is a case of Stockholm Syndrome.*<sup>1</sup>

The subject matter of this article is the legal and economic history of COVID-19<sup>2</sup> in Australia since January 2020, with an emphasis on the impact of Australia's federated system of government and the different agendas of the Federal Government compared to the States and Territories. A major theme to be explored is the critical governmental decisions that have been made in the previous three years which dramatically altered, with initial widespread public support, Australia's way of life. These decisions placed extraordinary restrictions on Australians in terms of their freedom of movement, ability to open their businesses and manage their own health. As will be discussed in Part II, such restrictions are potentially in conflict with s 92 of the Australian Constitution which states that "trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free".

However, judged by public opinion polls and the success of incumbent State and Territory governments in securing re-election in 2020 and 2021 having introduced lockdowns and closed internal borders, a majority of the public had been supportive of severe measures to restrict freedom of movement both within and between jurisdictional boundaries.<sup>3</sup> No serious thought was given to the mental and physical

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<sup>1</sup> Paul Murray on Sky News (3 August 2020). Stockholm syndrome describes the psychological condition of a victim who identifies with and empathises with their captor or abuser and their goals.

<sup>2</sup> COVID-19 or SARS-CoV-2 is a coronavirus that causes respiratory infections.

<sup>3</sup> The Queensland government was returned to office on 31 October 2020 and increased its number of seats from 48 to 52; the Western Australian government was returned on 13 March 2021 and increased its seats from 41 to 53; and the Northern Territory



side effects of these restrictions, as governments believed the only option was to rush headlong into lockdowns in the absence of a vaccine, along with the dire warnings from the medical profession as to the dangers of the virus spreading into the most vulnerable groups in the community.

In March and early April 2020, a fearful Australian population was clamouring for something to be done in the face of the COVID-19 threat. This article provides an account for the record of the legal cover under which Australia's COVID-19 policies were enacted and enforced at both the State and the Commonwealth level, as well as a description of the tools used – with a focus on how initially a series of voluntary “nudges” designed to encourage people to adopt certain behaviours became a mandatory “push in the back” regarding vaccinations if people wanted to keep to their jobs or avoid complete social isolation.

As will be seen, behavioural mechanisms used by Australian governments to implement their COVID-19 policies included the use of non-mandatory devices (nudges) such as the wearing of masks or the maintenance of social distancing and mandatory devices like “no-vax no-travel” rules. The nudge, defined as a voluntary and not coerced response, essentially served during this time as a “foot-in-the door” marketing technique operating on the government’s behalf, being followed up later with heavier demands such as vaccine mandates than were made initially. This sort of “brief creep” or escalation in demands is exactly what the classic “foot-in-the-door” technique foresees, whereas the classic nudge does not foresee this, and indeed it stands distinct from any manipulation that involves the significant alteration of economic incentives. In other words, a nudge relies on people recognising that a voluntary change in behaviour is in their own best interests, whereas a mandatory device relies on coercion and economic incentives or penalties.

Following the publication in 2008 of the watershed book entitled *Nudge* by Thaler and Sunstein,<sup>4</sup> where the authors define a nudge as “any aspect of the choice architecture that alters people’s behaviour in a predictable way without forbidding any options or significantly changing their economic incentives”,<sup>5</sup> governments have adopted policies that actively applied nudges to targeted sections of the population. As Dudas and Szanto point out numerous studies have investigated the effectiveness of nudges and have inter alia “demonstrated that nudges can be effective in promoting healthy behaviour, environmentally conscious efforts and encouraging retirement savings”,<sup>6</sup> but importantly the authors continue by stressing that under a pandemic “the application of the libertarian-paternalist approach needs to be re-evaluated”.<sup>7</sup>

Such was the pressure on politicians in Australia to take drastic and welfare-destroying action with no strings attached, it would be an error to view the imposition of lockdowns and closed borders as part of a bargain by the public with politicians who were then contractually obligated to produce government financial support to compensate for the lockdowns and closed borders. Politically, the subsequent provision of wide-ranging government financial support proved to be very popular,<sup>8</sup> which was funded by federal budget deficits on an unparalleled scale,<sup>9</sup> involving the expenditure of billions of dollars on

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government was returned on 22 August 2020 with a reduced number of seats (18 down to 14 in the 25 seat Legislative Assembly) which largely reflected a recovery by the Country Liberal Party after its landslide loss in 2016.

<sup>4</sup> Richard Thaler and Cass Sunstein, *Nudge* (Yale University Press, 2008).

<sup>5</sup> Thaler and Sunstein, n 4, 6.

<sup>6</sup> Levente Dudas and Richard Szanto, “Nudging in the Time of Coronavirus? Comparing Public Support for Soft and Hard Preventive Measures, Highlighting the Role of Risk Perception and Experience” (2021) 16(8) *PLoS One* 1 <<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0256241>>.

<sup>7</sup> Dudas and Szanto, n 6, 1.

<sup>8</sup> See *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (Cth). Section 3 sets out the objects of the Act: “The object of this Act is to provide financial support directly or indirectly to entities that are directly or indirectly affected by the Coronavirus known as COVID-19.”

<sup>9</sup> The Federal Budget Papers for 2021–2022 under the heading Economic and fiscal outlook state the federal government responded “to the once-in-a-century pandemic with \$291 billion in economic support”. <[https://archive.budget.gov.au/2021-22/download/glossy\\_overview.pdf](https://archive.budget.gov.au/2021-22/download/glossy_overview.pdf)>.

JobKeeper<sup>10</sup> and JobSeeker.<sup>11</sup> In tandem with unprecedented restrictions on freedoms in Australia in 2020 and 2021,<sup>12</sup> came a complete reversal of long-accepted federal fiscal restraint based on the mantra of a once in a century pandemic.

Essentially, politicians were engaging in a political calculus, with a weather eye on privately commissioned opinion polls, that the self-interest of most Australians, who were panicked by fears for their own safety, would override any humanitarian concerns they may have entertained for the 36,000 Australians stranded overseas following the Federal Government's decision to adopt a "fortress Australia" stance in March 2020.<sup>13</sup> Alternatively, such self-interest would mitigate anger at the damaging restrictions on movement within Australia such as the Premier of Queensland's oft repeated justification for closing its border with New South Wales of "keeping Queenslanders safe".<sup>14</sup> The argument being put by politicians was that in "trying to preserve the health and safety of the people" it was necessary to introduce significant restrictions on the people.

Nudge theory is based on voluntary not coerced responses which limits its usefulness as a predictive tool of behaviour in a pandemic. For example, Australians were initially told that once 80% of the population had been double vaccinated, then herd immunity would have been achieved and restrictions could be lifted. However, not only was the 80% figure lifted to 90% and expanded to include children,<sup>15</sup> but also certain categories of unvaccinated employees such as police officers, teachers and health workers faced losing their jobs, as well as more generally the unvaccinated being socially isolated in some jurisdictions such as Queensland.<sup>16</sup> In an environment limited to nudges, people who are sceptical of the efficacy of the vaccines are still able to personally assume the risk themselves, whereas in an environment that severely discriminates against unvaccinated people there is no realistic choice but to become double vaccinated.

Inevitably, nudge theory was soon elbowed aside when governments were not satisfied that the 80% vaccination rate was sufficient and the unvaccinated represented a significant risk to public health, leading to the social isolation of the unvaccinated and the dismissal of certain categories of unvaccinated

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<sup>10</sup> The JobKeeper payment was a wage subsidy paid by the federal government to eligible businesses impacted by the coronavirus, which allowed employers to continue to pay employees irrespective of whether they were able to work or not.

<sup>11</sup> The JobSeeker payment replaced the Newstart Allowance in March 2020 and provided financial assistance to those aged between 22 and Age Pension age who were seeking employment.

<sup>12</sup> The Victorian government locked down Melbourne for 267 days or 45% of the time between March 2020 and October 2021. See Calla Wahlquist, "How Melbourne's 'Short, Sharp' Covid Lockdowns Became the Longest in the World", *The Guardian* (Sydney), 2 October 2021 <<https://www.theguardian.com/australia-news/2021/oct/02/how-melbournes-short-sharp-covid-lockdowns-became-the-longest-in-the-world>>.

<sup>13</sup> "Stranded Australians Have Filed Legal Action with the UN against the Morrison Government", *SBS News*, 31 March 2021 <<https://www.sbs.com.au/news/article/stranded-australians-have-filed-legal-action-with-the-un-against-the-morrison-government/pab3nzcta>>. The article states a group of stranded Australians have declared that the Morrison government "arbitrarily breached their right to return to the land of their birth or citizenship", noting they were willing to comply with the public health measures required of them, including a 14-day quarantine period. The group said the caps on incoming flights prevented them from returning home.

<sup>14</sup> Felicity Caldwell, "Word of Warning: How Premier Went from 'Keeping Queenslanders Safe' to 'protect yourself'", *Brisbane Times*, 22 October 2021 <<https://www.brisbanetimes.com.au/national/queensland/word-of-warning-how-premier-went-from-keeping-queenslanders-safe-to-protect-yourself-20211019-p591ah.html>>.

<sup>15</sup> Tony Blakely and Vijaya Sundararajan, "80% Vaccination Won't Get Us Herd Immunity, But It Could Mean Safely Opening International Borders", *The Conversation*, 4 July 2021 <<https://theconversation.com/80-vaccination-wont-get-us-herd-immunity-but-it-could-mean-safely-opening-international-borders-162863>>.

<sup>16</sup> Zoe Zaczek, "Unvaccinated Queenslanders Will Be Unable to Attend Restaurants, Pubs, Stadiums from December 17, 2021 or 80 Per Cent Double-dose", *Sky News*, 9 November 2021 <<https://www.skynews.com.au/australia-news/coronavirus/unvaccinated-queenslanders-will-be-unable-to-attend-restaurants-pubs-stadiums-from-december-17-or-80-per-cent-doubledose/news-story/a39a361cc308efd0ca3ed051f893f901>>. "Queenslanders who have not received two doses of a coronavirus vaccine will not be able to attend hospitality and entertainment venues when the Sunshine State eases borders next month."

public sector employees,<sup>17</sup> despite the stigmatising of the unvaccinated being unjustified.<sup>18</sup> An example of the typical governmental line of argument can be seen in the one made by Kenneth Pettit SC on behalf of the Western Australian Government in seeking to oppose an application from Senior Constable Ben Falconer for judicial review of disciplinary proceedings against him, which could have led to his dismissal by the WA Police Commissioner for remaining unvaccinated.<sup>19</sup> Mr Pettit SC argued that some of the advantages associated with vaccination included averting the risks of mortality, preventing hospitals from being overwhelmed, prevention of loss of jobs, avoidance of psychological impacts from lockdowns, and mandated vaccinations were not disproportionate to the risk faced by the community.<sup>20</sup>

This article will examine whether such a line of argument provides a guide to likely government responses in the event of another serious pandemic in the future. The question to be asked is whether if the ultimate “go to” position in the future will be a mandatory “push in the back”, whether democratic freedoms and human rights can survive a second pandemic in Australia?

## II. CLOSED BORDERS AND POWER TO GIVE DIRECTIONS

*A nation which once prided itself on its laissez faire approach to life and the friendly, easy-going nature of its population lay besmirched by a descent into totalitarianism.*<sup>21</sup>

On 20 March 2020,<sup>22</sup> Australia closed its borders to all non-citizens and non-residents, the justification for which was slowing the spread of coronavirus “because around 80 per cent of coronavirus cases in Australia are people who caught the virus overseas before entering Australia, or people who have had a direct contact with someone who has returned from overseas”.<sup>23</sup> Almost immediately, the States and Territories followed suit and began closing their borders with each other in a bid to slow the spread of the coronavirus.

### A. Western Australia

On 5 April 2020, the Western Australian Government introduced a hard border between Western Australia and the rest of the country by virtue of the *Quarantine (Closing the Border) Directions* (WA) which

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<sup>17</sup> For example, both the New South Wales and Victorian governments announced that teachers would be required to be fully vaccinated or have their employment legally terminated. See, as an example, the New South Wales Vaccination requirements for workers. NSW Government, *Keeping Workers Safe* <<https://www.nsw.gov.au/covid-19/vaccination/requirements-for-workers>>.

<sup>18</sup> Günter Kampf, “COVID-19: Stigmatising the Unvaccinated Is Not Justified” (2021) 398 *The Lancet* 1871, 1871 <[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(21\)02243-1/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(21)02243-1/fulltext)>: “People who are vaccinated have a lower risk of severe disease but are still a relevant part of the pandemic. It is therefore wrong and dangerous to speak of a pandemic of the unvaccinated.”

<sup>19</sup> For the outcome of the application for judicial review, see *Falconer v Commissioner of Police (WA) (No 2)* [2022] WASC 2, where Allanson J allowed some of the five grounds of review of the Employer Direction issued by the Commissioner of Police to go to trial. See also *Falconer v Chief Health Officer (No 3)* [2022] WASC 270. On 12 November 2021, Directions were published under the *Public Health Act 2016* (WA) which prohibited any Western Australian Police Force worker from entering or remaining at any Western Australian Police facility unless they were vaccinated against COVID-19. The Applicant challenged the validity of the Directions. The Applicant sought declarations that the Directions were beyond power as legally irrational. The application was dismissed because the Court concluded that the Directions were directly related to the identified risk being the spread of COVID-19 within the community.

<sup>20</sup> David Weber, “WA Police Officer Ben Falconer Fights to Keep Job over COVID-19 Vaccination Mandate”, *ABC News*, 23 December 2021 <<https://www.abc.net.au/news/2021-12-23/wa-police-officer-fights-to-keep-job-over-covid-vaccination/100722202>>.

<sup>21</sup> John Stapleton, *Australia Breaks Apart* (A Sense of Place Publishing, 2023) Back Cover.

<sup>22</sup> On 18 March 2020, the Governor-General declared a “human bio-security emergency” under *Biosecurity Act 2015* (Cth) s 477(1), on the advice of the Federal Health Minister. The declaration enlivened the emergency powers of the Federal Health Minister, who could then determine “any requirement” that the Minister was satisfied was “necessary”, among other things to “prevent or control” the entry, emergence, establishment or spread of the listed human disease under *Biosecurity Act 2015* (Cth) s 477(1)(a). See Rosalind Croucher, “Executive Discretion in a Time of COVID-19 – Promoting, Protecting and Fulfilling Human Rights in the Contemporary Public Health Context” (Speech delivered at the 11th Austin Asche Oration in Law and Governance, Australian Academy of Law and Charles Darwin University, 17 November 2022).

<sup>23</sup> Prime Minister of Australia, “Border Restrictions” (Media Release, 19 March 2020) <[https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/7250182/upload\\_binary/7250182.PDF;fileType=application%2Fpdf#search=%22media/pressrel/7250182%22](https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/7250182/upload_binary/7250182.PDF;fileType=application%2Fpdf#search=%22media/pressrel/7250182%22)>.

were issued by the State Emergency Coordinator pursuant to ss 61, 67, 70 and 72A of the *Emergency Management Act 2005* (WA). In order to provide legal backing for the hard border, the Western Australian Government passed the *Emergency Management Amendment (COVID-19 Response) Act 2020* (WA). The key amendment was the addition of s 67(d) which provides that an authorised officer may “direct that any road, access route or area of water in or leading to the emergency area be closed”. The Minister for Emergency Services had previously declared the whole of Western Australia to be an emergency area pursuant to s 56(1) of the *Emergency Management Act 2005* (WA).<sup>24</sup>

For present purposes, other amendments that have severely impacted the freedoms of individuals include an amendment to s 70(1) which provides that relevant officers are able to direct a class of person and not just “any person”; s 70(3) which expands the period in which a class of person can be directed to remain in a specified area and/or remain quarantined beyond 24 hours to an unspecified period; s 70A which allows for the electronic monitoring of persons in quarantine; the insertion of s 72A(2) which allows an authorised officer to take “or direct a person or a class of person to take, any action that the officer considers is reasonably necessary to prevent, control or abate risks associated with the emergency”; and s 72A(3) which allows a relevant officer to direct a person to provide certain types of information.

It can be seen that s 72A(2) above is drawn in very wide terms and the relevant test is both subjective (the officer considers) and objective (reasonably necessary). However, the legal challenge to the *Emergency Management Act 2005* (WA) as amended was not to s 72A(2), but to s 67 which is the section most clearly directed to border closures.

### 1. *Palmer v Western Australia*

In *Palmer v Western Australia*,<sup>25</sup> the plaintiff commenced proceedings in the original jurisdiction of the High Court seeking a declaration that “either the authorising Act and/or the Directions are invalid, either wholly or in part ... by reason of s 92 of the Constitution”.<sup>26</sup> On account of a lack of agreement “between the parties as to the facts necessary to determine the defendants’ claim of the reasonable need for and efficacy of the measures contained in the Directions”,<sup>27</sup> the High Court remitted the issue to the Federal Court of Australia where Rangiah J made findings of fact.

At this point it is important to stress that Rangiah J confined his fact finding to public health risks posed directly by COVID-19 and explicitly excluded other public health risks or economic or social risks,<sup>28</sup> which followed from the High Court’s direction for the fact-finding exercise to focus on the need for and efficacy of the border restrictions. However, it is totally unclear how Rangiah J took the foreseeable mental health costs of lockdowns into consideration, or how the health costs of cancers, diabetes, dementia, heart malfunction and every other type of human malady or injury for which treatment or prevention was impacted due to COVID-19 restrictions were taken into account by Rangiah J.<sup>29</sup> The

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<sup>24</sup> Another example of the manner in which an emergency was declared can be seen in Victoria through the use of the *Public Health and Wellbeing Act 2008* (Vic), where under s 198(1) “The Minister may, on the advice of the Chief Health Officer and after consultation with the Minister and the Emergency Management Commissioner under the *Emergency Management Act 2013*, declare a state of emergency arising out of any circumstances causing a serious risk to public health”. Once a state of emergency exists under s 198 and under s 199(1)(b) the Chief Health Officer believes that it is reasonably necessary to grant an authorisation under this section to eliminate or reduce a serious risk to public health, then under s 199(2) the Chief Health Officer may, for the purpose of eliminating or reducing the serious risk to public health, authorise the exercise of certain powers. These broad powers allowed the Chief Medical Officer to do whatever is necessary to eliminate or reduce a serious risk to public health from COVID-19 under ss 199 and 200.

<sup>25</sup> *Palmer v Western Australia* (2021) 272 CLR 505.

<sup>26</sup> *Palmer v Western Australia* (2021) 272 CLR 505, [12] (Kiefel CJ and Keane J).

<sup>27</sup> *Palmer v Western Australia* (2021) 272 CLR 505, [15] (Kiefel CJ and Keane J).

<sup>28</sup> *Palmer v Western Australia (No 4)* [2020] FCA 1221, [23] (Rangiah J).

<sup>29</sup> “Since early 2020, a range of restrictions have been introduced at various times to prevent and reduce the spread of COVID-19 and maintain adequate capacity of the healthcare system to deal with the pandemic. Some of these restrictions were applied nationally, while others were applied on a regional or hospital level as local areas responded to outbreaks. This range of measures impacted on the number of people seeking hospital care, including to emergency departments and being admitted for elective surgery.” Australian Institute of Health and Welfare, *What Impact Has COVID-19 Had on Admitted Patient Activity* <<https://www.aihw.gov.au/reports-data/myhospitals/intersection/activity/apc>>.

same applies to the absence of deliberation as to the physical health decline that would predictably occur when people are confined to their homes and only allowed to exercise for short periods.

It would appear that the standard of argument required for a judge to find in favour of a COVID-19 restriction in this period was woefully low. There seems to have been no consideration of proportionality, no consideration of the competing costs and benefits of restrictions, and a comically small effect of the restriction (virtually none) required for its approval.

In addition, the parties agreed “that the respondents’ defence must be considered by reference to whether the border restrictions are currently justified, not whether they were justified when they were introduced”.<sup>30</sup> Arguably, the case would be decided differently today with over 90% of the Australian adult population now double vaccinated against COVID-19.<sup>31</sup> The respondents’ defence that the border restrictions were justified was summarised by Rangiah J in these terms: (1) they were reasonably necessary to protect the Western Australian community against the health risks posed by COVID-19; (2) they were reasonably appropriate and adapted for that purpose; and (3) there were no other equally effective measures available to achieve that purpose.<sup>32</sup>

With regard to the latter, which was the focus of the High Court’s remit to the Federal Court, Rangiah J accepted the argument that there were no other more effective alternative measures, as Currie has pointed out:

This conclusion rested heavily on a “vicariance” [the geographical separation of a population] view of spread prevention, reflected in closure of international borders, and the idea that when operating in uncertainty overreaction is preferable to underreaction.<sup>33</sup>

More specifically, Rangiah J concluded that mandatory hotel quarantining, a suite of screening and testing measures, and a “hotspot” regime were all inferior to the hard border restrictions.

- If the current border restrictions were replaced by mandatory hotel quarantining for all entrants to Western Australia for 14 days, Western Australia could not safely manage the number of people in hotel quarantine.
- If the border restrictions were replaced by a suite of measures including exit and entry screening, mandatory wearing of face masks on aeroplanes, PCR testing on the second and twelfth days after entry and mandatory wearing of face masks for fourteen days after entry, they would be less effective than the border restrictions in preventing the importation of COVID-19.
- If the border restrictions were replaced by that suite of measures plus a “hotspot” regime, involving either quarantining or banning persons entering from designated hotspots, they would be less effective than the border measures in preventing the importation of COVID-19.
- In view of the uncertainties involved in determining the probability that COVID-19 would be imported into Western Australia from elsewhere in Australia, and the potentially serious consequences if it were imported, a precautionary approach should be taken to decision-making about the measures required for the protection of the community.<sup>34</sup>

Rangiah J’s endorsement of the precautionary approach in an environment of uncertainty was inevitable given the sole focus was on public health risks posed directly by COVID-19 prior to the availability of a vaccine, to the exclusion of any consideration of other public health risks or economic or social risks. Essentially, there was no cost-benefit analysis undertaken. As Currie has observed, “considerations of the effectiveness of alternative measures will depend on a wide range of factors, including socioeconomic considerations, compliance with control measures, enforcement, urban layout, industries and specific

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<sup>30</sup> *Palmer v Western Australia (No 4)* [2020] FCA 1221, [25] (Rangiah J).

<sup>31</sup> “There is no known vaccine, and no treatment presently available to mitigate the risks of severe medical outcomes or mortality for a person who contracts COVID-19”: *Palmer v Western Australia* (2021) 272 CLR 505, [18] (Kiefel CJ and Keane J).

<sup>32</sup> *Palmer v Western Australia (No 4)* [2020] FCA 1221, [11] (Rangiah J).

<sup>33</sup> Scott Currie, “What Is the Court to Do with All This Data? Empirical Evidence, COVID-19 and the Law” (2021) 31 JJA 26, 37, citing in support *Palmer v Western Australia (No 4)* [2020] FCA 1221, [151]–[171], [308]–[329] (Rangiah J).

<sup>34</sup> *Palmer v Western Australia (No 4)* [2020] FCA 1221, [366] (Rangiah J).

cultural behaviours”.<sup>35</sup> Rangiah J rejected Professor Collignon’s evidence, given as an expert witness for Mr Palmer, that factors favouring “uncontrolled transmission have much more to do with lack of physical distancing, crowded indoor venues, people going to work or visiting when they have respiratory symptoms, delays in testing, isolation and quarantining than closure of State borders”.<sup>36</sup>

Effectively, Rangiah J equated the danger of COVID-19 with high-risk pathogen outbreaks such as Ebola, Avian Influenza, Pandemic H1N1 Influenza and Lassa.<sup>37</sup> This appears to be a fair conclusion of his Honour’s view of the seriousness of COVID-19 given that Australians have not suffered such restrictions to their freedoms as those imposed under the COVID-19 pandemic since the World War II.<sup>38</sup> As the High Court noted, Rangiah J found that “[i]n a worst-case scenario, the health consequences could be ‘catastrophic’”.<sup>39</sup> This was a critical and arguably unjustified step for Rangiah J to take given, for example, that Ebola has a fatality rate of 90%<sup>40</sup> and is one of the world’s most virulent diseases whereas the recovery rate for COVID-19 is over 98%.<sup>41</sup>

Given Rangiah J’s finding of facts, it was virtually certain that, in the absence of a vaccine, the High Court would find that the Border Directions were reasonably appropriate and adapted for the purpose of protecting the Western Australian community against the health risks posed by COVID-19.

[80] These findings leave little room for debate about effective alternatives. They provide no warrant for reading the power to prohibit entry into Western Australia during a pandemic down to accommodate some undefined level of risk. Accepting that s 67 [of the *Emergency Management Act 2005* (WA)] must accommodate a requirement that it be exercised proportionately, the defendants’ submission that there is no effective alternative to a general restriction on entry must be accepted.

[81] ... It must be accepted that the restrictions are severe but it cannot be denied that the importance of the protection of health and life amply justifies the severity of the measures.<sup>42</sup>

## 2. Critique of *Palmer v Western Australia*

The High Court’s ruling in favour of Western Australia’s hard border drew considerable criticism.<sup>43</sup> Professor Gray attacked the decision on two grounds. First, s 92 expressly envisages a unified, connected nation, and second, there were more reasonable ways than a hard border to protect West Australians from COVID-19, such as a 14-day quarantine period and a COVID-19 test prior to crossing the border.<sup>44</sup> Professor Zimmermann observed that “Sir Henry Parkes, would be totally appalled to see the Constitution he helped develop being so completely distorted”,<sup>45</sup> going on to point out that Quick and Garran

<sup>35</sup> Currie, n 33, citing in support *Palmer v Western Australia (No 4)* [2020] FCA 1221, [132], [135] (Rangiah J).

<sup>36</sup> *Palmer v Western Australia (No 4)* [2020] FCA 1221, [144] (Rangiah J).

<sup>37</sup> *Palmer v Western Australia (No 4)* [2020] FCA 1221, [49] (Rangiah J), where his Honour sets out Associate Professor Lokuge’s front-line epidemiological experience, which in turn his Honour uses in part to justify his preference for Associate Professor Lokuge’s evidence given as an expert witness for Western Australia.

<sup>38</sup> See *National Security Act 1939* (Cth).

<sup>39</sup> *Palmer v Western Australia* (2021) 272 CLR 505, [21] (Kiefel CJ and Keane J).

<sup>40</sup> See New South Wales Health Fact Sheet, *Ebola Virus Disease (EVD)* <[https://www.health.nsw.gov.au/Infectious/factsheets/Pages/ebola-virus-disease.aspx#:~:text=Ebola%20virus%20disease%20\(formerly%20known,of%20infected%20animals%20or%20people](https://www.health.nsw.gov.au/Infectious/factsheets/Pages/ebola-virus-disease.aspx#:~:text=Ebola%20virus%20disease%20(formerly%20known,of%20infected%20animals%20or%20people)>.

<sup>41</sup> See Alexandra Benisek, *Coronavirus Recovery* <<https://www.webmd.com/covid/covid-recovery-overview>>.

<sup>42</sup> *Palmer v Western Australia* (2021) 272 CLR 505, [80]–[81] (Kiefel CJ and Keane J). Gageler, Gordon and Edelman JJ each delivered separate judgments to similar effect in finding that *Emergency Management Act 2005* (WA) ss 56 and 67 when applied to an epidemic complied with the constitutional limitation of *Australian Constitution*, s 92.

<sup>43</sup> See, eg, Rule of Law Education Centre, *Does the Constitution Allow the States to Close Their Borders?* <<https://www.ruleoflaw.org.au/constitution/border-closures/>>.

<sup>44</sup> Augusto Zimmermann, “How the High Court Redefined ‘Absolutely’”, *Quadrant Online*, 4 March 2021 <<https://quadrant.org.au/opinion/qed/2021/03/how-the-high-court-redefined-absolutely/>>, citing in support Anthony Gray, “Covid-19 Border Restrictions and Section 92” (2020) 11 *The Western Australian Jurist* 99, 135, and Chris Merritt, “High Court Ruling on Clive Palmer’s Border Challenge Is a Step in the Right Direction”, *The Australian*, 26 February 2021.

<sup>45</sup> Zimmermann, n 44.

authoritatively stated s 92 gave an absolute right for citizens “to travel unburdened by State restrictions, regulations, or obstructions”.<sup>46</sup> Professor Stelliós noted that the adoption of different measures between States might mean that States taking more stringent approaches were going beyond what was reasonably necessary to achieve the prevention of the spread of COVID-19.

If lesser measures can achieve the same risk prevention as the more stringent measures (or if the impact between them is minimal), then the more stringent measures might be seen to be unreasonably burdensome and, thus in breach of section 92 of the *constitution*.<sup>47</sup>

However, as Professor Williams has argued, the Federal Parliament rather than the High Court is the place to determine a national plan during a pandemic as s 51(ix) of the *Constitution* gives the federal government power over quarantine matters, while s 109 provides that: “when a law of a state is inconsistent with a law of the commonwealth, the latter shall prevail.” Section 109 “provides the federal government with the unassailable authority to override state measures, including border closures”.<sup>48</sup> Williams also pointed out that the *Biosecurity Act 2015* (Cth) gives the federal Health Minister extraordinary powers.<sup>49</sup> For example, s 4(a) of the *Biosecurity Act* sets out the objects of the Act which inter alia provide for managing the following:

- (1) biosecurity risks;
- (2) the risk of contagion of a listed human disease or any other infectious human disease;
- (3) the risk of listed human diseases or any other infectious human diseases entering Australian territory or a part of Australian territory, or emerging, establishing themselves or spreading in Australian territory or a part of Australian territory.

Unfortunately, for political reasons the Commonwealth government was unwilling to take a leading role in controlling border closures within Australia, as it recognised the electoral popularity of State parochialism, epitomised by the Premier of Queensland claiming Queensland hospitals were for Queenslanders.<sup>50</sup> In terms of the limitations of nudge theory during a pandemic, it can be seen in *Palmer v Western Australia* that the High Court gave scant attention to the alternatives to a hard border, which would have given greater choice to persons wishing to enter or re-enter Western Australia to decide if they wanted to voluntarily undergo the entry conditions rather than be completely excluded. In this sense it would have been a reverse nudge: “we encourage you not to travel, but if you do you will be required to comply with these conditions.”

As has been aptly observed, “[t]he vaccine, rather than any new approach to jurisprudence, is likely to finally breathe life into the Constitutional guarantee that trade, commerce and intercourse between the states shall be absolutely free”.<sup>51</sup>

It is very difficult for an individual to rebut a government’s position, particularly when the plaintiff, even one as wealthy as Mr Palmer, lacks the technical resources of Chief Health Officers and their networks, such as the Australian Health Protection Principal Committee and other advisory bodies supporting responses to COVID-19. Without the courts providing robust oversight of government health measures, there is no protection for democracy.

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<sup>46</sup> Zimmermann, n 44, citing in support John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis, first published 1901, 2002 reprint) 844.

<sup>47</sup> RMIT ABC Fact Check, “Is It Illegal under the Constitution for a State to Close Its Borders to Other Australians?”, *ABC News*, 23 April 2020 <<https://www.abc.net.au/news/2020-04-23/fact-check-state-border-closures-australian-constitution-corona/12164440>>.

<sup>48</sup> George Williams, “Federal Parliament Has the Power to Rule on Borders”, *The Australian*, 3 September 2021 <<https://www.theaustralian.com.au/commentary/federal-parliament-has-the-power-to-rule-on-borders/news-story/180d1be838e60cb4a8fba6064f4edd14>>.

<sup>49</sup> Williams, n 48.

<sup>50</sup> Kelsey Wilkie and Tita Smith, “‘Only for Our People’: Queensland’s Premier Is Blasted for Her ‘astonishing’ Comments after a New Mum Nearly Lost Her Unborn Twins Because She Was Forced to Fly from the Border to Sydney for Emergency Surgery”, *Daily Mail Australia*, 19 August 2020; “‘For Our People Only’: Words Come Back to Haunt QLD Premier after Baby Dies”, *Over60* <<https://www.wyza.com.au/articles/health/for-our-people-only-words-come-back-to-haunt-qld-premier-after-baby-dies>>.

<sup>51</sup> Rule of Law Education Centre, n 43.

## B. Victoria

A further example of the High Court's approach to draconian public health orders can be seen in *Gerner v Victoria*,<sup>52</sup> where the plaintiff challenged the validity of s 200(1)(b) and (d) of the *Public Health and Wellbeing Act 2008* (Vic) and the Lockdown Directions pursuant to these subsections, as an infringement of a guarantee of freedom of movement said to be implicit in the Australian Constitution. As with *Palmer v Western Australia*, the High Court chose to ignore other public health costs as well as the social and economic costs of the lockdowns<sup>53</sup> in taking a narrow view that there is no freestanding guarantee of movement implicit in the Constitution. In support of this view, the High Court relied on a technical distinction between interstate intercourse and intrastate intercourse in s 92 of the *Constitution*.

[28] [T]he implied freedom for which the plaintiffs contend would swallow the freedom expressly guaranteed by s 92. The implication asserted by the plaintiffs would render otiose the delineation clearly drawn by the text of s 92 between protected interstate intercourse, that is to say, "movement... across State borders" (*Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 192), and intrastate intercourse, which it does not purport to protect. To accept the plaintiffs' argument would be to accept an implied restriction on legislative power that is wider in its operation than the express terms of s 92 of the *Constitution*.<sup>54</sup>

Consequently, the High Court's jurisprudence as far as s 92 of the *Constitution* and the gamut of severe restrictions imposed on movement of persons during the COVID-19 epidemic is concerned, amounts to (1) ss 56 and 67 of the *Emergency Management Act 2005* (WA) complying with the purported constitutional limitation of s 92, and (2) s 92 being irrelevant to intrastate intercourse. Presumably, as regards the latter, under this constitutional interpretation, Victorians could have been in lockdown indefinitely.

Another Victorian case challenging a lockdown can be found in *Loiello v Giles*,<sup>55</sup> which concerned the legality of a 9:00 pm to 5:00 am curfew that applied to all people living in "greater Melbourne", and again the plaintiff was a restaurant owner who stated her business income had been significantly reduced as a result of the curfew.<sup>56</sup> In *Loiello v Giles*, the plaintiff contended that the decision to impose a curfew was (1) unreasonable, illogical and irrational in the legal sense, and (2) unlawfully limited her human rights under the *Charter of Human Rights and Responsibilities Act 2006* (Vic), especially her rights of freedom of movement and to liberty.<sup>57</sup>

The tenor of Ginnane J's rejection of all the grounds raised by the plaintiff can be gauged from the following extracts of the judgment, which mirrors the deferential language of the High Court towards medical advice during an epidemic. Establishing legal unreasonableness:

is a very difficult task in the present circumstances, as the power exercised was an emergency power or discretion contained in public health legislation to be exercised for the protection of public health based on the authorised officer's decision of what was reasonably necessary.<sup>58</sup>

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<sup>52</sup> *Gerner v Victoria* (2020) 270 CLR 412.

<sup>53</sup> The plaintiff alleged he had suffered a significant loss of revenue to his restaurant business due to the restrictions on movement imposed by the Lockdown Directions.

<sup>54</sup> *Gerner v Victoria* (2020) 270 CLR 412, [28] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

<sup>55</sup> *Loiello v Giles* (2020) 63 VR 1.

<sup>56</sup> Given the entirely erroneous public statements that "we are all in this together", it is significant that the decision-makers, namely, Chief Health Officers and politicians were all on the public payroll and whose income was entirely unaffected by these restrictions, as were the public servants and police officers enforcing them. See Jennifer Hewitt, "We're all in This Together? Not Really", *Financial Review*, 8 July 2020 <<https://www.afr.com/policy/economy/we-re-all-in-this-together-not-really-despite-pm-s-best-efforts-20200708-p55a9q>>; Patrick McGorry, "Mental Health and COVID-19: Are We Really All in This Together?", *The Medical Journal of Australia*, 9 November 2020 <<https://www.mja.com.au/journal/2020/213/10/mental-health-and-covid-19-are-we-really-all-together>>.

<sup>57</sup> *Loiello v Giles* (2020) 63 VR 1, [5] (Ginnane J).

<sup>58</sup> *Loiello v Giles* (2020) 63 VR 1, [185] (Ginnane J).

As to the decision to impose curfew directions, “a logical or rational person could have considered them to be reasonably necessary to protect public health”<sup>59</sup> and “when different opinions are reasonably open, a decision to adopt one of them cannot be described as irrational or illogical”.<sup>60</sup>

Finally, with regard to s 7(2)(e) of the *Charter of Human Rights and Responsibilities Act* which requires consideration of “any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve”, Ginnane J did “not consider that there were other reasonably available means within the meaning of s 7(2)(e) to achieve the purpose of reducing infections”.<sup>61</sup>

The plaintiff in *Loiello v Giles* was a restaurant owner, and the case illustrates the unequal and disproportionate impact of the severe COVID-19 restrictions on small businesses as opposed to those on the public payroll or otherwise able to work from home with their income unaffected, which Gillane J completely discounted in the balancing act of whether the curfew directions were reasonably necessary to protect public health. Australians make decisions every day about their health, a freedom that was taken away from them during the COVID-19 pandemic. When judges are relying on a standard of “different opinions are reasonably open” and “no other reasonably available means” to justify curfews, the evidence to support such a view needed to be far stronger given Gillane J accepted “establishing legal unreasonableness is a very difficult task”. If democratic freedoms and human rights are in the balance, the author contends that governments seeking to remove these freedoms and rights should face a rebuttable presumption on the balance of probabilities that such a course of action is (1) justified and (2) the only available method to achieve the purpose of reducing infections.

### C. Queensland

In the context of restrictions on human rights through the powers given to Chief Health Officers and other authorised officers, it can be discerned that a common thread in the statutory language is a requirement for the authorised officer to consider the action is reasonably necessary, as further exemplified by s 362B(1) Power to give directions of the *Public Health Act 2005* (Qld).

- (1) This section applies if the chief health officer reasonably believes it is necessary to give a direction under this section (a “public health direction”) to assist in containing, or to respond to, the spread of COVID-19 within the community.

The width of the language “reasonably believes” is significant and hard to rebut in a legal context, as along with s 72A(2) of the *Emergency Management Act 2005* (WA) above, the words combine an objective (reasonably) and subjective (believes) test. Armed with such broad ranging discretion, any direction is backed up with severe penalties under s 362D Failure to comply with public health directions of the *Public Health Act*.

A person to whom a public health direction applies must comply with the direction unless the person has a reasonable excuse.

Maximum penalty – 100 penalty units or 6 months imprisonment.

The penalty unit value in Queensland is \$154.80 (current from 1 July 2023). Thus, potentially a person could be fined \$15,480.00 for not wearing a mask if such a health direction was in place today. This is a powerful incentive to comply and is at the opposite end of the spectrum to a voluntary nudge.

Furthermore, arguably judicial review is unavailable to a person seeking to challenge a public health direction issued under s 362B(1) Power to give directions of the *Public Health Act*. Under s 4(a) of the *Judicial Review Act 1991* (Qld), a decision must be of an “administrative character”,<sup>62</sup> and arguably a direction under s 362B(1) is of a legislative character because (1) under s 362FA(2) of the *Public Health*

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<sup>59</sup> *Loiello v Giles* (2020) 63 VR 1, [198] (Ginnane J).

<sup>60</sup> *Loiello v Giles* (2020) 63 VR 1, [203] (Ginnane J).

<sup>61</sup> *Loiello v Giles* (2020) 63 VR 1, [254] (Ginnane J). *Human Rights Act 2019* (Qld) s 13(2)(d) is written in similar terms: “(2) In deciding whether a limit on a human right is reasonable and justifiable as mentioned in subsection (1), the following factors may be relevant ... (d) whether there are any less restrictive and reasonably available ways to achieve the purpose.”

<sup>62</sup> *Griffith University v Tang* (2005) 221 CLR 99, 123 [63] (Gummow, Callinan and Heydon JJ).

Act, the Chief Health Officer “must not delegate the chief health officer’s power to give a public health direction”, and (2) giving a public health direction enlivens s 362D Failure to comply with public health directions and s 362E When public health directions must be revoked.

## D. Federal Minister of Immigration and Mr Novak Djokovic

Another example of the width of discretion can be seen in the powers given to the Federal Minister of Immigration under the *Migration Act 1958* (Cth) in the case of defending tennis champion Mr Novak Djokovic’s attempt to play in the Australian Open despite being unvaccinated. Under s 116(e)(i) and (ii), the Minister may cancel a visa if he or she is satisfied that:

- (e) the presence of its holder in Australia is or may be, or would or might be, a risk to:
  - (i) the health, safety or good order of the Australian community or a segment of the Australian community; or
  - (ii) the health or safety of an individual or individuals.

Section 133C of the *Migration Act* deals with the Minister’s personal powers to cancel visas on s 116 grounds, such as s 133C(3) which states:

- (3) The Minister may cancel a visa held by a person if:
  - (a) the Minister is satisfied that a ground for cancelling the visa under section 116 exists; and
  - (b) the Minister is satisfied that it would be in the public interest to cancel the visa.

When Immigration Minister Alex Hawke cancelled Mr Djokovic’s visa, he did so under the above sections of the *Migration Act*. Mr Djokovic sought judicial review from the Full Court of the Federal Court (Allsop CJ, Besanko and O’Callaghan JJ) as to whether the Minister’s decision contained an error.<sup>63</sup>

For the purpose of his decision, the Minister accepted a number of propositions in Djokovic’s favour. They included that Djokovic had tested positive for COVID-19 in December 2021, he had a medical reason not to get vaccinated, the incorrect travel form was not a reason to cancel the visa and he was of good character.

The Minister confined the reasons for visa cancellation to just one ground – allowing Djokovic to stay would stir up anti-vaccination sentiment and that was against the public interest on health and safety grounds.<sup>64</sup>

Mr Djokovic’s legal team sought to counter these reasons by arguing that stirring up anti-vaccination sentiment was a double-edged sword, and that the Minister had failed to take into account that deporting Mr Djokovic might also stir up anti-vaccination sentiment.

The fact that the Full Court of the Federal Court found for the Minister is less a testimony of the weakness of Mr Djokovic’s argument and more “a product of, and demonstration of, just how wide the Minister’s powers are, and how hard it is to challenge the decision”.<sup>65</sup> “The phrase ‘public interest’ is a broad one and especially so when an aspect of the power vested in a Minister responsible to Parliament.”<sup>66</sup>

In reality, Mr Djokovic posed a minimal health risk<sup>67</sup> as he had recently recovered from COVID-19 and the Omicron variant was rampant in the Victorian community. The decision to cancel Mr Djokovic’s visa

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<sup>63</sup> “The Court does not consider the merits or wisdom of the decision; nor does it remake the decision. The task of the Court is to rule upon the lawfulness or legality of the decision by reference to the complaints made about it”: *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 289 FCR 21, [17] (Allsop CJ, Besanko and O’Callaghan JJ).

<sup>64</sup> Justin Quill, “A Correct Decision, But Both Sides Are Losers”, *The Australian* (Sydney), 17 January 2022, 2. See *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 289 FCR 21, [48]–[62] (Allsop CJ, Besanko and O’Callaghan JJ).

<sup>65</sup> Quill, n 64.

<sup>66</sup> *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 289 FCR 21, [42] (Allsop CJ, Besanko and O’Callaghan JJ), citing in support *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28, 46–48 [39]–[46]; *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2015) 255 CLR 231.

<sup>67</sup> Snedden, Hall & Gallop, *Was Novak Djokovic’s Visa Cancellation Truly ‘In the Public Interest’?* <<https://shglawyers.com.au/was-novak-djokovics-visa-cancellation-truly-in-the-public-interest/>>: “Reading the Minister’s decision, it is striking how

was a political decision made by the Commonwealth government: “The Minister took the view that Mr Djokovic’s presence in Australia could encourage people to emulate his apparent disregard for safety measures.”<sup>68</sup> Such a subjective, opinion-based ground leaves little scope to find error,<sup>69</sup> especially where reasonable minds could reasonably differ on the facts.<sup>70</sup> The Federal Court did not consider the merits or wisdom of the Minister’s decision, only whether or not it was lawful. This goes to the Minister’s powers under s 133C(3) of the *Migration Act* above.

In general, the lack of questioning and more damningly the apparent absence of a legal ability to question the goal of “preventing the spread of COVID-19”<sup>71</sup> as (1) desirable and (2) more desirable than preventing other harms including other health harms as mentioned above, when judges are required to determine the legality of restrictions such as those adopted between 2020 and 2022 at the whim of “authorised officers”, is extremely alarming. This augurs poorly for Australia’s ability to evade a similar catastrophic loss of perspective and consequent policy misfire in the future.

## E. Summary

In summary, it can be seen that the Commonwealth and State governments rushed to close borders for fear of spread of contagion of COVID-19, and then armed their Chief Health Officers and Emergency Coordinators with unbridled power to give sweeping directions that restricted the movements of the entire Australian population under the guise of “following the medical advice”, which in turn was based on ultraconservative assumptions. Legal challenges to these directions were brushed aside by the courts in the absence of a vaccine. Furthermore, once governments were committed to a particular strategy, such as seeking to lockdown the populace until zero community transmissions had been achieved, it became very difficult to acknowledge the strategy had failed and to accept that the sheer number of community infections meant the strategy had to be abandoned, as the New South Wales and Victorian governments discovered with the outbreak of the Delta variant of COVID-19.<sup>72</sup>

The most recent example of an inability to abandon a COVID-19 strategy was seen in Western Australia’s decision to renege on its commitment to remove its hard border with the rest of Australia which had been “locked in” for 5 February 2022 as the state had achieved a 90% double vaccination rate for the adult population. The justification for the “backflip” was that “it would be reckless and irresponsible to open now as the Omicron variant had changed everything”.<sup>73</sup>

The delay in opening up the Western Australian border until 3 March 2022, having been closed for 697 days, brought into stark relief the mixed responses and growing divide within different groups in the

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little discussion there was about the risk that Djokovic posed in spreading COVID-19 throughout the community. In fact, at paragraph 17 of the written decision, the Minister said: I ... accept that Mr DJOKOVIC poses a negligible individual risk of transmitting COVID-19 to other persons.”

<sup>68</sup> Remy Varga, Jamie Walker and Jacquelin Magnay, “Game, Set and Match: Judges Expel Djokovic”, *The Australian* (Sydney), 17 January 2022 2, citing Mr Stephen Lloyd SC, counsel for the Immigration Minister.

<sup>69</sup> The Federal Court of Australia held “[i]t was not irrational for the Minister to be concerned that the asserted support of some anti-vaccination groups for Mr Djokovic’s apparent position on vaccination may encourage rallies and protests that may lead to heightened community transmission” (original emphasis): *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 289 FCR 21, [85] (Allsop CJ, Besanko and O’Callaghan JJ).

<sup>70</sup> “[W]here the criterion of which the authority is required to be satisfied turns upon factual matters upon which reasonable minds could reasonably differ, it will be very difficult to show that no reasonable decision-maker could have arrived at the decision in question”: *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 654 [137] (Gummow J).

<sup>71</sup> See, eg, *Tey v New South Wales* (2023) 375 FLR 437; [2023] NSWSC 266, where the two plaintiffs unsuccessfully challenged the validity of public health orders on the grounds that the powers restricted the freedom of political communication. Basten AJ held at [84] in the context of the power to protest that “refusal to comply with a law, while it may constitute a form of expressive conduct and thus political communication, is not given unqualified constitutional protection in Australia”.

<sup>72</sup> Casey Briggs, “Australia’s Two Biggest States Have Abandoned COVID Zero, But It’s Still a Long Path to Freedom”, *ABC News*, 2 September 2021 <<https://www.abc.net.au/news/2021-09-02/victoria-and-nsw-abandon-covid-zero-analysis/100426124>>.

<sup>73</sup> Jacob Kagi, “Mark McGowan’s WA Border Backflip May Have Unforeseen Consequences for Tackling COVID-19”, *ABC News*, 21 January 2022 <<https://www.abc.net.au/news/2022-01-21/mark-mcgowan-wa-border-opening-backflip-poses-risk-analysis/100771704>>.

community. On the one hand messages of support to ABC radio included “we should be thankful we have a premier who keeps us all safe” and “responsible leadership, well done Mark” (Mark McGowan was the WA premier at the time), while on the other hand critics bemoaned the isolation and a sense of being marooned “what’s the point of being triple-vaxxed and still locked away from life” ... “trapped, anxious, people are travelling internationally and we can’t leave this God-forsaken state” ... “gutless, spineless, pathetic and still imprisoned”.<sup>74</sup> This divide was reflected in the winners and losers from such isolation. A loser was clearly the tourist industry. WA Tourism Council chief executive Evan Hall was quoted as saying: “We have no date, no plan and no future for the tourism industry. It is horrendous and there appears to be no end to it.”<sup>75</sup>

As to the costs of such border restrictions, the Queensland government released the following facts relating to the Queensland border operations between 2020 and 2021.

3.3 million online border pass declarations; 3.68 million vehicles checked at road borders; 35,902 vehicles turned around at the border; 20,247 people directed into quarantine at the border; 29,336 domestic flights met by police; 1.8 million passengers checked from incoming domestic flights; 4,452 people refused entry domestically; 64,466 passengers directed into quarantine from domestic flights; 4,112 international flights met by police; and 117,182 passengers checked from incoming international flights.<sup>76</sup>

During 2020 and 2021, the Queensland government issued 61 different border directions, the economic and social costs of which are difficult to calculate, aside from the diversion of scarce police resources from traditional policing roles. These costs, which were common to all jurisdictions, included a lack of availability of workers such as fruit pickers, family disruptions, an increase in mental health conditions, the exclusion of interstate and international tourists, lost production through skill shortages because of zero migration, and reduced economic growth.

Presumably, the initial political calculus of the States and Territories was that provided the Commonwealth government continued to fund financial compensation for the restrictions through JobKeeper and JobSeeker, then these economic and social costs could be set aside against the public’s fear<sup>77</sup> of COVID-19, stoked by the dire warnings of the medical profession should the virus circulate in the community through “super-spreader” events. Effectively, the Australian population was being prepared for life under a pandemic, as if the country was at war with COVID-19. This siege mentality was reinforced by overseas comparisons as to the numbers of COVID-19 infections and deaths. Fortress Australia became the Commonwealth government’s mantra.

### III. FUTURE GOVERNMENT RESPONSES TO A PANDEMIC AND WHETHER A MANDATORY “PUSH IN THE BACK” IS THE “GO TO” POSITION

*Australia’s democracy proved virus thin.*<sup>78</sup>

On 21 September 2023 the Commonwealth Government announced it was setting up a COVID-19 Response Inquiry to identify lessons learned to improve Australia’s preparedness for future pandemics.<sup>79</sup> The scope of the inquiry focused exclusively on the Commonwealth’s response and, for blatant political

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<sup>74</sup> Kagi, n 73.

<sup>75</sup> Kagi, n 73.

<sup>76</sup> Dominic Cansdale and Jessica Rendall, “Queensland Welcomes Back Interstate Travel with the Removal of COVID-19 Border Checkpoints and Passes”, *ABC News*, 15 January 2022 <<https://www.abc.net.au/news/2022-01-15/qld-coronavirus-covid19-border-barricades-down/100757618>>.

<sup>77</sup> For example, such was the fear factor that Deakin’s chair of Epidemiology, Professor Catherine Bennett, felt it necessary to make the prediction that “people are more likely to be struck by lightning in Melbourne’s streets than catch COVID-19 in the community”: Patrick Durkin, “Polls Turn against Melbourne Lockdown”, *Australian Financial Review*, 30 September 2020.

<sup>78</sup> Stapleton, n 21, Back Cover.

<sup>79</sup> Australian Government, Department of the Prime Minister and Cabinet Commonwealth Government, *Covid-19 Response Inquiry Terms of Reference* (21 September 2023) <<https://www.pmc.gov.au/resources/commonwealth-government-covid-19-response-inquiry-terms-reference>>.

reasons not in the wider public interest, specifically excluded actions taken unilaterally by state and territory governments.

The Inquiry will review the Commonwealth Government's response to the COVID-19 pandemic and make recommendations to improve response measures in the event of future pandemics. It will consider opportunities for systems to more effectively anticipate, adapt and respond to pandemics in areas of Commonwealth Government responsibility.

The Inquiry will adopt a whole-of-government view in recognition of the wide-ranging impacts of COVID-19 across portfolios and the community. Specific areas of review may include, but are not limited to:

Governance including the role of the Commonwealth Government, responsibilities of state and territory governments, national governance mechanisms (such as National Cabinet, the National Coordination Mechanism and the Australian Health Protection Principal Committee) and advisory bodies supporting responses to COVID-19.

Key health response measures (for example across COVID-19 vaccinations and treatments, key medical supplies such as personal protective equipment, quarantine facilities, and public health messaging).

Broader health supports for people impacted by COVID-19 and/or lockdowns (for example mental health and suicide prevention supports, and access to screening and other preventive health measures).

International policies to support Australians at home and abroad (including with regard to international border closures, and securing vaccine supply deals with international partners for domestic use in Australia).

Support for industry and businesses (for example responding to supply chain and transport issues, addressing labour shortages, and support for specific industries).

Financial support for individuals (including income support payments).

Community supports (across early childhood education and care, higher education, housing and homelessness measures, family and domestic violence measures in areas of Commonwealth Government responsibility).

Mechanisms to better target future responses to the needs of particular populations (including across genders, age groups, socio-economic status, geographic location, people with disability, First Nations peoples and communities and people from culturally and linguistically diverse communities).

The Inquiry will consider the findings of previous relevant inquiries and reviews and identify knowledge gaps for further investigation. It will also consider the global experience and lessons learnt from other countries in order to improve response measures in the event of future global pandemics.

The following areas are not in scope for the Inquiry:

Actions taken unilaterally by state and territory governments.

International programs and activities assisting foreign countries.

To suggest that “the Inquiry will adopt a whole-of-government view in recognition of the wide-ranging impacts of COVID-19 across portfolios and the community” is a blatant misrepresentation of the scope of the inquiry which has been widely condemned as Labor running “a protection racket” for State and Territory governments.<sup>80</sup>

Human Rights Commissioner Lorraine Finlay also criticised the government for omitting individual state and territory actions while the Australian Medical Association said it could not see how examining state hospital systems and pandemic restrictions could be avoided if the inquiry were to come up with robust recommendations.<sup>81</sup>

The Inquiry is rightly to investigate key health response measures such as vaccinations and medical supplies, as well as financial support for individuals exemplified by income support payments but is prevented from examining the crucial impact on democratic freedoms and human rights of restrictions imposed by State and Territory governments. As has been discussed in Part II, the justification for the State

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<sup>80</sup> See, eg, Natassia Chrysanthos, “Major State Decisions to Be Excluded from COVID Inquiry”, *The Sydney Morning Herald*, 21 September 2023 <<https://www.smh.com.au/politics/federal/state-and-territory-decisions-will-be-excluded-from-inquiry-into-covid-pandemic-responses-20230921-p5e6ee.html>>, quoting federal Opposition Leader Peter Dutton.

<sup>81</sup> Chrysanthos, n 80.

and Territory lockdowns and border closures was the absence of a vaccine, which was a Commonwealth Government responsibility. Whether in the future Australians ought to be subjected to similar draconian restrictions and under what circumstances in the event of another pandemic is central to any serious Inquiry.

The magnitude of the omission of “actions taken unilaterally by state and territory governments” can be readily gauged when considering future government responses to a pandemic, by reviewing the draconian powers that were given to Chief Medical Officers once a state of emergency had been declared, as exemplified by the *Public Health and Wellbeing Act 2008 (Vic)*. The Emergency Powers under ss 199 and 200(1) of the Act allow Authorised Officers to:

- detain any person or group for as long as reasonably necessary to eliminate or reduce a serious risk to public health; restrict the movement of any person within Victoria; prevent any person or group from entering Victoria; and give any other direction reasonably necessary to protect public health.

In addition to the Emergency Powers, the Victorian Chief Health Officer may allow Authorised Officers to exercise certain public health powers where it is necessary to investigate, eliminate or reduce risk to public health from COVID-19 (Public Health Powers).

The Public Health Powers are very broad and allow Authorised Officers to do any of the following, if necessary to do so to eliminate or reduce the risk to public health under s 190(1) of the Act.

- close any premises; direct a person or group to enter, not to enter, to remain at, or to leave, any particular premises; without a warrant, enter any premises and search for and seize anything; request information, including names and addresses; inspect any premises; require the cleaning or disinfection of any premises; require the destruction or disposal of anything; or direct the owner or occupier of any premises, or any other person, to take particular actions.<sup>82</sup>

In assessing the necessity for the extreme restrictions imposed on Australian citizens by State and Territory governments, it is worthwhile focusing on the deaths due to COVID-19 in Australia between 11 March 2020 when the World Health Organization declared COVID-19 to be a pandemic and 31 July 2023, in order to establish the proportionality of the governmental responses to the perceived dangers of the virus:

There are 19,510 death registrations that have been received by the ABS where an individual is certified as having died from or with COVID-19 between the start of the pandemic and 31 July 2023. Of the 596,368 death registrations received by the ABS (both doctor and coroner certified) in Australia during the pandemic period, 3.3% are of people who have died with or from COVID-19.<sup>83</sup>

The head of mortality statistics for the Australian Bureau of Statistics, Lauren Moran, stated that “the average age at death for COVID-19 was 86 years”, and they often had comorbidities.<sup>84</sup>

Most deaths due to COVID-19 have other conditions listed on the death certificate (95.9%) ... over half of all certificates had both a causal sequence and pre-existing conditions listed on the certificate. On average, deaths due to COVID-19 had 3.2 other diseases and conditions certified alongside the virus.<sup>85</sup>

Thus, only 3.3% of death registrations between 2020 and July 2023 were COVID-19 related, with on average 3.2 other diseases and conditions alongside the virus which is scarcely surprising as the average age at death was 86 years. Only 4.1% of COVID-19 death registrations reported COVID-19 alone on the death certificate.<sup>86</sup> The Commonwealth, State and Territory governments would argue that the 3.3% death registrations for COVID-19 would have been higher but for the closed borders and lockdowns, especially given the pressures on the public health systems.

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<sup>82</sup> Justice Connect, *How the Victorian Government’s Emergency Restrictions on COVID-19 (Coronavirus) Work* (22 June 2021) <[https://justiceconnect.org.au/resources/how-the-victorian-governments-emergency-restrictions-on-coronavirus-COVID-19-work/#\\_ftn7](https://justiceconnect.org.au/resources/how-the-victorian-governments-emergency-restrictions-on-coronavirus-COVID-19-work/#_ftn7)>.

<sup>83</sup> Australian Bureau of Statistics, *COVID-19 Mortality in Australia: Deaths Registered until 31 July 2023* (25 August 2023) <<https://www.abs.gov.au/articles/covid-19-mortality-australia-deaths-registered-until-31-july-2023>>.

<sup>84</sup> Stephen Lunn, “Covid Death Surge Marks Change for the Ages in Mortality Trend”, *The Australian*, 28 September 2023.

<sup>85</sup> Australian Bureau of Statistics, n 83.

<sup>86</sup> Australian Bureau of Statistics, n 83.

In this context, it is instructive to compare Australia's death registrations which were COVID-19 related with those of Sweden for an approximately similar period. Sweden avoided draconian lockdowns and placed far greater trust in the common sense of its citizens than did Australia.<sup>87</sup> Between 2020 and 2022, there were a total of 284,819 deaths in Sweden of which 22,431 or 7.8% were COVID-19 related.<sup>88</sup> On its face, Australia performed better with 3.3% of COVID-19 related death registrations versus 7.8% for Sweden. However, that is only one raw statistic and inter alia does not take into account the amount of money paid in economic support (\$291 billion in Australia),<sup>89</sup> the impact on Gross Domestic Product, the impact on the education of school age children, and the mental and physical impacts of the lockdowns and closed borders on the Australian population as a whole.

Australian politicians appear to have been solely focused on the health advice, where the medical science was often disputed, rather than considering all other factors in the overall cost-benefit calculation. This raises an important issue: whether the test of "reasonably necessary" to issue a public health direction takes into account enough factors, which by implication requires the Chief Health Officer to make a recommendation to the relevant Minister of the Crown who in turn undertakes a balancing exercise in weighing up a variety of factors and does not solely rely on the health advice.

Given the specificity of the elderly cohort of the population most at risk, the extensive lockdowns and draconian restrictions appear a disproportionate and untargeted response to the overall risks to the Australian population as a whole, a factor the courts were unwilling to address. It is to be hoped that in future the courts will be more rigorous in assessing the costs and benefits of draconian restrictions, and adopt a robust test of proportionality.

As to how Australians were feeling as they exited the pandemic, Channel Seven News conducted a COVID-19 poll on 23 October 2022 to which some 45,000 people responded:

More than half of respondents either said they regretted getting vaccinated or were unvaccinated and happy with their decision. Only 35 per cent out of more than 45,000 people said they were vaccinated and would make the same decision again. Not a single person said they were unvaccinated and regretted the decision. One fifth of respondents said they had received two doses of a vaccine, 26 per cent had three and 16 per cent had four shots, while 37 per cent said they had not taken any vaccine.

More than two thirds of respondents said Australia's leaders had been too heavy-handed in the pandemic response, 25 per cent said they did their best they could, and 8 per cent said as well as any other country.<sup>90</sup>

Even allowing for the limitations of such a sample which appears to contain an over-representation of anti-vaccination respondents, the responses are illuminating, especially in relation to the high number who said they regretted getting vaccinated, and may provide a guide to those agencies trying to assess the future political climate and how severe health risks and death rates would have to be for the public to accept in the future the type of COVID-19 restrictions imposed between 2020 and 2021. The need for the severity of the COVID-19 restrictions was portrayed in the context of COVID-19 being a one in a 100-year pandemic, largely based on the long period of time since the 1918–1919 influenza pandemic. However, with the prevalence of international travel and the prospect of further dangerous virus mutations, whether or not within the coronavirus strain, another pandemic in the near future must be taken seriously.

Australian governments will retain the emergency powers presently available. The three major issues being raised here are: (1) the circumstances under which these emergency powers should be activated; (2) the likelihood that the Australian populace would accept the restrictions imposed depending on their

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<sup>87</sup> For a full account of how Sweden remained open while the rest of the world shut down, see Johan Anderberg, *The Herd: How Sweden Chose Its Own Path through the Worst Pandemic in 100 Years* (Scribe, 2022).

<sup>88</sup> Statista, *Number of deaths in Sweden from 2012 to 2022* <<https://www.statista.com/statistics/525353/sweden-number-of-deaths/#:~:text=The%20number%20of%20deaths%20in,to%20nearly%2095%2C000%20in%202022>>. *Coronavirus Deaths in Sweden, Worldometer*. <<https://www.worldometers.info/coronavirus/country/sweden/>>.

<sup>89</sup> The Federal Budget Papers for 2021–2022, n 9.

<sup>90</sup> "Covid Poll: A Pulse Check of Australia as We Exit the Pandemic", *news.com.au*, 23 October 2022 <<https://www.news.com.au/world/coronavirus/australia/covid-poll-a-pulse-check-of-australia-as-we-exit-the-pandemic/news-story/cb910eb5525d0dd24ca38ff5a6240822>>.

severity; and (3) the likelihood that the courts would intervene to mitigate the severity of the restrictions if they were challenged. The only two terms of reference relevant to the above three issues in the Commonwealth Government Inquiry are: (1) “Governance including the role of the Commonwealth Government”; and (2) “Mechanisms to better target future responses to the needs of particular populations”. The only direct reference to border closures is in relation to “international policies to support Australians at home and abroad”. Otherwise, the Inquiry is focused on improving response measures, systems and supports, while ignoring the most important issue of the impact on individual freedoms, which in turn follows from the exclusion of “actions taken unilaterally by state and territory governments”. The absurdity of such an exclusion can be judged by the fact that criminal laws are not covered by s 51 of the *Australian Constitution*, and the behaviour of police in enforcing the lockdowns was essentially a state and territory matter.<sup>91</sup>

The prevailing public attitude today to COVID-19 is one of “we have to live with the virus” and is now either an afterthought or an experience that is largely seen as recent history. This collective learnt experience of surviving lockdowns and restrictions will colour any future public responses to the re-emergence of health risks from serious contagious infections. The public and the politicians will likely be wary of a second wave of lockdowns and border closures, not least because with tight budget constraints<sup>92</sup> the Commonwealth Government will be unable to afford a second round of income support schemes as generous as JobKeeper and JobSeeker. This begs the question whether empty federal coffers and likely public resistance to a repeat of the severe restrictions experienced under the extreme COVID-19 response will mean that democratic freedoms and human rights survive a second pandemic, with governments relying on nudges to change behaviour voluntarily rather than mandatory pushes in the back to enforce compliance.

#### IV. CONCLUSION

Between 2020 and 2022 Australia was gripped by a madness which was spiritual, administrative, political, social and judicial in its dimensions. Australians who stood up against the rising tide of tyranny found themselves pepper sprayed, bashed by police, fined and imprisoned in dictatorial abuses which made headlines around the world, a warning to the world against Covid overreach.<sup>93</sup>

There is a world of difference between encouraging people to wear masks, to socially isolate, to undergo a medical test, and to be vaccinated, which was the path Sweden chose, as opposed to imposing severe restrictions on people’s movements to shop or engage in recreation, confining people to their own homes, preventing people from working or running a business, and threatening people with loss of employment if they refuse to be vaccinated. The former are classic voluntary nudges, while the latter are mandatory pushes in the back when reinforced by draconian fines for each breach of an order issued under the emergency powers given to Chief Medical Officers.

In the COVID-19 poll referred to in Part III, more than two-thirds of the 45,000 respondents said, “Australia’s leaders had been too heavy-handed in the pandemic response”.<sup>94</sup> Whether, in the event of a second pandemic, there will be a repeat of such heavy-handedness is the central question. Unfortunately, the Commonwealth COVID-19 Response Inquiry is focused on preparedness for future pandemics rather than the binary choice between voluntary nudges or mandatory pushes in the back. In the future, it may well be that Australians will have to turn to the courts to preserve basic democratic freedoms and

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<sup>91</sup> For a recent example, see Michaela Whitbourn, “University of Sydney Law Professor Wins Court Fight against NSW Police”, *The Sydney Morning Herald*, 2 October 2023. “Professor Simon Rice launched a District Court suit against the state of NSW this year after he was violently arrested and fined under COVID-related health orders in October 2020. Judgment was entered in Rice’s favour in the civil suit on September 21, 2023.”

<sup>92</sup> The federal budget papers for 2023–2024 project federal budget deficits out to 2026–2027, with no prospect of a federal budget surplus in the foreseeable future. Commonwealth Government, *Budget 2023-24* (May 2023) 6 <[https://archive.budget.gov.au/2023-24/overview/download/budget\\_overview.pdf](https://archive.budget.gov.au/2023-24/overview/download/budget_overview.pdf)>.

<sup>93</sup> Stapleton, n 21, Back Cover.

<sup>94</sup> “Covid Poll: A Pulse Check of Australia as We Exit the Pandemic”, n 90.

human rights, rather than the past obsequious judicial rubber stamping of the “medical advice” which characterised COVID-19 legal cases during 2021–2022 from Mr Clive Palmer to Mr Novak Djokovic.

In an address to the Medico Legal Society of Victoria in 2009, the then Chief Justice quoted Sir Owen Dixon in drawing an important distinction between the kind of intuitive judgment that a medical practitioner exercises every day and the kind of justification expected from the medical expert witness in a court of law:

However valuable intuitive judgment founded upon experience may be in diagnosis and treatment, it requires the justification of reasoned explanation when its conclusions are controverted. Reasoned explanation requires care and forethought – qualities the presence of which is not always transparently visible in expert evidence.<sup>95</sup>

It is to be hoped that such a benchmark of reasoned explanation requiring care and forethought that is subjected to critical and robust judicial scrutiny in the context of a broad cost-benefit analysis will be the hallmark of future High Court cases in a pandemic where democratic freedoms and human rights are in the balance. Only the courts stand between governments and authoritarianism, which requires strong independent oversight of the medical science, particularly where it is disputed, that politicians and Chief Health Officers claim mandates emergency measures. The lockdowns experienced by Australians between 2020 and 2022 were not subjected to an adequate or transparent process because there was insufficient independent scrutiny of whether the decisions made by Chief Health Officers were reasonably necessary in all the circumstances and not just based on the medical advice.

Ultimately, it may be the ballot box that finally convinces Australia’s politicians in the event of a second pandemic that the public will resist and punish electorally the use of mandatory draconian pushes in the back. Otherwise, it may be a case of “[t]hose who cannot remember the past are condemned to repeat it”.<sup>96</sup>

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<sup>95</sup> Chief Justice Robert French, *Science and Judicial Proceedings – Seventy-six Years On* (2 May 2009) Medico Legal Society of Victoria 8, citing Sir Owen Dixon in Severin Woinarski, *Jesting Pilate* (Lawbook, 2<sup>nd</sup> ed, 1997) 18.

<sup>96</sup> George Santayana, *The Life of Reason* (1905).