

## MEASURES TO FIGHT THE COVID-19 PANDEMIC. AUSTRALIA\*

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\* Text received: 14.09.2020.

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**Recommended citation:** Poblet, Marta, Lane, Aaron M., & Nabben, Kelsie. (2020). Measures to fight the COVID-19 pandemic. Australia. *Revista Catalana de Dret Públic*, (special issue), 276-288. <https://doi.org/10.2436/rcdp.i0.2020.3562>.

## 1 Introduction

When Australia confirmed its first case of COVID-19 in the summer of 2020 (January 25), the blazes that had ravaged millions of hectares in the eastern states were not yet extinguished. Victoria had activated its first-ever State of Disaster and New South Wales (NSW) and the Australian Capital Territory (ACT) had declared states of emergency. February started with the blocking of arrivals from mainland China (February 1) and continued with cancelled flight travel from South Korea, Iran and Italy. Cases plateaued in February, with less than 25 diagnosed, before the number multiplied in March.<sup>1</sup>

While remaining in an enviable position vis-à-vis the global pandemic outbreak, Australia would soon follow up many other countries in adopting public health measures to contain the spread of the new coronavirus, including internal and external border closures, lockdowns and, later on, curfews. These measures, unprecedented in peacetime, also raised serious challenges for civil liberties--notably freedom of movement and privacy--that remain contested and, ultimately, unresolved.

Australia is a Federation in the common law tradition with a separation of powers between the Commonwealth government and six state governments along with two territory governments. This article, therefore, provides an overview of the measures that Australian public authorities at different levels have adopted to date to address the challenges of the COVID-19 pandemic and outlines the main legal and ethical issues at stake. Section 2 outlines the legal basis underpinning these measures, both at the federal and state level. Section 3 covers the most relevant measures in terms of impact on fundamental rights. Section 4 reviews the key legal and ethical issues in the public debate and offers some directions for further exploration of these issues. Section 5 concludes by offering a compilation of legislation relevant to this period.

## 2 Legal basis for the adoption of COVID-19 related measures

In Australia, the Commonwealth parliament has legislative powers governing external affairs, as well as quarantine, immigration and emigration, among other subject matters (Australian Constitution, section 51).<sup>2</sup> Within this constitutional framework, the *Biosecurity Act 2015* (Cth) (“Biosecurity Act”) gives the federal Minister for Health extensive powers to adopt public health measures to manage “the risk of contagion of a listed human disease or any other infectious human disease” (Biosecurity Act, section 4).<sup>3</sup> The Constitution also grants residual statutory powers to the states on matters of public health and emergencies (Brenker, 2020), and similar regulatory provisions have also been enacted (See Section 5 for a list of principal legislative instruments).

### 2.1 Declaration of a biosecurity emergency

On 18 March 2020, following the provisions of the Biosecurity Act, the Governor-General of the Commonwealth of Australia declared that a “human biosecurity emergency exists”.<sup>4</sup> The declaration provided the federal Minister for Health with the legal umbrella to issue directions and set requirements to address the outbreak and spread of COVID-19. More specifically, under section 477 of the Biosecurity Act, these powers extend to: (i) requirements that apply to persons, goods or conveyances when entering or leaving specified places; (ii) requirements that restrict or prevent the movement of persons, goods or conveyances in or between

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1 For a full chronological list of events in the first 100 days of the pandemic, see <https://www.abc.net.au/news/2020-05-04/charting-100-days-of-the-coronavirus-crisis-in-australia/12197884?nw=0>.

2 See [https://www.aph.gov.au/About\\_Parliament/Senate/Powers\\_practice\\_n\\_procedures/Constitution/chapter1/Part\\_V\\_-\\_Powers\\_of\\_the\\_Parliament](https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution/chapter1/Part_V_-_Powers_of_the_Parliament).

3 Biosecurity Act 2015 (Cth), <https://www.legislation.gov.au/Details/C2019C00097>.

4 See <https://www.legislation.gov.au/Details/F2020L00266>.

specified places; (iii) requirements for specified places to be evacuated.<sup>5</sup> In addition, section 478 specifies that the Minister “may give any direction, to any person to prevent or control” the spread of the disease.<sup>6</sup> While the initial declaration is for three months, section 476 of the Biosecurity Act allows for the extension of the three-month period “more than once” if the situation that triggered the declaration persists.<sup>7</sup> A new extension was activated on 14 May 2020 and another extension prolongs the emergency period until 17 December 2020.

## 2.2 A new form of coordination

In some federal or quasi-federal countries, the response to the pandemics has provoked sudden redistributions of power between government levels (e.g. Migone, 2020). In Australia, COVID-19 triggered an institutional innovation, the National Cabinet. The National Cabinet was announced by Prime Minister Scott Morrison on March 13 as a new intergovernmental decision-making body composed of the Prime Minister, the premiers of the states and the chief ministers of the territories. The precedent of the National Cabinet is the Council of Australian Governments (COAG) established in 1992 as a forum for state and territory leaders to work with the Federal Government.<sup>8</sup> While the meetings of COAG were biannual, the National Cabinet began holding weekly meetings (more than 25 as of September 2020), with the provision of regular monthly meetings after the pandemic. This *de facto* substitution of COAG came to an end on May 29 when the Prime Minister announced the National Cabinet to permanently replace COAG. Shortly after, on June 12, a new National Federation Reform Council was announced, together with six areas of reform and six corresponding National Cabinet Reform Committees: (i) rural and regional Australia; (ii) skills; (iii) energy; (iv) infrastructure and transport; (v) population and migration; (vi) health.<sup>9</sup>

## 3 Measures adopted by public authorities to face the Covid-19 pandemic

The measures adopted by Australian public authorities can be clustered into different categories: (i) border closures, (ii) self-isolation requirements and quarantines; (iii) gatherings and lockdowns, and (iv) business restrictions.

### 3.1 Closure of external and internal borders

#### 3.1.1 Federal government

On 20 March 2020, all non-Australian citizens and non-Australian residents were banned from entering Australia.<sup>10</sup> Overseas travellers coming into Australia were the initial source of COVID-19 infections that then spread throughout the community. In total, there were 5,172 direct cases of overseas infection recorded as at 3 September 2020 (Department of Health, 2020). On this basis, one of the first precautionary measures the Federal government made was to close the international borders in a series of cascading directions. Likewise, on 25 March 2020, the Federal Health Minister made a further direction that an Australian citizen or permanent resident could not travel outside Australia without an exemption.<sup>11</sup> At the time of writing, the overseas travel bans have not yet been lifted.

5 See [http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol\\_act/ba2015156/s477.html](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba2015156/s477.html).

6 See [http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol\\_act/ba2015156/s478.html](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba2015156/s478.html).

7 See [http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol\\_act/ba2015156/s476.html](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba2015156/s476.html).

8 See <https://www.pmc.gov.au/news-centre/government/coag-becomes-national-cabinet>.

9 See <https://www.pmc.gov.au/domestic-policy/effective-commonwealth-state-relations>.

10 See <https://www.pm.gov.au/media/border-restrictions>.

11 Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020: <https://www.legislation.gov.au/Details/F2020L00306>.

Prior to that, on March 16, the Australian government made a direction that had the effect of banning international cruise ships from entering Australian ports. As further context, around this time, COVID-19 infected passengers aboard the cruise ship “Ruby Princess” were cleared to disembark in Sydney, New South Wales. This episode subsequently became the subject of a Royal Commission - the highest form of public inquiry in Australia.<sup>12</sup>

### 3.1.2 State governments

On 5 April 2020, Western Australia became the first state to close its borders and prevent any non-essential person from crossing the border or arriving by plane. On 11 April 2020, Queensland followed suit, with internal travel restrictions to “outback areas” to protect remote Aboriginal and Torres Strait Islander communities. Northern Territory, South Australia, Tasmania did not have a hard border but effectively put borders up by requiring incoming travellers to undertake a 14-day quarantine period. Following a second outbreak in Victoria, South Australia and Tasmania imposed a hard-Victorian border and the Australian Capital Territory and New South Wales imposed quarantine periods on travellers arriving from Victoria. The National Cabinet is seeking to reach consensus to move to a consistent national system preventing travellers from “hotspot” areas rather than blanket restrictions (Morrison, 2020).

All states manage the compliance of their directions and have established penalties for breaching the public orders above. New South Wales, for example, has individual penalties of up to \$11,000 (\$55,000 for corporations), or imprisonment for 6 months, or both.<sup>13</sup> In Western Australia, where the maximum jail term is 12 months, at least four people have been imposed 6-month sentences.<sup>14</sup>

## 3.2 Self-isolation and quarantines

On 16 March 2020 the Federal government imposed a self-isolation requirement on all international arrivals. Later, this requirement would be moved to hotel quarantine where returning travellers were monitored under security. From March 16, overseas arrivals were required to self-isolate for 14 days. From 21 March, Tasmania required all non-essential arriving travellers to self-isolate for 14 days, with penalties for non-compliance of up to AUD\$16,800 or up to six months’ imprisonment.

As community transmission began to spread, self-isolation and quarantine rules were progressively introduced in all states. Victoria set \$4,957 on-the-spot fines for breaching isolation rules. This added to \$1,652 on-the-spot fines for breaching the directions of the Chief Health Officer (e.g. breaching the imposed curfew from 8:00 pm to 5:00 am), and a \$200 penalty for not wearing a mask when outdoors.

## 3.3 Gathering bans and lockdowns

From mid-March, the federal government declared bans on non-essential outdoor gatherings of more than 500 people, and of non-essential indoor gatherings of more than 100 people. By the end of the month, most indoor and outdoor gatherings had been limited to two people and Australians were encouraged to work from home (except from essential services). Non-essential businesses were ordered to close. While the federal government announced on 8 May 2020 a three-stage plan to ease restrictions across the country, the subsequent measures (both reinstating new restrictions or relaxing them) have been taken at the state level. Public and private gathering bans, social distance restrictions and lockdowns, therefore, differ from state to

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12 See: <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>.

13 See <https://www.nsw.gov.au/covid-19/what-you-can-and-cant-do-under-rules>.

14 See <https://www.abc.net.au/news/2020-08-25/woman-who-snuck-into-wa-on-truck-handed-six-month-jail-sentence/12592832>.

state depending on the epidemiologic advice of their own Chief Health Officers (CHOs). Those compulsory measures entail different penalties and fines than can go up to \$11,000 in New South Wales for people who leave their home without good reason.

The most restrictive lockdown measures in Australia so far have affected metropolitan Melbourne, which entered Stage 4 restrictions on 2 August (initially for six weeks, then extended by an additional two weeks). Under Stage 4, restrictions ordered Melburnians to stay at home other than for obtaining necessary goods and services, providing or receiving care, attending permitted work – for those industries that remained open – and limited 1-hour outdoor exercise), imposed a curfew between 8pm and 5am, and prevented movement within a 5km radius of a person’s residence. For organisations that remained open to the public, Victoria orders imposed a “density quotient” limiting indoor spaces to one person per four square metres. Further, public worship services were not permitted and there was a strict 5 person limit on weddings and a 10 person limit on funerals. Mask wearing was made compulsory for all Victorians with a \$200 fine. During the same period, regional Victoria remained in a non-curfew Stage 3, while the other states and territories were gradually adjusting their own restrictions as levels of community transmission remained very low or were suppressed.

### 3.4 The digital response

One of the most widely adopted digital measures across the world in response to the public health crisis is the deployment of digital contact-tracing applications. This is the first time that manual contact-tracing, or the process of interviewing people to track who they have been in contact with once diagnosed with the virus, has been digitised and deployed across entire populations (Martinez-Martin et al. 2020). The Australian Federal Government released its own “COVIDsafe” digital contact-tracing app on 25 April 2020 to help to identify people exposed to coronavirus.<sup>15</sup>

Some states have also gone to unprecedented measures to use technology to enforce COVID-19 restrictions, including hardware tracking devices and surveillance drones. Western Australia has granted itself the power to mandate surveillance hardware in the Emergency Management Amendment (COVID-19 Response) Bill 2020.<sup>16</sup> The amendment includes approval for people in quarantine to be legally compelled to wear a GPS electronic monitoring device and have such devices installed in their home. Penalties for failure to comply can include fines of \$12,000 AUD and up to 12 months in jail. A \$91.2 million police package in support of the COVID-19 response was announced, including \$17.8 million to expand police tracking and tracing capabilities. This record cost included Automatic Number Plate Recognition technology and electronic monitoring devices.

“Pandemic drones” have also taken to the skies to oversee compliance with mandatory restrictions (Richardson, 2020). Early reports of drones for monitoring social distancing in closed public areas such as beaches emerged at the beginning of the pandemic (Lane, 2020). The normalization of surveillance has compounded, with authorities in the State of Victoria deploying 1000 police units, Defence Force troops and high-tech drone technology to enforce city-wide in-home isolation and catch people outside not wearing a face mask (Pearson, 2020; Stonor, 2020). Amidst the fear and anxiety of Melbourne’s Stage 4 restrictions, Victoria Premier Daniel Andrews tweeted images of highway surveillance camera snapshots with the message “Thank you.”<sup>17</sup>

## 4 Legal debate regarding the measures adopted

There are a number of dimensions to the debate regarding the legitimacy of responses to COVID-19 in Australia in relation to rights and freedoms. Responses have been measured against constitutional principles, privacy and personal data rights legislation, as well as the human rights principles of transparency and proportionality.

15 See <https://www.health.gov.au/news/covidsafe-new-app-to-slow-the-spread-of-coronavirus>.

16 See [https://www.parliament.wa.gov.au/Parliament/Bills.nsf/5924018EEA598B994825853B001C0B08/\\$File/Bill179-1.pdf](https://www.parliament.wa.gov.au/Parliament/Bills.nsf/5924018EEA598B994825853B001C0B08/$File/Bill179-1.pdf).

17 Victoria Premier Daniel Andrews on Twitter: ‘Thank You’, <https://t.co/A2RkFxE9ks>.

## 4.1 Border closures

One of the most contested aspects of managing the pandemic has been the closure of interstate borders to prevent the spread of COVID-19. The constitutional validity of state border closures is unclear. On 25 May 2020, Clive Palmer (mining billionaire, and one-time Member of the House of Representatives) and his company Mineralogy Pty Ltd commenced proceedings against the state of Western Australia in the High Court of Australia.<sup>18</sup> A second challenge to the Queensland border was discontinued (Karp 2020).

In summary, Palmer seeks a declaration from the court that state border closures are invalid because they contravene section 92 of the Constitution. That is, “on the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.” The High Court has previously held that “[section 92], if it is to have substantial content, extends to a guarantee of personal freedom to pass to and fro among the States without burden or restriction.”<sup>19</sup> On the other hand, Western Australia argues that “(a) [border closures] are reasonably necessary for the protection of the Western Australian community against the health risks of COVID-19; (b) they are reasonably appropriate and adapted to advance that object or purpose; (c) there are no other equally effective means, which would impose a lesser burden on interstate trade, commerce and intercourse, available to achieve that object or purpose.”<sup>20</sup>

On 16 June 2020, the Chief Justice of the High Court remitted the matter for a hearing in the Federal Court of Australia to hear evidence.<sup>21</sup> On 25 August 2020, the Federal Court concluded the evidence showed that “the border restrictions have been effective to a very substantial extent to reduce the probability of COVID-19 being imported into Western Australia from interstate.”<sup>22</sup> Whether the measures are constitutionally permissible now falls to the High Court to determine. While the Federal government was initially supportive of the legal challenge to the Western Australian border they have since changed their position.<sup>23</sup> As indicated above, it may be that these issues are resolved through the political process of the National Cabinet rather than through the courts.

## 4.2 Civil liberties and legal rights

Australian governments have used emergency powers to enforce “social distancing” measures designed to slow the spread of COVID-19. This is based on the scientific evidence that COVID-19 “appears to mainly be spread via droplets and close contact with infected symptomatic cases.” (WHO 2020: 3). The specific measures differed from one state jurisdiction to another. As seen above, Victoria imposed the harshest measures in Australia. These measures would ordinarily be inconsistent with several specific provisions of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (‘Victorian Charter’) including:

- Section 12 - “Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.”
- Section 14 - “Every person has the right to freedom of thought, conscience, religion and belief, including...the freedom to demonstrate his or her religion or belief in *worship*, observance, *practice* and teaching, either individually or as *part of a community, in public* or in private...” (emphasis added).

18 *Palmer v State of Western Australia* [2020] FCA 962 at [5].

19 *Cole v Whitfield* (1988) 165 CLR 360 at 394 citing *Gratwick v Johnson* (1945) 70 CLR 1 at 17; C.f., *Nationwide News Pty Ltd v Wills* [1992] 177 CLR 1 (Brennan J).

20 *Palmer v State of Western Australia (No 4)* [2020] FCA 1221 at [11].

21 *Palmer v State of Western Australia (No 4)* [2020] FCA 1221 at [5].

22 *Palmer v State of Western Australia (No 4)* [2020] FCA 1221 at [366].

23 See *Palmer v State of Western Australia (No 3)* [2020] FCA 1220.

- Section 16 - “Every person has the right of peaceful assembly” and “Every person has the right to freedom of association with others...”.
- Section 20 - “Every person has the right to liberty and security” and “a person must not be subjected to arbitrary arrest or detention.”

The protection of these rights in Australia, however, is not absolute. The Victorian Charter does not invalidate Victorian law, and inconsistent laws can be passed by the Parliament (Victorian Charter, s 29). The Victorian government has recognised the apparent inconsistency but considers that the measures are “reasonable and proportionate in all the circumstances” to protect public health (Victoria 2020).<sup>24</sup> At a Federal level, the right to peaceful assembly is given limited constitutional protection with the implied right of free expression of political opinion. The High Court has recently described this as “indispensable to the exercise of political sovereignty by the people of the Commonwealth” (*Brown v Tasmania* [2017] HCA 43 at 88 per Kiefel CJ, Bell and Keane JJ).

These issues came to the fore with “Black Lives Matter” protests that occurred in many cities around Australia, in solidarity with the United States movement that was reignited following the death of George Floyd in Minneapolis. On 6 June 2020, a large protest march in Melbourne, Victoria, went ahead with an estimated 10,000 people in attendance - despite health directions prohibiting bans on public gatherings. According to ABC News reports, some of the protest’s organisers received fines for breaching the Victorian directions but the Victorian government and Victoria Police did not otherwise enforce the health directions.<sup>25</sup>

The New South Wales government took a different approach. In that state, on 5 June 2020, the Commissioner of Police sought orders from the Supreme Court of New South Wales to prevent similar Black Lives Matter protests planned for the following day. The Commissioner was successful at first instance but, dramatically, the decision was overturned on appeal on the afternoon of the protest - meaning those tens of thousands of people already gathering were doing so lawfully.<sup>26</sup> The Commissioner of Police was successful in a further court applications to prevent a “Refugee Action Coalition” protest planned in Sydney on the 13 June 2020,<sup>27</sup> and a Black Lives Matter protest planned in Wollongong on 20 June 2020,<sup>28</sup> although the Commissioner was unsuccessful in preventing a Black Lives Matter protest in Newcastle on 5 July 2020<sup>29</sup>

Another implication of social distancing measures is the operation of the courts. While courts around Australia have quickly built capacity to hold virtual hearings, and are continuing to deal with urgent matters, many civil and criminal trials have been indefinitely adjourned.<sup>30</sup> Rights to due process appear to be in tension during the pandemic. For instance, persons charged with indictable offences ordinarily have a right to trial by jury - but social distancing requirements at this time mean that it is not possible to empanel juries. At the same time, persons charged with offences - particularly those being held in custody awaiting trial - have a right to a speedy resolution of the matters against them. Legislation in Victoria has temporarily enabled judge alone trials.<sup>31</sup> Other states also have existing provisions for judge alone trials (Judicial College of Victoria 2020). The Victorian legislation gives the court discretion to make orders in the administration of justice but ultimately places decision making in the accused hands as the legislation requires the accused person to consent (after having received legal advice).<sup>32</sup> It is more problematic in other jurisdictions such as the ACT

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24 Although it is noted that this is similar to the language of the Federal constitutional test not the wording under section 7 of the Victorian Charter.

25 See <https://www.abc.net.au/news/2020-06-06/melbourne-black-lives-matter-protest-organisers-fined-by-police/12329514>.

26 *Bassi v Commissioner of Police (NSW)* [2020] NSWCA 109.

27 *Commissioner of Police (NSW) v Supple* [2020] NSWSC 727.

28 *Commissioner of Police, New South Wales Police Force v Kumar (OBO National Union of Students)* [2020] NSWSC 804.

29 *Commissioner of Police v Gray* [2020] NSWSC 867.

30 The Judicial College of Victoria provides a summary here: <https://www.judicialcollege.vic.edu.au/resources/coronavirus-and-courts>.

31 *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic), Part 3.8.

32 *Criminal Procedure Act 2009* (Vic), s 420D.

where the accused's consent is not required.<sup>33</sup> Courts are also factoring in the impact of COVID in deciding whether to grant bail and in sentencing (Nekvapil, Narayan and Brenker 2020). The pandemic is also being factored into other areas of case law including migration, family law, and industrial law (Nekvapil, Narayan and Brenker 2020).

### 4.3 Privacy and cybersecurity concerns

Privacy in Australia is principally governed under Federal legislation. The *Privacy Act* 1988 (Cth) sets the 13 Australian Privacy Principles (APPs) that apply to Australian government agencies, organisations with an annual turnover of more than \$3 million, and some other organisations (“APP entities”) in their handling of personal information, including its collection, use, disclosure, governance, accountability and access. There is also specific privacy legislation at the state level.

The unprecedented use of digital solutions to manage the pandemic raises legal, ethical and cyber-security concerns about what is the best approach for both user privacy and public health effectiveness, and how data should be collected, governed and disposed of. In Australia, the COVIDsafe app has been introduced with new legal instruments, including the Biosecurity Determination and the Privacy Amendment (Public Health Contact Information) Act to replace interim protections.<sup>34</sup>

The legitimacy of digital contact-tracing as an example of a digital response to the crisis can be assessed against the privacy legislation, as well as the general principles of Human Rights and Civil and Political Liberties that governmental powers should be exercised constitutionally (Human Rights Committee, 1996; United Nations, 2015). There is no doubt that efforts have been made to categorise and assess these approaches according to voluntary download, limited time-span, data destruction clauses, minimized information collection, transparent code and technical base for location or proximity measurement (O'Neill et al. 2020). Yet, issues with the use and legitimacy of COVIDSafe persist. According to the Determination that sets out the rules about the collection, use and disclosure of COVIDsafe application data, it is illegal to coerce download or use of the app.<sup>35</sup> Criticism then arose when the Federal Health Minister himself was criticised for coercion in response to his tweet saying “Want to go to the footy? Download the app” – implying eased restrictions in exchange for downloading the app.<sup>36</sup>

The COVIDSafe app also raises concerns in terms of individual data privacy and security. While some countries, such as Germany, opted for a more decentralised technical design which allowed data to remain on individuals phones more in line with the General Data Protection Regulation (GDPR) (Martin et al. 2020), Australia adopted a centralised model, based on the app source code of Singapore (Nabben and Berg, 2020). If an individual is confirmed to have COVID-19, they are asked to consent to the app data being uploaded to a centralised data server. Individuals may still be identified and contacted by authorities, even after they delete the app, unless they complete a deletion request form and undertake a call with a COVIDSafe Administrator. The legislation sets out that at the “end of the pandemic” data will be deleted. However, it is unclear what constitutes the end of the crisis, what happens to data outside of the data store but held by State and Territory health authorities, and if the exercise of digital contact tracing will formally end (Smith et al. 2020).

Legislation and documentation are being developed as the pandemic unfolds and there has also been criticism around transparency. For example, to allow public auditing, the source-code of the app was released 2 weeks after the launching of the application itself. The server-side code -- what code is running on private Amazon Web Services infrastructure-- is not available for public scrutiny and feedback at the time of writing (Teague,

33 See: *R v UD (No 2)* [2020] ACTSC 90.

34 See <https://www.ag.gov.au/rights-and-protections/privacy/covidsafe-legislation>.

35 (“Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—Public Health Contact Information) Determination 2020”).

36 Federal Health Minister Greg Hunt on Twitter: “Want to go to the footy? Download the App”, <https://twitter.com/GregHuntMP/status/1256403073674739712>.

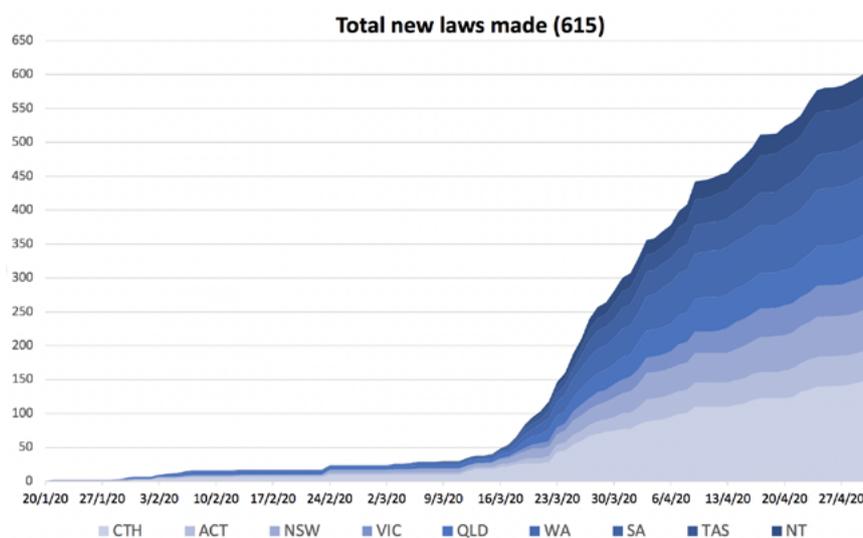
2020). Yet, these details are critical to understand how data is managed, decrypted and analysed, especially as the legislative requirements for data to remain on Australian soil and only for use by health authorities for contact tracing may conflict with the US CLOUD (Clarifying Lawful Overseas Use of Data) Act. This applies to Amazon Web Services (AWS) as a subsidiary of a US incorporated entity and allows the US Government to compel information from US-based cloud and technology companies under warrant (Library of Congress, 2018).

Furthermore, the Privacy Impact Assessment (PIA) covering COVIDSafe raised that State and Territory public health officials must provide robust processes to guarantee security around data access, disclosure and use.<sup>37</sup> However, this obligation does not appear to be enshrined in law and raises constitutional issues (Smith et al. 2020). As a result, numerous civil society groups in Australia and overseas have raised concerns over the digital measures taken in Australia and individual privacy (Rodriguez et al. 2020; Teague, 2020). In terms of efficacy, COVIDSafe has reportedly cost around AU\$2.75 million in contractor fees alone (Sadler, 2020). The application has been downloaded 6.6 million times at the time of writing and the Government has traced 200 contacts (Borys, 2020). None of these were in Victoria, the State under the most severe restrictions due to a COVID-19 virus outbreak.

## 5 Compilation of Federal, State and Territory regulatory measures

The regulatory activity during the first four months of the pandemic in Australia has been intense, both at the federal level and the state and territory level. It is highly likely that this will continue after publication of this article. In addition to legislation, Chief Health Officers and Emergency Coordinators will continue to issue emergency and public health directions relating to the COVID-19 pandemic as the situation evolves. These directions have the force of law. Another source of regulatory activity is the actions that governments are taking to “freeze” the economy in place until the health crisis has subsided (see Allen et al. 2020) - covering areas from competition regulation, residential and commercial tenancy, corporate insolvency, through to liquor licensing and town planning laws. The chart below shows the activity from the outbreak of the pandemic to 2 May 2020. The first layer corresponds to the federal level, while the additional layers represent the states and territories in the legend, from left to right.<sup>38</sup>

**Figure 1 - COVID-19 laws in Australia, January 2020 - May 2020**



Source: John Plumidis (Apollo.Law, 2020)

37 See <https://www.health.gov.au/resources/publications/covidsafe-application-privacy-impact-assessment#:~:text=The%20PIA%20identifies%20the%20impacts,a%20response%20to%20the%20recommendations>.

38 For a breakdown of data at the state level, see <https://www.apollo.law/c19index>.

Due to this ongoing production, a compilation of relevant legislation would exceed the limitations of this article and be soon outdated due to amendments, repeals, and expiration dates of different instruments. Instead, Table 1 provides a high-level summary of the principal emergency and public health legislation and powers in each Australian jurisdiction.

**Table 1 - Summary of Legislative Powers, by jurisdiction**

Jurisdiction	Principal Legislation	Powers
Commonwealth	<i>Biosecurity Act 2015 (Cth)</i>	The Governor-General (in practice, on advice of the government) may declare a human biosecurity emergency. This declaration provides the Minister for Health with the power to make declarations to prevent or control the spread of a human disease.
Victoria	<i>Public Health and Well-being Act 2008 (Vic)</i> ; <i>Emergency Management Act 1986 (Vic)</i> ; <i>Emergency Management Act 2013 (Vic)</i> .	The Minister for Health may declare a state of emergency, on the advice of the Chief Health Officer and after consultation with the Minister for Emergency Management and the Emergency Management Commissioner. This declaration provides the Chief Health Officer with broad powers and provides powers to the Minister for Health and the Minister for Police and Emergency Services under their respective legislation.  The Premier of Victoria after considering the advice of the Minister for Police and Emergency Services and the Emergency Management Commissioner can declare a state of disaster. This declaration provides the Minister for Police and Emergency Services with broad powers to direct government resources and override legislation.
New South Wales	<i>Public Health Act 2010 (NSW)</i>	The Minister for Health has powers to take actions and give directions as necessary to deal with a risk to public health and its possible consequences.
Queensland	<i>Public Health Act 2005 (Qld)</i> ; <i>Disaster Management Act 2003 (Qld)</i> .	The Minister for Health, consulting with the chief executive and the chief health officer, may declare a public health emergency. This declaration provides powers to emergency officers to give directions. In addition, the Chief Health Officer and emergency officers have specific powers to give directions reasonably necessary to assist in containing, or to respond to, the spread of COVID-19 within the community.  The Minister for Fire and Emergency Services and the Premier may declare a disaster situation. This declaration provides a district disaster coordinator or a declared disaster officer with broad powers to control the movement of persons, animals or vehicles into the disaster area, amongst other things, to prevent or minimise loss of human life, illness or injury to humans.

<b>Jurisdiction</b>	<b>Principal Legislation</b>	<b>Powers</b>
South Australia	<i>Emergency Management Act 2004 (SA)</i> ; <i>South Australian Public Health Act 2011 (SA)</i> .	The State Coordinator (in practice, the Commissioner of Police) may declare a Major Emergency. This declaration provides the State Coordinator and authorised officers with broad powers necessary for the response.  The Chief Executive of the Department of Health may, with the approval of the Minister for Health, declare a public health emergency. The declaration provides the Chief Executive and Minister with the same powers as under a Major Emergency.
Western Australia	<i>Emergency Management Act 2005 (WA)</i> ; <i>Public Health Act 2016 (WA)</i> .	The Minister may declare that a state of emergency, having first considered the advice of the State Emergency Coordinator (in practice, the Commissioner of Police). The declaration provides the State Emergency Coordinator with the ability to authorise the exercise of broad emergency powers including making directions.  The Minister for Health may declare that a public health state of emergency exists, having first consulted the Chief Health Officer - who must in turn have consulted the State Emergency Coordinator. The declaration provides the Chief Health Officer with the ability to authorise the exercise of broad emergency powers including making directions.
Tasmania	<i>Emergency Management Act 2006 (Tas)</i> ; <i>Public Health Act 1997 (Tas)</i>	The Premier may declare a state of emergency. This declaration provides authority to the State Controller (in practice, the Commissioner of Police) and Regional Controllers to take any action required and use, direct and coordinate available resources. Further, the State Controller can make directions under the emergency powers.  The Director of Public Health may declare that a public health emergency exists if satisfied that the situation requires it. This declaration provides the Director with broad powers to take action and give directions - and may provide authorisation to others.
Northern Territory	<i>Public and Environmental Health Act 2011 (NT)</i>	The Minister may declare a public health emergency. This declaration provides the Chief Health Officer with broad powers to make directions necessary, appropriate or desirable to alleviate the public health emergency.
Australian Capital Territory	<i>Public Health Act 1997 (ACT)</i>	The Minister may declare a public health emergency. This declaration provides the Chief Health Officer with broad powers to make directions necessary or desirable to alleviate the emergency.

Source: authors' compilation using official repositories of legislation.<sup>39</sup>

39 ACT: <https://www.legislation.act.gov.au>; Commonwealth: <https://www.legislation.gov.au>; NSW: <https://www.legislation.nsw.gov.au>; NT: <https://www.legislation.nt.gov.au>; Qld: <https://www.legislation.qld.gov.au>; SA: <https://www.legislation.sa.gov.au>; Tas: <https://www.legislation.tas.gov.au>; Vic: <https://www.legislation.vic.gov.au>; WA: <https://www.legislation.wa.gov.au>.

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## 6 Conclusion

Almost 10 months into the pandemic, COVID-19 case numbers and fatalities have remained notoriously lower than most European countries and the US, and more aligned with other countries in the Asia Pacific region such as New Zealand, Singapore, Vietnam or South Korea. The situation is evolving rapidly and both the federal and state-level public health measures will vary accordingly in the next future. While external borders are expected to remain closed until mid or late 2021, negotiations in the National Cabinet, Australia's newest political innovation, remain open with regard mid or late to the opening of internal borders and to further cooperation among the states to get to the other side of the pandemic. In the meantime, the legal debates about the impact of public health measures on fundamental rights will keep developing, and will most likely shape both legislation and case law in the years to come.

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