Law and Border – Who has the power to control movement across state borders?

The Constitution says that 'intercourse among the States … shall be absolutely free'. When the Commonwealth tried to stop Dulcie Johnson crossing state borders to see her fiancé one last time before he headed off to war in World War II, it failed. When Western Australia closed its border to Clive Palmer during the COVID pandemic, it succeeded. What powers do the Commonwealth and the states have to close state borders? If a state closes its border, could the Commonwealth override the state and force the border to open? This lecture will explore the difficult question of who really controls freedom of movement across Australia.

When the COVID-19 pandemic struck, some States closed their borders in an attempt to prevent the disease from spreading within their State. This led to a political and constitutional dispute. Section 92 of the Constitution states that 'trade, commerce, and intercourse among the States … shall be absolutely free'. In this context, intercourse means the movement of people, animals and goods across borders. It is effectively, therefore, a guarantee of free movement across the country. Was the Constitution breached when the States closed their borders during COVID, and could the Commonwealth do anything to override these actions?

What does s 92 mean?

The first question that must be confronted is what is meant by the words 'absolutely free'? Can any restrictions be placed on freedom of movement amongst the States? In considering that question, it is helpful to look at the intent of the framers of the Constitution and to read the text of the Constitution as a whole to see how s 92 fits with other provisions.

It is plain from the text of the Constitution that some restrictions are permitted. The Commonwealth Parliament was given power to regulate inter-state trade and commerce in s 51(i) and make laws about quarantine in s 51(ix). Section 112 recognises that States may levy charges for the inspection of goods and animals crossing the border to ensure they are not diseased (although the Commonwealth can enact laws to annul these charges). These provisions show that the words 'absolutely free' must therefore permit some level of regulation and the ability to exclude diseased goods, animals and, possibly, people.

This is consistent with the original intent behind s 92, as shown by the framers of the Constitution in the Constitutional Convention debates of the 1890s and in legal opinions they gave in the first decade after federation. Samuel Griffith, for example, considered that s 92 was directed at freedom from taxes, charges and imposts at State borders. When John Cockburn and Henry Higgins raised the fear that the proposed s 92 might prevent their States from excluding diseased animals or plants, their concern was dismissed. Richard O'Connor, observed that the States would retain a right of self-protection, so that they could prohibit diseased persons and animals from entering the State without breaching the freedom of trade, commerce and human intercourse. O'Connor later became one of the first Justices of the High Court.

Alfred Deakin, writing as Attorney-General in December 1902, accepted that 'interstate freedom of trade is not infringed by a law prohibiting the introduction of diseased animals' and that State legislative powers extend to 'quarantine and reasonable inspection laws'.

Patrick Glynn, another framer, writing as Attorney-General in 1909, advised that a State inspection law would 'be unconstitutional if it imposed an unnecessary or unreasonable burden upon interstate commerce'. He considered that a State law that imposed a complete prohibition on certain kinds of plants being brought into a State, healthy and diseased alike, imposes 'an unnecessary burden on interstate commerce, and cannot be justified on the ground that it is a precautionary measure against the introduction of disease'. If the law were conditional, rather than absolute, and the conditions were neither unreasonable nor greater than reasonably necessary to meet the ostensible purpose, then the law would be valid.

High Court authority

It is unsurprising, therefore, that the High Court took the same approach. In the case of *Ex parte Nelson,* in 1928, Knox CJ, Gavan Duffy and Starke JJ observed:

> The establishment of freedom of trade between the States is perhaps the most notable achievement of the Constitution: yet it would be a strange result, if that achievement had stripped the States of power to protect their citizens from the dangers of infectious and contagious diseases, however such dangers may arise.

Their Honours concluded that a NSW law that prohibited diseased cattle from crossing the border into NSW and which required in some cases for the cattle to be destroyed if they entered the State, did not breach s 92 of the Constitution.

In 1935, the Court took a similar view in relation to diseased potatoes. A law that banned diseased potatoes from entering a State was valid, but a law that banned *all* potatoes without checking them, just to exclude the risk of disease, was considered invalid because it was disproportionate. Here, we see the notion of proportionality entering the jurisprudence, which will become important.

The Spanish Flu

But what about people? Could a State shut its borders to prevent people from crossing so that an infectious and deadly disease did not enter the State? This dilemma was first faced in the wake of World War I as troops began to return to Australia.

When the Spanish flu began to spread in late 1918, Australia had two layers of protection – the external border of Australia, and borders between States. Soldiers returning from war were quarantined on their ships in Sydney Harbour or at North Head quarantine station. There was insufficient accommodation at North Head, so the troops were made to pitch tents in the bush area in the grounds. On one occasion, soldiers housed in tents at North Head found it was infested with poisonous snakes. Having killed 67 on their first night, they mutinied. Fully masked and in military formation they marched to the gates of the Quarantine Station, defying the guards on duty to shoot them. Unsurprisingly, the guards were not prepared to shoot at hardened Australian troops who had risked their lives to defend Australia. The troops marched onto a ferry, steamed into Circular Quay and, after some negotiations, proceeded to the Sydney Cricket Ground where they served out their quarantine without snakes.

The second line of protection was State borders. In November 1918 an inter-governmental agreement was reached that if a State identified an infection, it would notify the Commonwealth immediately. The Commonwealth would then take control of the State's

borders, closing them to neighbouring states and re-opening them when the neighbouring state was also infected. Victoria became infected but didn't admit it, until a doctor blew the whistle. By then Spanish Flu had spread to New South Wales. A furious NSW Government slammed shut its border with Victoria, and declared the inter-governmental agreement at an end.

From then, it was every State for itself. The Commonwealth tried to reassert control, but its threats were ignored. The States closed or opened their borders in their own interests.

Western Australia seized and impounded the transcontinental train as it entered Western Australia, placing all travellers in quarantine. The Commonwealth objected that this breached the inter-governmental agreement of November 1918, and possibly the Constitution.

Western Australia didn't care. The Perth *Daily News* explained:

> Had we admitted the transcontinental travellers we might have suffered infection. There was a chance. We preferred to flout authority, break the agreement of November, and even perhaps fracture some constitutional statute rather than court the disaster of the entrance within our borders of the black plague.

The Western Australian Premier, Henry Lefroy, however, found himself on the wrong side of the closed border. He was stuck in Melbourne where he had been attending a Premier's Conference. The Acting WA Premier, Hal Colebatch, who had shut the border, resisted the pleas of his own Premier and the Prime Minister to reopen it. His actions in closing the border were wildly popular. So popular, indeed, that Colebatch was soon after made Premier, despite being a Member of the upper House.

While Spanish Flu did eventually penetrate the State, its delayed entry saved many lives.

Queensland also shut its borders, including to those in border communities. It charged people a considerable amount to enter quarantine camps and required them to receive two compulsory vaccinations before they could enter the State. There were all too familiar stories of lockdowns, the closure of schools, disagreements about mask-wearing, vaccine mandates and quack cures. But despite all the controversy, no one initiated a constitutional challenge to the border closures.

War

War was the next reason to stop people from crossing State borders. During World War II, the Commonwealth issued an order under a national security law that prohibited civilians from travelling by train across State borders unless they had a permit.

According to the public version of events, Dulcie Johnson was a young woman, engaged to be married. Her fiancé was in the navy and about to be shipped off to war, from his training base in Perth. She might never see him again. In October 1944, Dulcie applied for a permit to travel from Sydney to Perth, but it was denied. She went anyway, in a last dash to see her beloved. She bought tickets for the train, on successive legs, as far as Port Augusta, but then stayed on the train and admitted to the conductor in South Australia that she had no ticket or permit to cross the border into Western Australia. He said she would have to leave the train at Cook, the last stop before the Western Australian border, but the Station Master refused to allow her to leave the train, because it was not a suitable place for a young lady. She made it to Perth, where

she was prosecuted. Her counsel argued that the law breached s 92 of the Constitution. The magistrate agreed and the charge was dismissed.

The media portrayed this as a great love story. Dulcie was described as blonde and remarkably beautiful. 'Love Laughed At Rail Permits', cried one newspaper. The Commonwealth appealed the case to the High Court, where Dulcie was represented by two of the most illustrious Kings Counsel of the time, including Garfield Barwick. They were being paid by the airlines who were using Dulcie as a pretty and sympathetic stalking horse for their own s 92 challenge. Or was Dulcie using them?

Here, the tale might have ended, except for the researches of one of my students, Clare Davidson. In looking into Dulcie's story, she discovered that there was a remarkably beautiful blonde woman who used the alias Dulcie Johnson, among many others. She was also known by the press as the 'Angel of Death' and the 'Black Widow'. This Dulcie Johnson, was a notorious Sydney underworld figure. According to the press at least eight of her husbands or lovers had been gunned down or stabbed to death, and she had more than 100 convictions. We know she did travel to Perth from her east-coast dens of crime, because she was convicted of running a brothel in Perth in 1946.

But was she the same Dulcie Johnson who had no permit to travel to Perth in October 1944? Having now scoured the archival files on *Gratwick v Johnson*, there are two red flags. First, the records state that proof of Dulcie's identity was waived. The authorities relied upon the name she gave and no one ever checked. One does wonder why her lack of confirmed identity was noted a number of times in the file. Second, in her interview Dulcie named her fiancé in the navy – but according to the war records in the National Archives, no such person existed. So the great love story appears to have been a ruse.

Was this instead the story of a gangland figure, fleeing her crimes to run a brothel in Perth, and getting the most eminent Kings' Counsel in the land to represent her for free in the High Court? Perhaps. We don't know for sure.

But what of the law, you ask? The High Court accepted that transport is intimately connected with defence and that the defence power would support a law restricting transport. But this was still subject to s 92. If the law had been one that regulated train travel for defence purposes, affecting both intra-state and inter-state travel, it could have been valid. But here, no defence justification was given for restricting inter-state train travel, but not intra-state train travel. The Order was held invalid.

The Commonwealth Government, in submissions in a later case, criticised this decision. It argued that priority needed to be given to military personnel and freight in long-haul train transport during the war. It contended that the law was not directed at stopping people crossing the borders, as they could do so by other means. But when it came to limiting long-haul civilian travel, the natural place to police it was at the State borders. It contended that the real purpose was defence – not impeding interstate movement of people. But it was too late, as the case had already been lost.

The Leper Line

What if a State law marked a line *within* a State that could not be crossed, with the added effect of preventing inter-state movement by stopping people from getting to the border? In Western

Australia, leprosy had begun to spread rapidly in Aboriginal communities in the north of the State during World War II, due to the lack of health patrols and nursing services. In 1941 a law was enacted to prohibit Aboriginal people, who didn't have a permit, from crossing from north to south across the 20th Parallel, which was near Port Hedland. It was known colloquially as the 'leper line'. The line had the effect of separating Aboriginal communities and preventing those in the north, who had poor working conditions, leaving for better paid work south of the line. In 1957, an Aboriginal man, Dooley Bin Bin, transported 17 Aboriginal people from stations north of the line to places south of the line. One of them had leprosy. Dooley, who was described in court documents as a 'native law giver', was prosecuted, convicted and fined £1 by the magistrate, along with costs of £32.

Dooley was represented by a former WA politician, Thomas Hughes, who argued that the law was invalid because it breached s 92 of the Constitution as it prevented Aboriginal people in the north from travelling south in Western Australia in order to get to South Australia. The magistrate rejected the argument and it went to the Full Court of the WA Supreme Court.

There, Hughes again argued his constitutional case. He told the Court that Dooley, as a tribal law carrier, held an equivalent status to the judges and was a 'brother-in-law of the Bench'. It is not clear what effect this provocative assertion had, but the Court did not appear sympathetic to the constitutional arguments made.

Chief Justice Dwyer, with whom the rest of the Court agreed, found that the law was a reasonable measure to prevent the spread of disease. It prevented movement of people within a State so that those south of the line would not be exposed to leprosy. He noted that it had not been suggested that Mr Dooley or anyone else had been seeking to travel interstate and was prevented from doing so. The law had 'no real effect on intercourse amongst the States at all'. He characterised the law as an exercise of health powers that could not be seen to be an attempt to evade the operation of s 92 of the Constitution.

Dooley lost his appeal. But he still won the war. He arranged for Aboriginal people to cross north and south across the line in such large numbers on so many occasions that it was impossible to arrest and hold them all. The Native Welfare Department concluded that the law was not really for welfare and that it was a waste of time trying to enforce it. It tried to get the Health Department to agree to its removal, but the Health Department insisted it was still needed for public health. In the end, the problem was avoided by making permits easily available so there was no necessity to take any action.

COVID-19

This history gives us good context for what happened when a pandemic hit Australia in 2020. Just as in 1919, States were prepared to close their borders to prevent the spread of a deadly disease, at least before there were vaccinations available to limit its serious effects and prevent hospitals from becoming overwhelmed.

Tasmania's *Mercury* newspaper gave as a headline in March 2020 – 'We've got a moat, and we're not afraid to use it'. Western Australia, just as it did in 1919, shut its border to keep COVID out, and was again largely successful in doing so. The border closure protected the mining industry, which was essential to Australia's exports and its economic well-being, and also protected vulnerable Aboriginal communities.

The *Palmer* case

The Western Australia border-closure, which was again wildly popular, was criticized by the Commonwealth and challenged in the High Court by Clive Palmer, who was refused entry to the State. Palmer claimed that his physical presence was needed in Western Australia to run his businesses there. Western Australia said that he could use Zoom like everyone else.

As the parties could not reach an agreement on the facts in relation to risk, this aspect of the case was sent to the Federal Court to determine. Justice Rangiah heard evidence from epidemiologists about the level of risk involved in the spread of COVID and in relation to different measures to prevent its entry into the State. He determined that a precautionary approach should be taken to protect the community. The State's capacity to provide safe quarantine facilities was limited and the risk of COVID spreading was high with potentially catastrophic results.

On the basis of Rangiah J's findings, it could be concluded that the border closure was reasonably necessary and proportionate to achieving the legitimate end of protecting public health. Unlike the case about the diseased potatoes, there was no ability to know with certainty whether a person entering a State was carrying COVID-19.

The High Court then reconsidered the test that should be applied to see whether a law breaches s 92. First it looked to whether the law discriminated against interstate trade or movement. In this case the law did, by preventing the movement of people across the border. Second, it looked to whether there was a legitimate purpose for the law, and whether it was proportionate to achieving that purpose.

In this case, the High Court held that there was a legitimate purpose of protecting public health and that the law was proportionate to achieving it. There were in-built restrictions on the use of the emergency powers in WA. They could only be exercised for the purpose of managing the adverse effects of a declared emergency, and an emergency could only be declared where extraordinary measures were required to minimise loss of life and harm to health. If the powers were exercised for other purposes, such as political purposes, their exercise would be invalid. But that was not the case here.

Chief Justice Kiefel and Justice Keane said: 'It may 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'.

While the terminology has differed over the years, all the examples I have described lead to the same conclusion. Section 92 is not absolute. The inter-state movement of people may be restricted, but only where there is a legitimate purpose, such as public health and safety, and only if the law is proportionate to achieve that legitimate purpose. This approach is also consistent with overseas authorities from countries facing similar problems. For example, a challenge to lockdown laws in the United Kingdom was defeated on the basis that the relevant regulations were made for a legitimate purpose and were proportionate (*R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605).

Commonwealth override powers

But if States could validly enact these laws, could they still be overridden by the Commonwealth? Section 109 of the Constitution provides that where valid Commonwealth and State laws conflict, the Commonwealth law prevails and the State law is inoperative to the extent of the inconsistency. The High Court has also held that the Commonwealth may enact a law that covers a particular field to the exclusion of any State law in that field. So could this be done in a way that forced the opening of State borders?

The Commonwealth Parliament can only legislate upon matters that fall within the heads of power conferred upon it by the Constitution. One of those powers is the external affairs power. It can be used to implement treaty obligations, including those in human rights treaties, such as the right to freedom of movement. For example, article 12 of the *International Covenant on Civil and Political Rights* includes a 'right to liberty of movement'. But Art 12 is expressly subject to the qualification that it may be restricted, as provided by law, where this is necessary to protect public health, amongst other things. The UN Human Rights Committee, in interpreting this qualification, has stated that any restriction must be proportionate and the least intrusive means of achieving the applicable purpose.

Commonwealth legislation to give effect to this right of freedom of movement would probably not have been capable of overriding State border closures if those State laws were regarded as necessary to protect public health and proportionate in their application. This is because the Commonwealth's implementation of the treaty obligation would be regarded as only 'partial' and inconsistent with the terms and intent of the provision. This may well be the reason why this approach was not taken.

The Commonwealth, however, has another relevant power, being the power to make laws with respect to quarantine. This is a concurrent power, meaning that both the Commonwealth and the States can make laws about quarantine, but if there is an inconsistency, the Commonwealth law prevails. In the past, for example, the Commonwealth took over State quarantine stations.

The Commonwealth could have exercised this power to enact a comprehensive law with respect to quarantine of people suffering from diseases, which included the management of the movement of people carrying (or potentially carrying) a disease across State borders. Theoretically, this could have excluded the application of State laws that required permission to cross borders or required entrants to meet other types of quarantine requirements – although it would depend upon the drafting whether or not the law remained within the scope of the head of power and validly excluded the operation of the State law.

In practice, however, the implementation of such a comprehensive Commonwealth law was probably well beyond the capability of the Commonwealth to manage. This, again, is probably why the Commonwealth did not pursue this course. It was not so much a lack of legal power, but the absence of the capacity to give effect to a comprehensive quarantine scheme – not to mention the politics of being responsible for thousands of deaths consequential upon opening up a State to a deadly disease. Politically, there was greater benefit in carping against border closures than being responsible for the consequences of opening up State borders.

Conclusion

What does all this tell us? The States can, in rare circumstances, restrict movement across State borders, if it is for a legitimate purpose, such as protecting public health, and the law is proportionate. Such a law can exclude everyone from a State Premier, such as Henry Lefroy, or a wealthy businessman, such as Clive Palmer. But if there is not a clear justification for restricting inter-state movement, as opposed to intra-state movement, as was the case during the war, then a law that does so may be struck down, so that love-lorn young women, or Sydney gangland figures, as the case may be, may travel across the country with impunity. Love may have laughed at rail permits, but so did young Dulcie, who seemed better able to get her way to Perth than Henry or Clive.