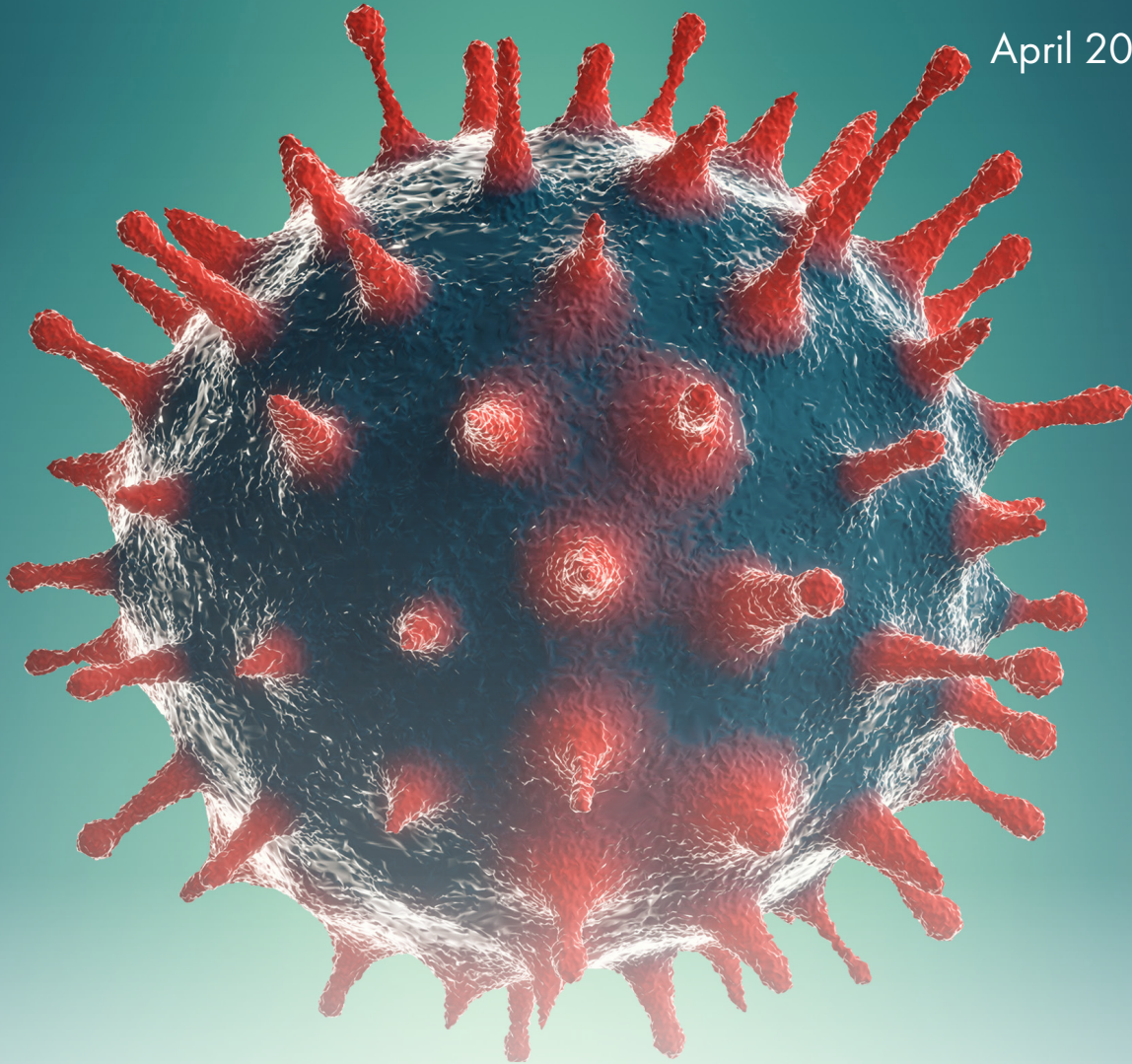


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STATES OF EMERGENCY:

AN ANALYSIS OF COVID-19
PETTY RESTRICTIONS

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Introduction

Since the World Health Organization's declaration of the coronavirus as a pandemic-level public health event Australians have been subject to an increasingly arbitrary, inconsistent and petty public policy response. The policy response has been felt by Australians in the form of enforced social distancing and isolation measures in order to delay the spread of the virus so that the number of active coronavirus cases does not at any time exceed the capacity of the health system to provide the appropriate level of care. The Commonwealth Department of Health has explained that keeping 1.5 metres away from other people and practicing good hygiene are essential to the social distancing which is necessary to meet this public health regulatory objective. However, many of the strict rules imposed by state governments have failed to take into consideration whether those activities can be undertaken while maintaining distancing of 1.5 metres.

Under Australia's federal system, the direct responsibility for imposing a policy response to the coronavirus has mostly fallen on the state governments. In order to impose the extensive restrictions, the states have relied on a variety of emergency and public health powers which have been validated by existing legislation. For instance on 16 March the State of Victoria declared a State of Emergency, which was made possible by the Public Health and Wellbeing Act passed in 2008 and which was to last for a period of four weeks. On 12 April, the state government extended the State of Emergency for a further four weeks, a power available to the government and which it can repeatedly do for a cumulative period not exceeding six months. At no stage does the Victorian government need to debate or approve in parliament the oppressive measures that has turned Victoria into a "police state" as described by John Roskam, executive director of the Institute of Public Affairs.¹

In contrast to the strict approach of Victoria, Western Australia has adopted a relatively more relaxed approach to responding to the coronavirus. While Western Australia also declared a state of emergency on 15 March, its policy response has been largely directed towards quarantining interstate travellers in government facilities and restricting travel between its nine internal regions, except where travel is undertaken for good reason such as work or compassionate reasons. Other states fall

¹ John Roskam, 'Beautiful one day, police state the next,' *The Australian Financial Review*, 3 April 2020.

somewhere in between Victoria and WA level of restrictions: South Australia declared a public health emergency but has not refused to enforce the Prime Minister's advice against gatherings of more than two people. Instead the South Australian government has prohibited gatherings of more than 10 people. Tasmania has implemented a broad definition of "social support" which is considered an essential and lawful reason for leaving the house.

The stricter states have used these powers to introduce an extraordinary level of restrictions on social, economic, and recreational activity. Many businesses have been instructed to cease operating altogether and gatherings of multiple people are in many cases prohibited. The implementation of these rules is often arbitrary and inconsistent with the fundamental legal rights of Australians, such as the presumption of innocence. A violation of a direction issued under public health or emergency powers will result in a strict liability offence. This means that the state does not need to find a mental element, or a person's intention to commit a crime, in order to be issued a penalty. In practice people who are outside of the house would in many instances be required to justify why they are outside or being with or around other people. Absurdly, this has seen a Victorian couple fined \$1,632 each for allegedly breaching travel restrictions after sharing holiday photos on Facebook which were taken in 2019.²

Because the distancing rules are issued by declarations and do not require the scrutiny of parliament in order to become law, these rules are being issued in relatively rapid pace and often in an inconstant way. There is a great deal of confusion about what the rules are and who the rules might apply to at any given moment. This was best illustrated when on 1 April the Premier of Victoria revealed that a person would not be permitted to visit a partner if they did not live with them. But by the end of the day it was announced that a special exemption would be made for people in this position. Deputy Commissioner Shane Patton of Victoria Police noted a problem in inconsistent enforcement when he noted he "was concerned that there continues to be an inconsistent approach from our members when enforcing the directives of the Chief Health Officer...the lack of discretion erodes public confidence in Victoria Police..."³

2 Summer Wooley, 'Coronavirus Australia update: Victorian couple fined \$3,300 over year-old holiday snaps,' *7news*, 13 April 2020 <<https://7news.com.au/lifestyle/health-wellbeing/coronavirus-australia-update-victorian-couple-fined-3300-over-year-old-holiday-snaps-c-973271>>.

3 Tammy Mills, COVID-19 lockdown fines 'eroding public confidence' to cop warns,' *The Age*, 13 April 2020 <<https://www.theage.com.au/national/victoria/covid-19-lockdown-fines-eroding-public-confidence-top-cop-warns-20200413-p54jfk.html>>.

If the rationale for restrictions is accepted it doesn't logically follow that any level of restrictions is appropriate. Nor does it follow that blunt one-size-fits-all restrictions are the best way to achieve the regulatory goal. It is entirely reasonable to suggest that the cause of regulation is justified but that the measures adopted are inappropriate to meet the goal. This is the case here. The restrictions imposed by the Australian states have been characterised by the kind of heavy-handed one-size-fits-all approach mentioned above, applying rules across different industries and activities. As a consequence the restrictions are being imposed on activities without regard for whether those activities can be undertaken while maintaining 1.5 metre distancing. These include restrictions on outdoor recreational activities such as fishing or playing a round of golf, as well as solitary activities such as driving in a vehicle due to boredom or to travel to a different place to exercise alone. In these situations it may be expected that the police will exercise discretion informed by common sense to have a relaxed enforcement approach. If this is not the case—and the numerous cases highlighted in this report suggest that this is an issue—then it is the rules which need to change.

The purpose of this report is to outline the petty implementation of restrictions of recreational and family activities which can be undertaken while maintaining 1.5 metre distancing. Specifically we ask if whether a person in each state is allowed to participate in a number of mundane recreational or social activities, such as whether a person is allowed to learn how to drive or visit your immediate family during the period of enforced distancing.

The National Cabinet has reportedly asked chief medical officers for “social relaxation options” to consider at a meeting to be held on 16 April 2020. This research highlights the need for scarce government resources to be directed towards enforcing rules which are the minimal effective regulations required to achieve the public health objective.

Petty restrictions, by state

Question	NSW	VIC	QLD	WA	SA	TAS
Can you go fishing?	Allowed as long as people follow social distancing regulations.	Victoria is currently the only state or territory that has banned recreational fishing. Boat ramps, piers, jetties and other marine infrastructure closed from 9 April for the Easter weekend.	Fishing is allowed as long as people follow social distancing rules.	Encouraging fishers to stay home but is not banned.	Fishing is allowed as long as people follow social distancing rules.	Allowed as long as people follow social distancing regulations. Fishing with up to two people in a boat is allowed.
Can you play a round of golf	Golf courses remain open after a "miscommunication" which told all to close immediately.	Closed as per directions prohibiting "recreational facilities" from operating during the state of emergency.	Golf courses allowed to open but Golf Australia recommends courses should close anyway.	No specific advice or case studies.	Treated no differently to public parks and beaches (10 person limit restrictions apply)	State government has set a limit of 2 people per hole on the golf course.
Can you visit your immediate family if you don't live together	Probably not. Police Commissioner said on 1 April 2020 that while visiting partners was allowed social visits do not count.	Social visits are not allowed unless for compassionate reasons.	Allowed to have two additional guests in a house at a time but physical distancing should be observed, and unnecessary social gatherings limited.	Families are exempt from the two-person gathering limits, however, unnecessary social interaction is discouraged.	Allowed as long as there are a maximum of 10 people at a gathering, however unnecessary social interaction is discouraged.	Tasmania has a broad definition of "social support" which is considered an essential reason for leaving the house.
Can you visit your partner if you don't live with them?	Legislation would suggest not, but police commissioner Mike Fuller has said that this falls under the "care" exemption.	Originally declared to be not allowed (1 Apr 2020). Later that afternoon the state chief health officer tweeted that an exemption to the social visits rule would be made for partners.	Allowed. Households are allowed to have two additional guests at a time but physical distancing should still be observed when possible.	No specific advice or case studies.	No specific advice or case studies.	Tasmania has a broad definition of "social support" which is considered an essential reason for leaving the house. Not permitted to stay overnight however.
Can you go for a drive?	No specific advice or case studies.	Fines were reportedly issued to four people who were driving aimlessly. Another man was issued a fine for driving to a bike trail for under "unnecessary travel" restrictions.	A person can travel with those living in the same household, or with one other person, but there are exemptions for the elderly or people with a disability.	No specific advice or case studies. State government has warned that all passengers need an essential reason to travel.	No specific advice or case studies.	No specific advice or case studies. State government has warned that all passengers need an essential reason to travel.

Can you learn how to drive?	This is a reasonable excuse to leave the house.	A 17-year-old learner driver with her mother in the passenger seat was pulled over by police and issued with a \$1,652 fine. The Health Minister later stated that learning to drive was not an essential activity.	This is a reasonable excuse to leave the house but driving tests have been cancelled for three months from 28 March.	Driving lessons are still allowed and some driving tests are still happening. Travel is not allowed between the nine WA regions.	SA police have said that SA restrictions "would not prevent two members of the same family group from being together in a motor vehicle for the purposes of a driving lesson."	Driving lessons are a "reasonable excuse" under the state's public health orders but people are urged to "drive within their local area."
Can you have social guests if you live alone?	Social visits are not allowed.	Social visits are not allowed.	Allowed. No more than two guests are allowed in a house at a time.	Allowed, but only one person, or family.	Allowed, but gatherings are limited to 10.	Allowed under social support rules but only two visitors are allowed at a time and must be mindful of social distancing and avoiding unnecessary travel.
Can you drive to your beach house or holiday house?	NSW Arts Minister Don Harwin resigned when he was fined \$1,000 for breaching a ban on non-essential travel after he was photographed at his Central Coast holiday house.	Premier Andrews has said that the government won't stop people traveling to <i>properties they own</i> over Easter. However roadblocks are to be set up on the Great Ocean Road to "stop rogue holiday-makers" spreading the virus. However a Victorian couple were fined \$1,632 each for breaching restrictions after sharing year-old holiday photos on Facebook.	According to <i>The Courier</i> you may travel to a holiday house with those you live with, only leaving the holiday property for essential reasons.	No specific advice or case studies.	No specific advice or case studies.	No specific advice or case studies.
Can you go to the beach or go surfing?	NSW Health has stated that "surfing, like any other recreational activity or gathering... should not be done in any more than groups of two with the rules of 1.5m social distancing being followed at all time."	Piers and jetties closed from 9 April 2020. Tourists discouraged from surfing at Torquay.	Gold Coast mayor Tom Tate said beaches would close at The Spit, Surfers Paradise and Coolangatta due to "out of towners" visiting the beaches.	Beaches are not closed but the state government has urged people to adhere to social distancing rules or popular spots like Cottesloe will be shut down.	Premier Stephen Marshall has stated that surfing, walking along the beach and exercising in parks is still allowed.	Tasmanian national parks have been shut meaning any beaches within national park areas are not accessible. Council-patrolled swim spots remain open.

How far are you allowed to travel for exercise or other reasons?	Allowed to drive across town however not allowed to travel hours out of the city	Premier Andrews said on Twitter that exercise had to be local and not "driving for miles and being out all day."	Not specified but government urges residents to use common sense and avoid unnecessary travel.	Not allowed to travel between the nine regions of WA without good cause, such as work or compassionate reasons.	No specific advice or case studies.	No specific advice or case studies.
Can you sit on a park bench?	Premier Berejiklian said a person sitting on a park bench would be asked to move on. "You shouldn't be stationary." A man was fined \$1000 after he was caught eating a kebab on a park bench in Newcastle.	A strict reading of the directions indicate a person can not sit idly on a park bench.	Associate Professor of Law Susan Harris Rimmer advises Queenslanders to "not sit on anything, play on anything or touch anything" at local parks.	No specific advice or case studies.	No specific advice or case studies.	No specific advice or case studies.
Can you leave the house if you are bored?	A woman was fined for joining a man delivering food because she was bored of being at home.	Reported that fines were issued to four people who were driving aimlessly.	No specific advice or case studies.	No specific advice or case studies.	No specific advice or case studies.	No specific advice or case studies.
Can you buy food from an outdoor market?	No specific advice or case studies.	No specific advice or case studies.	Premier threatened to shut down fresh food markets after crowds attended a market.	No specific advice or case studies.	No specific advice or case studies.	No specific advice or case studies.

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