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The Role of the State in the Protection of Public Health: The Covid-19 Pandemic

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ABSTRACT

This chapter deals with the disrupting effect of the Covid-19 virus in Australia. It briefly describes the restrictions which were imposed on people by the Australian authorities to combat the virus. The chapter characterises these restrictions as an extreme version of “Nanny State” measures which are paternalistic in nature and have an enormous and deleterious effect on the rights of people, and even have unintended consequences for the protection of their health. The author considers the constitutional foundations of the Covid-19 laws and regulations and highlights the perceived weaknesses of the Government’s actions. It is suggested that it is too early to make an accurate assessment of the lasting impact of the pandemic on the fabric of Australian society.

I THE COVID-19 PANDEMIC AS A DISRUPTOR

The year 2020 has thus far been dominated by one momentous event: the Covid-19 virus which dramatically changed the domestic and in-

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ternational landscapes.¹ The highly infectious virus spread quickly throughout the world, resulting on 30 January 2020 in a declaration by The World Health Organization (‘WHO’) of a Public Health Emergency of International Concern, which soon after was recognised as a ‘pandemic’. The pandemic generated an avalanche of laws and regulations in many countries, aimed at combating, controlling, or eradicating the disease. This unprecedented legislative activity necessitates a consideration of the role of the State in the protection of peoples’ health.

I have always been interested, intellectually and practically, in the proper role of the State in society, but I have pursued this interest in the context of a coronavirus-free environment. Specifically, in 2015 I published a paper that dealt with the role of the State in the protection of peoples’ health in which I argued that governments, rather than prescriptively prohibiting unwanted behaviour by the adoption of “Nanny State” measures, had recourse to more subtle, but equally effective, “Nudge State” measures that purported to maintain personal choice.²

However, the spread of the Covid-19 virus has completely changed this narrative and, hence, it is appropriate to revisit the proper role of the State in the protection of peoples’ health in the light of the pandemic. In this chapter, I trace the journey of State interventionism involving the legislative adoption of behavioural rules to improve public health. In the pre-Covid-19 era, “Nudge State” interventionism was the preferred legislative approach to controlling the health of citizens. However, since the outbreak of the Covid-19 pandemic and the staggering rivers of cash thrown at its eradication, it is clear that an ex-

¹ Of course, there were other events that captured the attention of the world, for example, the Black Lives Matters Movement that started following the death of George Floyd in Minnesota at the hands of a police officer, and the protests against racism and refugees’ detention, which led to the destruction of many historical monuments in the United States, the United Kingdom and Australia. On 26 June 2020, President Donald Trump issued an Executive Order on Protecting Monuments, Memorials, and Statues and Combating Recent Criminal Violence.

² Gabriël A. Moens and Rajesh Sharma, ‘Improving Public Health Through Behavioural Rules: A Legitimate Legislative Project of a Nanny State or a Nudge State?’ (2015) 57(4) *Journal of the Indian Law Institute* 474.

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treme version of the “Nanny State” approach is prevalent and that any “Nudge State” measures are merely convenient smokescreens used in less challenging times to protect the health of a State’s population.

In the next section of this chapter, I will briefly describe Australia’s response to the spread of the Covid-19 virus, and the measures which have been taken to fight the disease. An evaluation of these measures requires a theoretical understanding of the “Nanny State” and “Nudge State” approaches to the protection of peoples’ health. Specifically, it will be argued in the third section that the distinction between “Nanny State” and “Nudge State” measures is a distinction without a difference and, therefore the “Nudge State” approach does not really differ, in substance, from the “Nanny State” approach. In section four, I argue that the Covid-19 virus pandemic has resulted in the restoration of an extreme version of the “Nanny State” approach. Section five examines whether this version is compatible with the Commonwealth Constitution and focuses on the consequences of the implementation of this extreme version for the rule of law and the rights of people. Some concluding comments are offered in the last section.

II AUSTRALIA’S RESPONSE TO THE COVID-19 PANDEMIC

The Covid-19 virus apparently entered Australia sometime in January 2020, possibly by plane coming from Wuhan, Hubei Province, People’s Republic of China.³ The Government of Australia responded to this unprecedented virus threat to the health of people by instituting a National Cabinet, consisting of the Prime Minister and the Premiers of the States and the Chief Ministers of the Territories, assisted by the Chief Medical Officer, to design a joint and co-ordinated response to the spread of the virus.

The response involved the adoption of draconian restrictions on the free movement of people. The measures taken were, by any standard, severe. Australia, like many other countries, opted for a ‘lockdown’ without seriously considering the social and economic consequences of this measure. China had previously ordered a lockdown in the Wu-

³ <https://www.health.gov.au/news/chief-medical-officers-update-on-novel-coronavirus>.

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han region, affecting approximately 56 million people. This measure became the template for other countries. The authorities were able to justify their harsh lockdown measures by referring to the seeming inability of the New South Wales Health Service to contain the infection found on board an arriving cruise ship, the *Ruby Princess*. The virus also seemed to proliferate in an uncontrolled manner in aged care facilities. In one facility, the now notorious Anglicare Newmarch House Facility in New South Wales, nineteen people died from the virus, out of a total of 126 fatalities attributed to the virus, as at 25 July 2020. The occupants of the Facility were apparently not allowed to go into a hospital to have their viral infection treated.

States and Territories effectively closed their borders. Meetings of more than ten people were banned in some States. People over 70 and Aboriginals over 50 were deemed to be vulnerable groups; as such they were encouraged, if not ordered, to stay at home. Visitors to Australia were required to self-isolate for fourteen days or were compulsorily quarantined in city hotels or government facilities. Food and medicines were delivered to people's houses and physical contact, even with children and grandchildren, was discouraged. People were expected to practice "social distancing" which involved maintaining a distance of at least 1.5 metres from other people.

The closure of businesses was ordered by the National Cabinet. The Cabinet also cancelled events, stopped international travel and most of domestic travel, thereby creating an unemployment crisis of immense proportions. More than one million workers lost their jobs, at least temporarily, making it difficult for many people to pay their rents or mortgages, or to purchase food for their families. All the resources of Government were commandeered to fight the disease. The Government undertook to spend a staggering amount of money, AU\$214 billion, to protect the sovereignty of Australia and to ensure that businesses could return to normal once the crisis passed. When adopting the Covid-19 legislation on 8 April 2020 the Prime Minister stated:

Our sovereignty is measured in our capacity and freedom to live our lives as we choose in a free, open and democratic so-

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ciety. Our sovereignty is enabled by having a vibrant market economy that underpins our standard of living that gives all Australians the opportunity to fulfil their potential. To have a go and to get a go. We will not surrender this.⁴

The Government's treasure chest was used to temporarily finance the JobKeeper scheme which provided monetary support for workers who became unemployed when businesses closed. Childcare centres were subsidised to ensure they stayed open, private hospitals were brought under public control, and many people were directed to now work from home. Elective surgery was suspended temporarily in the expectation that hospital beds would be needed for coronavirus patients and that all ventilators would be used by Covid-19 sufferers. This may have had the unintended consequence that some people died from other diseases, for example cancer, because the treatment of all other health conditions were subordinated to the fight of the Covid-19 virus.⁵ The implementation of these restrictive measures raises the question as to whether the Government's response to the virus threat was proportionate to the dangers associated with the disease.

The lockdown measures were not without critics. An English medical scholar, Carlo Caduff, commented that, 'A crude, extreme and ultimately unsustainable version of the Chinese approach became the international norm.'⁶ Some countries, rather than ordering a total lockdown, promoted a herd immunity approach, and concentrated from the beginning of the pandemic on increased testing and contact

⁴ Phillip Coorey, 'Coronavirus measures are temporary: PM', *Financial Review*, 8 April 2020 <<https://www.afr.com/politics/federal/morrison-coronavirus-a-threat-to-our-sovereignty-20200408-p54i3y>>.

⁵ It is ironic that the lockdown measures taken to protect the health of citizens may have the unintended effect of diluting the quality of medical services in Australia. For example, the Government-approved medical service delivery by telephone has made it more difficult to secure a face-to-face appointment with a medical practitioner in a timely manner.

⁶ Carlo Caduff, 'What Went Wrong. Corona and the World after the Full Stop', accepted for publication in a forthcoming issue of *Medical Anthropology Quarterly*. See also volume 10, issue 2 of *Migration Policy Practice* which contains many articles about the pandemic; Barrie Sander and Jason Rudall (eds), 'COVID-19 and International Law' (2020) March-April *Opinio Juris*.

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tracing. However, the Australian authorities, in deciding on lockdown measures in response to the transmission of the virus, relied on mathematical disease modelling which appeared, for some time, to be the only tool used in the formulation of Government policy. The National Cabinet were thus guided by medical experts who used statistical modelling to predict the extent to which the disease would spread in Australia. A commentator, Professor David Flint, has argued that reliance on mathematical modelling ‘has limited utility’. Specifically, he opined that, ‘Relying on secret modelling, today’s leaders concentrated on stopping the spread of the virus they had let in by destroying jobs and much of the productive part of the country and ... squandering billions of the next generation’s inheritance on a succession of ill-thought and knee-jerk measures.’⁷ For him, the science of mathematical modelling had yielded routinely wrong results in the past and, in the circumstances of the Covid-19 challenge, it irrationally overstated the number of infections and deaths.

Flint’s point implicitly warns that the use of questionable scientific tools in the making of policy decisions is precarious and possibly dangerous. However, in Government circles, there appears to be an unquestioned belief in the accuracy of scientific findings and in the ability of people to explain everything in a scientific way, leaving no room anymore for common sense and even faith.⁸ Current scientific achievements and developments, while impressive and promising, may reveal the existence of unexplained phenomena and mysteries which are not yet amenable to systematic investigation. Hence, there will always be room for, and a need of, common sense and faith.⁹

⁷ David Flint, ‘Recover Reparations, Restore Independence’, *The Spectator*, 11 April 2020.

⁸ In this context, Article 1, The Humanist Manifesto II, 1973 states that, ‘We believe ... that traditional dogmatic or authoritarian religions that place revelation, God, ritual, or creed above human needs and experience do a disservice to the human species. Any account of nature should pass the tests of scientific evidence; in our judgment, the dogmas and myths of traditional religions do not do so.’

⁹ However, scientific developments have now made it possible to manipulate the gender of our children, and cloning technology already exists. We have witnessed the adoption of same sex marriage as a legal institution in Australia. And increasingly, legislators around Australia promote euthanasia to enable people to determine how and when they die.

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Larry P Arnn, President, Hillsdale College in Michigan similarly criticises the idea, that health experts and other people with scientific expertise should run the government. He emphasises the importance of common sense when he states that, ‘If decisions are made ultimately according to common sense and if everyone can have it, then we are able as well as entitled to manage the affairs of the nation as citizens who deliberate together.’¹⁰

The Australian lockdown measures were eased as from the beginning of May 2020, but Western Australia and Queensland kept their borders shut. South Australia, which did not register any infections for some weeks, opened its border to some interstate traffic in June 2020. Queensland opened its border to interstate travellers, except from Victoria and some New South Wales hotspots on 10 July 2020. A second wave of infections hit Victoria in July 2020, which resulted in the complete lockdown of nine social housing towers. A bungled supervision of quarantined people in a Melbourne hotel considerably increased the rate of infections. By the end of July 2020, there were more than 600 new infections every day in Victoria. New South Wales, especially some hot spots around Sydney, experienced a second wave of infections. By 13 August 2020, 352 people had died from Covid-19 complications.

It is expected that some limited interstate travel might be possible in the second half of 2020, but international travel does not seem to be an option until at least the middle of 2021.

III THE “NANNY STATE” AND THE “NUDGE” STATE: A DISTINCTION WITHOUT A DIFFERENCE?

Since the Second World War, governments have intervened legislatively and administratively to ensure that citizens are properly protected against health risks. This intervention led to the creation of the “Nanny State” which essentially replaced the free choice of individuals with the decision-making power of the government. In pre-Covid-19 days, this intervention generated a discussion about the extent to which governments should embrace paternalism as a principle of

¹⁰ Larry P Arnn, ‘Thoughts on the Current Crisis’ (2020) 49(3/4) *Imprimis* 4.

legislation. The implementation of this principle resulted in the imposition of unpopular and burdensome health regulations because it validated the making of decisions which individuals should be allowed to make themselves. For this reason, supporters of “Nanny State” interventionism sought to moderate their approach through the medium of a “Nudge State”, though in goal and philosophy they are similar. This similarity arises from the fact that the “Nudge State” seeks to achieve the same objectives, not by prescriptively controlling, forbidding or compelling the behaviour of individuals, as is usual under “Nanny State” interventionism, but by making this behaviour economically expensive, socially undesirable, or emotionally challenging.

The term “Nanny State” is a familiar description of the tendency of many modern governments to treat their ‘citizens as children in a nursery’,¹¹ supervising and influencing their choices according to the government’s view of their well-being. Such an approach is ‘authoritarian and paternalistic ... imposing on people what is good for them, for “nanny knows best”’.¹²

In contrast, the supporters of the “Nudge State” approach seek to make Nanny less prominent by seeking to preserve free choice. They rather wordily define a “nudge” as ‘any aspect of the choice architecture that alters people’s behavior in a predictable way without forbidding any options or significantly changing their economic incentives’.¹³ According to Richard Thaler, the “Nanny State” is coercive, for example by banning cigarettes, while the “Nudge State” seeks to goad people in a pre-determined direction that is favoured by the State, for example, by quitting smoking.¹⁴ The “Nudge State” philosophy thus seeks to manipulate and influence peoples’ choices, not by ban-

¹¹ R W Holder, *How Not To Say What You Mean: A Dictionary of Euphemisms* (Oxford University Press, 4th ed, 2007) 269.

¹² John Ayto and Ian Crofton, *Brewer’s Dictionary of Modern Phrase and Fable* (Weidenfeld & Nicolson, 2nd ed, 2006) 520.

¹³ Richard H Thaler and Cass R Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Yale University Press, 2008) 5-6.

¹⁴ Interview with Richard Thaler, *HARDtalk*, BBC World Service, 24 October 2012 <<http://www.bbc.co.uk/podcasts/series/ht/all>>

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ning these choices, but by making it more difficult to freely choose or by making the choice economically prohibitive, socially undesirable, or emotionally challenging. As such, although Nanny does not make the decisions, for example, that people should not smoke, it nevertheless influences and manipulates individuals' choices to smoke.

The “Nudge State” approach is zealously paternalistic: ‘At the core of nudging is the belief that people do not always act in their own self-interest.’¹⁵ Underlying that philosophy is the notion that the State can make better choices for citizens than those citizens will make for themselves if left to their own devices. This worldview seeks to protect consumers even where they do not want protection, ‘overriding consumer preferences to improve public health.’¹⁶

A patronising sense of entitlement to a guiding role over the lives of others pervades the policies of a “Nudge State”. The “Nudge State” seeks to ‘coax and cajole ... autonomous adults into healthier decision making’¹⁷ and ‘to steer citizens towards making positive decisions as individuals and for society.’¹⁸ Although the changes to the choice architecture of society might appear to be minimal, their cumulative effect is to significantly shift the behaviour of people in the direction favoured by governments.¹⁹

The Nudge approach even made its presence felt in the formal structure of government. The British coalition Government, led by former Prime Minister David Cameron, established a Behavioural Insights Team, popularly known as the “Nudge Unit”. This unit attempted to apply insights from behavioural psychology to the devel-

¹⁵ Katrin Bennhold, ‘The Ministry of Nudges’, *New York Times*, 8 December 2013, BU1.

¹⁶ Katherine Pratt, ‘A Constructive Critique of Public Health Arguments for Antiobesity Soda Taxes and Food Taxes’ (2012) 87 *Tulane Law Review* 73, 107.

¹⁷ Jonathan Cummings, ‘Obesity and Unhealthy Consumption: The Public-Policy Case for Placing a Federal Sin Tax on Sugary Beverages’ (2010) 34 *Seattle University Law Review* 273, 294.

¹⁸ Alberto Alemanno, ‘Nudging Smokers: The Behavioural Turn of Tobacco Risk Regulation’ (2012) 3(1) *European Journal of Risk Regulation* 32.

¹⁹ Helen Lewis, ‘Out of the Ordinary’, *New Statesman*, 30 September-6 October 2016, 23.

opment of policy, seeking to influence individual behaviour to ensure its compatibility with government policy objectives. The State thus employed people who were actively charged with dreaming up new ways to interfere in the lives of ordinary people. The Unit's Internet blog ranged over the staggeringly wide field in which they offer their valuable insights: from obesity, tax compliance, literacy, numeracy, organ donation, household appliances, loft insulation, mobile phone theft, Christmas presents, plastic shopping bags, staircases, and penalty shoot-outs.²⁰ Similarly, in the United States, President Barack Obama issued an Executive Order mandating the use of behavioural science in policymaking.²¹

But in general, there is little difference in substance between the "Nanny State" and the "Nudge State". The "Nudge State" is simply an attempt to rebrand the way in which governments seek to influence the choices made by their citizens. As the "Nanny State" has been rejected by the citizenry because of its paternalistic characteristics, a "Nudge State" government seeks to promote its preferred choices by manipulating the choice. In doing so, "Nudge State" governments often adversely impact on the rights and interests of the suppliers of these choices. Thus, the "Nanny State" and the "Nudge State" legislative programmes are both based on, and inspired by, the same "nanny knows best" philosophy. Essentially, it is a distinction without a difference.

For example, government policymakers may assume, perhaps correctly, that people in general are addicted to soft drinks which contain a high level of sugar, which contributes to obesity. This, in turn, may facilitate the introduction of "Nudge State" measures, including the imposition of production specifications or additional taxes, that result in substantially increasing the price of these products. In this sense, a Nudge measure is a short cut which enables governments to achieve

²⁰ <http://www.behaviouralinsights.co.uk/blog>.

²¹ Executive Order 13707, 'Using Behavioral Science Insights to Better Serve the American People', 15 September 2015. This order requires federal agencies to integrate behavioural insights into their policies and programmes; it also establishes the Social and Behavioral Sciences Team ('SBST').

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policy objectives, and targets, in an expedient manner perceived social ills without having to rely on the cumulative effect of private choices which are made by people.

In contrast, a libertarian philosophy and approach provide an alternative to the implementation of the principle of paternalism. According to libertarian philosophy, it is not the role of the State to hold the hands of adults of full capacity as they make their way through commercial life. This libertarian philosophy emphasises both personal choice and acceptance of individual responsibility for the consequences of those choices: ‘people should be free to choose whether to live in ways that are healthy or unhealthy and take personal responsibility for their own health.’²²

Every time the government seeks to mould individual economic and social choices, personal freedom is diminished, so strong justifications should be proffered for such interventions. Intervention should be a last resort, not a reflex instinct. Most “Nanny State” or “Nudge State” interventions take place by way of legislation, rather than judge-made law. Many rules of the common law and equity have libertarian characteristics, generally holding parties to their bargains and resisting the temptation to abolish or revise obligations freely undertaken merely because their outcomes subsequently prove disadvantageous to a party. In contrast, the legislative and executive branches of many governments in Western countries appear to be faithfully devoted to “Nudge State” interventions.²³

There are numerous policy objections to most paternalistic “Nanny

²² Pratt, above n 16, 110, 129.

²³ One of the most controversial “Nudge State” interventions is the Australian federal law which provides that tobacco products may be sold only in generic packaging. The exterior of Australian cigarette packs must be “dark drab brown” in colour and have a matt finish. The executively mandated specific colour is reputed to be the world’s ugliest colour. The interior of packs must be white. The legislation effectively strips valuable tobacco trademarks of any economic significance. Trademarks may not appear on cigarette packaging, other than a single use of the brand name. Even the size, typeface and colour of the brand name are regulated closely. Trademarks may not appear on the cigarettes themselves or the packet wrappers. Ugly graphic health warnings must take up 75% of the front of packets and 90 % of their reverse side.

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State” and “Nudge State” interventions, for example, the ready alternative of promoting and accepting individual responsibility, the substitution of the targeted product by a different, but an equally satisfactory product, the probable circumvention of paternalistic laws, for example by buying a targeted product in a neighbouring state, the likelihood of unintended consequences, the availability of voluntary alternatives, the lack of public support for such measures and the likelihood of endless litigation challenging “Nanny State” and “Nudge State” impositions. As it is conceptually difficult to distinguish “Nudge State” and “Nanny State” measures, these objections may apply equally to both types of impositions.

IV THE RESTORATION OF THE “NANNY STATE” APPROACH: THE COVID-19 CHALLENGE

It was argued in the previous section that “Nudge State” interventionism in the field of public health is the functional equivalent of “Nanny State” interventionism. These interventions, regardless of the form they take, have effectively removed from individuals the power to make their own health decisions. In a Covid-19 context, the Australian authorities have determinedly embraced this interventionist policy, adopting measures aimed at maintaining peoples’ health. Hence, it is not surprising that a staggering amount of legislation relating to the Covid-19 pandemic has already been adopted.²⁴

This legislation reveals the irrelevance of any attempts to ascertain sophisticated differences between “Nudge State” and “Nanny

²⁴ See, for example, *Biosecurity Act 2015 (Cth)* (Compilation as at 1 March 2019); *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Amendment (No. 1) Determination 2020*, 7 April 2020; *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020*, 25 March 2020; *Biosecurity Repeal (Human Health Response Zones) Determination 2020*, 18 March 2020; *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Determination 2020*, 18 March 2020; *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020*, 18 March 2020; *Coronavirus Economic Response Package Omnibus Act 2020*, 24 March 2020. Bottom of Form

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State” measures. Indeed, the Commonwealth Government, in adopting draconian legislation to combat the coronavirus, has once again resorted to conventional, prescriptive “Nanny State” measures which have the potential to seriously impact on the enjoyment of civil liberties, and generally, respect for the rule of law. This is because these measures have substantially increased the discretionary power of the police, who may well assume that people are presumed guilty of violating social distancing rules, non-essential travel restrictions, and isolation requirements, all of which might result in the imposition of hefty fines.

These unprecedented restrictions on the enjoyment of our civil liberties have been criticised, notably by Professor Augusto Zimmermann in *Quadrant Online*, on the ground that they involve decision making by diktat. In his comment, *Government by Virus and Executive Diktat*²⁵ of 8 April 2020, he deplores the diminished authority of the Parliament and the erosion of the separation of powers doctrine, and he describes the actions of governments as more suitable to totalitarian regimes:

Because these extreme measures are dictated by the executive and have no deadline to expire, we are effectively experiencing government by executive decree. This is something akin to the actions of deeply authoritarian regimes, in particular when such executive measures are not properly scrutinised.

Professor Zimmermann, while admitting that sometimes emergency powers are needed, maintains that the current measures ‘will dramatically increase the power of the state, thus allowing governments to arbitrarily exercise mass surveillance powers’ involving an ‘alarming restriction of civil liberties’. He further states that, ‘any rush to embrace draconian measures in our response to the present crisis will give the state terrifyingly broad powers.’ In using these powers,

²⁵ Augusto Zimmermann, ‘Government by Virus and Executive Diktat’, *Quadrant Online*, 8 April 2020 < <https://quadrant.org.au/opinion/qed/2020/04/government-by-virus-and-executive-diktat/>>.

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governments have adopted measures which have devastated the entire economy. Potentially, the collapse of the economy has frightening concomitant consequences:

Inevitably, job losses will lead to far more homelessness, with financial pressures leading to a much higher suicide rate, widespread marriage breakdown and to a dramatic growth in crime, which always increases in times of economic crisis.²⁶

His assessment is clear:

Yes, coronavirus poses a serious public health risk. But the key word here is proportion. These draconian measures provide a pretext for the authoritarian takeover of civil society that not only unleashes unprecedented economic mayhem, but also threatens our present way of life and what it means to live in a free and democratic society.²⁷

Similarly, Professor David Flint has argued in *The Spectator* that the lockdown is a disproportionate response to the challenges posed by Covid-19 and is not cogently related to the objectives that the State wishes to achieve. He is critical of Australia's policymakers:

What our morally corrupt political elites have done is to deliver even more evidence that they had, with reckless indifference, not properly examined whether they had the power to impose this totally unnecessary lockdown nor considered whether the resulting damage to millions of Australians would be justified. In brief, they had not properly considered whether their cure would far worse than the disease.²⁸

He argued that the Government, in relying on the advice of scientists who believed in the infallibility of modelling science, was responsible for major economic dislocations in society. Most sacri-

²⁶ Augusto Zimmermann, 'In the State You Will Trust', *Quadrant Online*, 5 April 2020 <<https://quadrant.org.au/opinion/qed/2020/04/in-the-state-you-will-trust/>>.

²⁷ Ibid.

²⁸ David Flint, 'The Horse Has Bolted and the Emperor Has No Clothes', *The Spectator*, 13 June 2020.

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lices had to be borne by businesspeople, not the bloated public service which was preserved and was able to make regulations to burden the productive sectors of the Australian economy. He claims that, ‘There is too often a complete absence of common sense.’²⁹

Carlo Caduff, in a recent article on Covid-19, agrees with Flint’s analysis on the disproportionate response to the virus. He states:

How was it possible for a virus to trigger such a massive response that continues to threaten society and the economy, with so little discussion about the costs and consequences of extreme measures? Why is there widespread agreement that aggressive interventions to ‘flatten the curve’ were necessary and justified? It seems that this unprecedented public health experiment occurred without sufficient consideration of the social, political and economic consequences.³⁰

In his paper he criticises the reliance of many Western countries on the lockdown approach of the Chinese Government and the failure, in the early part of the pandemic, to rely on testing and contact tracing.

V A CONSTITUTIONAL LAW ASSESSMENT OF THE GOVERNMENT’S RESPONSE TO THE COVID-19 PANDEMIC

The commentators referred to above bemoan the Government’s failure to fashion a response which is proportionate to the objectives it wanted to achieve, which is the protection of peoples’ health by controlling or eradicating the disease. The concept of “proportionality” ‘has often been advanced as a touchstone of constitutional validity’ of legislative provisions.³¹ “Proportionality” has been discussed by the High Court of Australia mainly in cases involving Commonwealth legislative powers that are purposive in nature. The majority of s 51 and s 52 powers of the *Commonwealth Constitution* are non-purposive, for example, a power to regulate external affairs, taxa-

²⁹ Ibid.

³⁰ Caduff, above n 6.

³¹ Gabriël A Moens and John Trone, *The Constitution of the Commonwealth of Australia Annotated* (LexisNexis Butterworths, 9th ed, 2016) 35.

tion, and family law. However, some powers are purposive because they require the court to look, not only at the terms of the legislation but also at its purpose in advancing the subject matter of the power. For example, the defence power is a purposive power because any legislation that relies on this legislative power is for the purpose of protecting the sovereignty of Australia, and that purpose may vary in the light of the changing circumstances in which the Commonwealth may find itself.³²

The case of *Davis v Commonwealth*³³ provides a good example of the application of the purposive approach. This case dealt with the incidental power to the executive power of s 61 of the *Commonwealth Constitution*, the nationhood power. As the executive power extended to the incorporation of an institution to promote the Bicentenary of European settlement in Australia, the incidental power would support legislation regulating that institution's procedures, giving it certain powers, and protecting its name and symbols. However, "proportionality" considerations came into the picture because the legislation went much further and prohibited the expression of ideas violating freedom of expression. Brennan J said that, 'it cannot be incidental to the organisation of the commemoration of the Bicentenary to prohibit, under criminal sanctions, the peaceful expression of opinions about the significance of the events of 1788.'³⁴

Australia's response to the Covid-19 challenge involves the adoption of legislation which arguably has been based on the Commonwealth's nationhood power. In Australia, the legislative power to adopt emergency legislation belongs to the States and Territories.³⁵ Hence, each jurisdiction has adopted relevant emergency legislation.³⁶

³² Ibid 28.

³³ (1988) 166 CLR 79.

³⁴ Ibid at 117.

³⁵ Australian Institute for Disaster Resilience, 'Australian Emergency Management Arrangements', Department of Home Affairs, 2019, 4.

³⁶ See *Emergencies Act 2004* (ACT); *State Emergency and Rescue Management Act 1989* (NSW); *Emergency Management Act 2013* (NT); *Disaster Management Act 2003* (Qld); *Emergency Management Act 2004* (SA); *Emergency Management Act*

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However, it might be argued that the “nationhood” power which is based on s 61 of the *Commonwealth Constitution* according to which ‘The executive power of the Commonwealth ... extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth’ may also provide a justification for the introduction of Commonwealth-sponsored emergency measures. If so, the question of proportionality is squarely in issue. The problem is that only the principles are known, not their implementation. Although we know that the means must be cogently related to the end, for example, flattening the curve or even eradication of the Covid-19 disease in Australia, we do not know how far the legislator can go. Does the government have an unfettered discretion in the matter?

Economist Andrew Stone told *The Australian* that, ‘Government led people to believe the virus would be like a Spanish flu; that’s turned out not to be the case, and they will forgive it if it admits that, on new information, it was wrong and allows businesses to reopen.’ He went on to say that, ‘Most of all we need to avoid a situation whereby we’re effectively printing money to pay people to do nothing.’³⁷ His latter comment refers to the government’s signature \$130 billion JobKeeper package, which commenced in May 2020.

It is likely that the emergency measures introduced by the Commonwealth are constitutional as suggested in *Pape v Federal Commissioner of Taxation*, decided by the High Court in 2009.³⁸ *Pape* dealt with the Global Financial Crisis of 2008-2009 and the economic stimulus law adopted by the Parliament. In *Pape*, the Commonwealth argued that such law was supported by an implied legislative “nationhood power”. Although a majority of the High Court (French CJ, Gummow, Crennan and Bell JJ) found it unnecessary to consider this issue,³⁹

2006 (Tas); *Emergency Management Act* 1986 (Vic); *Emergency Management Act* 2013 (Vic); *Emergency Management Act* 2005 (WA).

³⁷ Adam Creighton, *The Australian*, 23 April 2020, 6.

³⁸ 238 CLR 1 (2009). See on this case Gabriël A Moens and John Trone, *The Constitution of the Commonwealth of Australia Annotated* (LexisNexis Butterworths, 9th ed, 2016) 233.

³⁹ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 133.

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it was held that the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth), which authorised the appropriation of money from consolidated revenue to make stimulus payments to individual taxpayers was constitutionally valid under s 51(xxxix) of the *Commonwealth Constitution*, namely the incidental power to the exercise of the executive power. Gummow, Crennan and Bell JJ stated that, ‘The Executive Government is the arm of government capable of and empowered to respond to a crisis be it war, natural disaster or a financial crisis on the scale here.’⁴⁰

Nevertheless, there were moderating voices. For example, French CJ indicated that, ‘the exigencies of “national government” cannot be invoked to set aside the distribution of powers between Commonwealth and States and between the three branches of government for which this Constitution provides, nor to abrogate constitutional prohibitions.’ In his dissent, Heydon J pointed out that the mere fact that a matter is one of national interest does not mean that it necessarily falls within an implied nationhood power.⁴¹ He opposed a substantial extension of Commonwealth powers in this interesting passage from his judgment:

The truth is that the modern world is in part created by the way language is used. Modern linguistic usage suggests that the present age is one of “emergencies”, “crises”, “dangers” and “intense difficulties”, of “scourges” and other problems. They relate to things as diverse as terrorism, water shortages, drug abuse, child abuse, poverty, pandemics, obesity, and global warming, as well as global financial affairs. In relation to them, the public is endlessly told, “wars” must be waged, “campaigns” conducted, “strategies” devised and “battles” fought. Often these problems are said to arise suddenly and unexpectedly. Sections of the public constantly demand urgent action to meet particular problems. The public is continually told that it is facing “decisive” junctures, “crucial” turning points and “critical” decisions. Even if only a

⁴⁰ Ibid 89 (Gummow, Crennan and Bell JJ).

⁴¹ Ibid, 504.

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narrow power to deal with an emergency on the scale of the global financial crisis were recognised, it would not take long before constitutional lawyers and politicians between them managed to convert that power into something capable of almost daily use. The great maxim of governments seeking to widen their constitutional powers would be: ‘Never allow a crisis to go to waste.’

Justice Heydon’s sentiment is reinforced in a powerful comment, published in *Quadrant Online* by Professor Zimmermann:

[M]any Australians have developed an utterly distorted view of what governments can do for them. Such individuals now blindly worship at the altar of the all-powerful State, expecting it to be their almighty saviour, seeing in government the ultimate provider for all things. Perhaps this is a result of society’s lost faith in the God of Christianity. Be that as it may, the undeniable truth is that far too many Australians have acquired an unshakable faith in their political class. Call it a form of idolatry if you wish.⁴²

VI CONCLUDING COMMENTS

It will be interesting to see how the Covid-19 crisis unfolds and what the lasting consequences will be for the protection of citizens’ civil rights and the rule of law in Australia. Justice Heydon’s admonition that governments could convert emergency powers into ‘something capable of almost daily use’, and Professor Zimmermann’s assessment that citizens have acquired an unrealistic view of what governments can do for them, are important reminders of the innate dangers associated with this pandemic.

But for now, it is undeniable that Nanny has triumphed!

⁴² Above n 26.