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Only the Australian People Can Clean up the Mess: Call for People's Constitutional Review

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ABSTRACT

The Australian government's response to COVID-19 virus should involve the exercise of sound and mature judgement, based on the best available evidence and ensuring there would be most minimal restrictions on the exercise by the people of their fundamental rights. Sadly, that response has been well below standard and indeed, it has been a disaster. This has been at the enormous cost, not only financial and economic, to millions of Australians and those yet to be born. Most of this has been unnecessary and it is clear then that there is need for an urgent and in-depth review by the people of the constitutional arrangements of Australia. This could best be achieved under a new version of the path along which we successfully come together as a nation, that is, a Second Corowa Plan.

I FIRST CONSIDERATIONS

Australia, the first country in the world where the people voted on the approval of their constitution, is one of the world's oldest continuing democracies – democracies which have long functioned not only in

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the good times, but also under the stress of world war and economic depression.

Accordingly, it was reasonable to expect that government response to the COVID-19 virus would involve the exercise of sound and mature judgement, calmly based on the best available evidence and especially guided by world's best practice, but at the same time ensuring there are the most minimal restrictions on the exercise by the people of their fundamental rights.

Sadly, that response has been well below standard and indeed, it has been a disaster. It is of great importance that this be examined so that Australians can ensure that this failure is never repeated.

It is normal and proper in any constitutional state for governments to exercise exceptional powers during an emergency such as war, natural disasters and of course, plagues, or as they are called today, pandemics. At the same time, it is important that there always be rigorous controls and close surveillance and scrutiny concerning any exercise by government of emergency powers. This should be by the legislature, executive councils, the courts and a free and responsible media. Most of these controls were absent during the long government response to COVID-19.

Two self-evident considerations are crucial in a democracy. First, that the emergency powers and their exercise in curtailing rights, including those under the common law, be no greater than is absolutely necessary. Second, that they be withdrawn as soon as the emergency is over.

As is the nature of a pandemic, COVID-19 came without notice but surely not as a surprise. In this instance, the lack of notice was exacerbated by the extraordinarily deceitful behaviour of the government of the People's Republic of China ('PRC'), where the virus emerged. As is well known, the PRC is a one-party state under the control of the Chinese Communist Party (CCP). The CCP regime failed to inform the world immediately and fully about the virus, while imposing an internal lockdown and allowing its citizens and residents to travel to other countries.

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Nevertheless, pandemics are neither rare nor unusual. Each has its own characteristics in relation to contagion, vulnerability and the damaging effects they can impose on victims. This means that government response must always be tailored to the particular virus; there is no 'one size fits all solution'.

Pandemics will continue to emerge and to spread. Some say they will increase because of massive increases in urbanisation, international travel and chicken and pig consumption as well as those sickening 'wet markets'. This is of course conjecture, but this should act as a warning.

Accordingly, it is important that countries plan to deal with them properly, allowing for sufficient flexibility having regard to the nature of the virus and with minimal restrictions on the exercise of fundamental rights.

Given that pandemics are not at all unusual, it is curious that Australian governments were not better prepared. Why then was the one political leader most acclaimed for his work in this area not invited to join the National Cabinet?¹

In 2009, the Swine Flu pandemic resulted in 37,537 confirmed cases in Australia and, according to some estimates, around 1600 deaths. Flu pandemics come regularly, varying in intensity. Thus in 2019, there were 312,978 cases of influenza with 902 deaths. Neither of these pandemics produced a reaction by government similar to COVID-19. In this Australia was not alone, but there were notable exceptions.

At the time of writing, there have been 24,812 cases relating to COVID-19 in Australia, with 502 deaths. 362 over these were aged over 70, 286 over 80, and 255 or 68% in aged care. 289 or 77% of the deaths were in Victoria.²

Governments have not explained adequately why COVID -19 has

¹ David Flint, 'Missing from the National Cabinet – Tony Abbott', *Spectator Australia*, 8 May 2020 <<https://www.spectator.com.au/2020/05/missing-from-the-national-cabinet-tony-abbott/>>.

² The time of writing is 24 August 2020.

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been treated differently from others. Is it that the American mainstream media used this in a blatant political campaign against the President with the Australian mainstream media following them, thus raising greater interest here?³

It is crucial to democracy that the rights of the people should only be limited as is absolutely necessary in any emergency, including a pandemic. It will be argued here that the Australian response has gone far too far in restricting fundamental human rights.

In failing to properly exercise their emergency powers, we have seen Australian governments panicking, abdicating the judgement for which they are elected to bureaucratic experts and questionable computer modelling, neutralising or ‘duchessing’ the media and behaving capriciously, applying double standards.⁴

The most glaring example of the latter was the complete exclusion of the non-essential public sector, including themselves, from the economic sacrifice they so easily imposed on others. Indeed if the politicians’ frequently mantra “We’re all in this together” means anything, the non-essential public sector would have been locked down first and public sector wages, including politicians’, would be capped near average earnings, \$80,000 pa.

There was little apparent concern demonstrated about the increasing economic burden the politicians were imposing on the nation, and thus future generations. Nor was there sufficient concern about the burden imposed on business, and especially small business and those employed in this area. Indeed, there seemed to be an assumption that a business can be easily turned off and on as if it were an electric light switch.

Notwithstanding major restrictions on fundamental rights, government failed significantly in maintaining adequate entry controls, on adequate quarantine arrangements and in protecting the vulnerable

³ David Flint, ‘Anyone Remember the Obama Pandemic?’, *Spectator Australia*, 12 March 2020. <<https://www.spectator.com.au/2020/03/anyone-remember-the-obama-pandemic/>>.

⁴ In colonial times, when Australian politicians were well received in official circles in London, they were said to have been ‘duchessed’ and more susceptible to British influence.

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especially those in aged care, as well as those who were otherwise ill but whose medical attention was removed. This was done either by the completely superfluous ban on elective surgery and the way both medical professionals and patients were frightened away from medical attention.

The most significant and fundamental lapse by government in Australia was to ignore world's best practice, that of Taiwan, which was available at the time when relevant decisions were being taken.⁵ It is difficult to understand how this occurred. All ministers have access to public service advice, much of which is increasingly outsourced to consultants. All ministers and especially the prime minister and premiers have for many years enjoyed the support of large corps of politically appointed but taxpayer funded advisors, too many of whom are apprentices whose ambition is a political career. (Such advisory corps were not thought necessary in either World War.)

In addition, all ministers have access to consultants, often early retired politicians and lobbyists most of whom are associated with and are influential within their party, sometimes to controlling candidate pre-selections and who are often former politicians. It is surprising that from this vast network, government ministers were not aware of Taiwan's experience and achievements which were not as apparent as they were to this author not only before governments not only decided on the lockdown, but when they were determining entry standards including the quarantine.

The disastrous ignoring of world's best practice has been hidden by playing down, with considerable mainstream media support, our considerable natural advantage in being a remote island nation. As such, it is far easier to control entry which of course is crucial — at the time of writing, Fiji has had 28 cases and one death.

⁵ David Flint, 'The Ruby Princess Fiasco: Our Leaders' Latest Great Failure Not Only Over Coronavirus, but China as a Whole', *Spectator Australia*, 2 April 2020 <<https://www.spectator.com.au/2020/04/the-ruby-princess-fiasco-our-leaders-latest-great-failure-not-only-over-coronavirus-but-china-as-a-whole/>>.

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Taiwan has achieved her record, one which Australia, with sound leadership, could have at least equalled or with our isolation as an island nation, surpassed. And this, without the economy being seriously damaged, lives ruined, jobs lost, a massive debt imposed and with a once free people too long effectively under house arrest. In addition, government has adopted the hallmark of a dictatorial government like that of the USSR and the German Democratic Republic, the need for rarely granted official approval to leave the country.

So why did Australia's governments ignore the lessons offered by Taiwan, a democracy which had learned from previous pandemic coming from the People's Republic of Taiwan?

From 2008 Taiwan was invited each year to attend the WHO as an observer under the name "Chinese Taipei". This ended in 2016 when the Democratic Progressive Party candidate won the presidential election. Beijing then discouraged contact with the Taiwan government. Indeed, the CCP regime has long made it clear to other governments, including Australia's, that Taiwan is to be treated a pariah. In any event, Australian governments made a serious error in ignoring the Taiwanese model which is clearly world's best practice. A question which must be asked is whether Taiwan was ignored because of the influence of the PRC within political circles.

Our political class have for long been too beholden to the CCP government, some influenced by the prospect of the fortunes they could make from this – and not only in curiously early retirement. Obsessed with a utopian version of free trade, they too readily handed over not only manufacturing to Communist China but also premium and strategic assets, including our farms.

Before briefly examining particular aspects of the government response to COVID-19, the response to any pandemic should be fourfold:

- to control its entry including any requisite quarantine;
- as far as reasonably possible to slow its spread;
- to protect the vulnerable and where appropriate;
- to recover reparations for any damage suffered by Australia through a significant breach of international obligations.

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II ENTRY

Given the fact that Australia is one of the world's most remote island nations, it is easier to limit the entry of disease than for most other nations. For some years, governments have not been as insistent as in the past on the level of control and quarantine both in relation to persons and goods.

Australia was not, as has been claimed, the pioneer in imposing a travel ban on non-residents from China.⁶ As late as 31 January, 2020 at a press conference with Minister Hunt, Chief Medical Officer Murphy spoke against a travel ban which he said was opposed by the WHO; hardly a surprise. If the situation worsened, he said somewhat naively, Beijing would 'stop exits from China, which is a more effective way (than a ban)'.

But later that day, against advice and with the outrage of the Democrats and mainstream media, President Donald Trump announced a travel ban on foreign nationals who were in China in the preceding 14 days. The next day, Australia turned tail and imposed its own ban.

Nevertheless, entry and quarantine controls were shown to be seriously inadequate during the first crucial two months and not only in relation to the Ruby Princess.⁷ Nor were the most vulnerable properly protected, as has been sadly seen in NSW and especially Victoria.

It is clear that had the leaders properly controlled entry, we would not have the serious problem we have today. Our political leaders have significantly failed to protect Australians from COVID-19. Sitting in the National Cabinet (yet another name change for the time-honoured meetings between the Prime Minister and Premiers), they ignored widespread public concern at the absence of proper entry controls on the wharves and airports.

Had our leaders acted with elementary common sense and prudence as had the Taiwanese government, there would have been very

⁶ David Flint, 'The Virus Is in the Political Ranks', *Spectator Australia*, 15 August 2020 <<https://www.spectator.com.au/2020/08/the-virus-is-in-the-political-ranks/>>.

⁷ Flint, above n 5.

few cases of returning travellers innocently going home and finding out that later they in fact had the virus, having unintentionally infected many others and spread the disease. There would have been no need to impose such damage the private sector and the many workers there.

The *Ruby Princess* cruise liner debacle is but the best known; there have been many similar arrivals involving thousands of travellers, including the author of this chapter. This loophole continued until the politicians belatedly announced tighter entry controls on 26 March 2020. But, according to one source in the Daily Telegraph on the very day of the announcement a United Airlines from New York flew into Sydney ‘with zero testing in place’, while on the following evening 33 doctors were left to self-quarantine.

III LOCKDOWN

The decision to put Australia into serious lockdown followed the politicians’ condemnation of the young for being Australian and going to the beach on a warm day in Sydney’s typical Indian Summer.⁸ If the virus had not been around, the weather would probably have been used as proof of global warming. Instead, the pandemic was cynically misused to justify the massive shut-down of private-sector Australia, leaving the vast non-essential parts of the taxpayer-funded public sector unscathed.

The politicians seriously blundered. Those young Australians were innocent of the alleged mass breach of the social distancing protocols. The press photographs were taken at ground level. With the well-known phenomenon in photography known as *perspective illusion*, this created the impression that people who were standing and walking were closer to one another than they actually were.

After all, this is in a city with well over one hundred beaches. And this was Bondi Beach, not a beach in China or indeed, the French Riviera in August. Australians just do not cram together, especially on a large beach like Bondi. That didn’t stop the political class, includ-

⁸ Ibid.

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ing former politician Amanda Vanstone, from dismissing these young Australians to be 'selfish idiots'.⁹

This event seemed to trigger action which closed much of the nation's small business, including those in regions wholly unaffected by the virus, destroying many of them leading to serious unemployment and bringing on at least a recession.

A foreign dictatorship had given the nation the virus; our politicians used this to take exorbitant control over our lives without admitting that most of the problem comes from their gross negligence. Some were even talking about this going on for six months.

Realising the large unemployment they had created, the federal government announced a hastily concocted 'JobKeeper' allowance which was later alleged to encourage recipients not to take up work when it became available. The lock-down was completely unnecessary, yet another result of abdicating governing to computer modelling.

Unlike Donald Trump's daily White House briefing, Australian modelling was kept a closely-guarded state secret, tolerated by a media too easily dazzled by the exercise of raw power.¹⁰ Based on the principle, *purgamentum init exit purgamentum* – garbage in garbage out – experts agree, modelling is hardly reliable. Computer modelling has been widely relied on to justify the responses adopted concerning global warming (now referred to as climate change).

In any event, the most celebrated modeller at Imperial College London, Professor Neil Ferguson was soon shown to be breaching the very distancing rules he had advised, through secret assignations

⁹ Amanda Vanstone, 'People on Bondi Beach Win the Selfish and Stupid Award', *The Sydney Morning Herald*, 22 March 2020 <<https://www.smh.com.au/national/people-on-bondi-beach-win-the-selfish-and-stupid-award-20200321-p54chx.html>>.

¹⁰ David Flint, 'Recover Reparations, Restore Independence', *Spectator Australia*, 11 April 2020. <<https://www.spectator.com.au/2020/04/recover-reparations-restore-independence/>>. The modelling contained a monumental error which should have been noticed: David Flint, 'National Cabinet – Our Very Own Junta. Lockdowns are Based on a Monumental Error', *Spectator Australia*, 19 September 2020 <<https://spectator.com.au/2020/09/national-cabinet-our-very-own-junta/>>.

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with his mistress.¹¹ When this was exposed, he resigned as a principal government adviser, but not before the British government had acted on his warning of half a million deaths from the Wuhan virus as did the US on his warning of 2.2 million deaths there.

Professor Ferguson was probably the direct or indirect source for the similar warning of 150,000 Australian deaths, a warning which no doubt put the National Cabinet into a state of panic. What is surprising about what was referred to as the ‘Professor Lockdown’ affair is not so much the fact that most politicians and journalists do not seem to realise that computer modelling, while a useful tool, must always be wrong.

What is truly surprising is that anyone at the time in government took note of previous modelling from the same source which could hardly have encouraged confidence. These include 150,000 UK deaths from mad cow disease (there were 177); 200 million world-wide deaths from the bird flu pandemic (281 died) and 6,500 UK deaths from the swine flu pandemic (457 died).

Surely that record would have encouraged some reservations about his modelling concerning COVID-19. But curiously, there seemed to be no one among either the politicians, their anointed experts or, as far as we know, their vast armies of advisers who counselled against abdicating decision making to modelling.

As to the lockdown, a number of highly respected international scientists have published research concluding that lockdowns are pointless.¹² Unfortunately, the resort to such unnecessary and costly lockdowns is being greatly helped by the mainstream media’s shock reporting of each and every new virus case, without balancing this by the far more important constantly decreasing death rate.

¹¹ David Flint, ‘Professor Lockdown and the Hypocrisy of the Elites’, *Spectator Australia*, 18 May 2020 <<https://www.spectator.com.au/2020/05/professor-lockdown-and-the-hypocrisy-of-the-elites/>>.

¹² Stephanie M Lee, ‘An Elite Group Of Scientists Tried To Warn Trump Against Lockdowns In March’, *BuzzFeed News*, 24 July 2020 <<https://www.buzzfeednews.com/article/stephaniemlee/ioannidis-trump-white-house-coronavirus-lockdowns>>.

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The purpose of the lockdown when first announced was not to wipe out the virus. It was to 'flatten the curve', that is, make the hospitalisation of the predicted 150,000 cases more manageable.

The sheer panic and incompetence with which the National Cabinet had imposed the mainly small business lockdown, while exempting themselves and the non-essential bureaucracy, has once more been demonstrated. This was in the recent news that they made the dole so attractive that many prefer to stay on it rather than take available jobs.

In addition, as the backpackers depart, they are not being replaced for the collection of the harvest by the long-term, able-bodied unemployed who, as a class, were undeservingly rewarded by a substantial increase in their dole.

At least we still have some backpackers here, thanks to the Senate blocking the government's plan to impose a flat 30 per cent tax on them. This would have ensured that most would have gone to other countries.

In the meantime, the politicians subtly and without explanation changed the *raison d'être* for the lockdown from 'flattening the curve', that is, spreading the incidence of infection over time. This was to allow the hospitals to cope with the massive number of seriously ill predicted by the modelling the politicians had accepted, so large they banned elective surgery.

'Flattening the curve' has been inexplicably turned into 'eradication', with the politicians hoping nobody noticed, especially the mainstream media who have been distracted into making panic and irrelevant announcements about someone visiting a small restaurant or similar outlet and subsequently testing positive.¹³ They seem little concerned that this comes at enormous cost to that small restaurant, perhaps sufficient to destroy them.

¹³ David Flint, 'The virus is in the political ranks', *Spectator Australia*, 15 August 2020 <<https://www.spectator.com.au/2020/08/the-virus-is-in-the-political-ranks/>>.

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IV THE VULNERABLE

At the time of writing, there are 39 COVID-19 cases in intensive care in Australia, 32 of whom are in Victoria.

It has been in protecting the vulnerable that Australia's response has been particularly poor, especially in New South Wales and Victoria. In addition, because the Federal government has assumed responsibility with respect to aged care, they must share responsibility for some significant failures there. Indeed, the greater part of the deaths in Australia have been in aged care.

A significant outbreak in Victoria was traced to the state government's decision to leave quarantining to a security firm with alleged political connections.¹⁴ This was notwithstanding that a request had been put in for Army assistance which was then inexplicably revoked. The Victorian government, with Federal approval then put the state into an extreme and authoritarian second lockdown.

V SCRUTINY

The response by State and Federal Governments has been subject to little parliamentary scrutiny. Legislatures have not been sitting for an exaggerated fear of infection. In any event, some Acts of Parliament deny the ability of any parliamentary chamber to disallow subordinate legislation. In similar emergencies, subordinate legislation should only be made in the executive council where the viceroy could and should insist on advice on the question of power to act.

Except challenges to border closures, litigation is not at all common and too expensive for most of those damaged. The mainstream media have been over-supportive of government, too often doing little more than rearranging press releases and using the language of government, especially in repeating and enforcing calls for obedience under the cover of calls do the "right thing".

¹⁴ Remy Varga, 'Coronavirus Australia: Three sources to blame for 99pc of cases in Victoria's second wave', *The Australian*, 18 August 2020 <<https://www.theaustralian.com.au/nation/coronavirus-australia-hotel-quarantine-command-unclear-inquiry-hears/news-story/569837e46a4590b759ee369f27aa1517>>.

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The Andrews government in Victoria could themselves do the “right thing”, arrange an early election to seek a democratic endorsement for their draconian policies for the second lockdown. It is unacceptable that the only way they can be forced to an election is a vote of no confidence in the Legislative Assembly, unlikely without an ALP split and last seen in 1955. Until 2003, the Legislative Council could have forced an election. But having seen how effective this was with Whitlam, the major parties colluded to get rid of the power to reject supply.

While subordinate legislation and decisions under the relevant legislation,¹⁵ may well, when more facts are available, constitute misfeasance in public office, the Governor is most unlikely to do what Sir Philip Game did in 1932 to Premier Jack Lang – dismiss the Premier and obtain advice for an early election.

This demonstrates an urgent need to empower the people with the right to recall politicians. Recall elections are usually triggered by a petition signed by between 10 and 40 per cent of electors. From opposition, NSW Premier Barry O’Farrell campaigned on appointing an expert panel to advise on such elections. But a subsequent favourable report was shelved, the attorney-general candidly explaining circumstances had changed – the LNP was now in government.

After well over a century, there needs to be a serious review of our constitutions, state and federal, to restore good government across our land.

VI ‘UNDER THE COVER OF COVID’

In the meantime, we are seeing the signs of emerging authoritarianism and significant damage to fundamental rights. In giving legal effect to decisions of the National Cabinet, ministers have resorted to subordinate legislation which, as we indicate above, has been subject to little scrutiny.

Take for example the decision to refuse to allow most citizens and permanent residents to leave their country, once the hallmark of totali-

¹⁵ *Public Health and Wellbeing Act 2008* (Vic).

tarian regimes. The Minister exercised a power under section 477 of the *Biosecurity Act 2015* (Cth), to prevent or control the spread of the virus to another country.

The subordinate legislation he made on 25 March 2020, a Determination, provides that ‘an Australian citizen or permanent resident must not leave Australian territory as a passenger on an outgoing aircraft or vessel’ unless he or she has an exemption for ‘exceptional reasons’.¹⁶ There are six categories listed on the official website, mainly those for official and business purposes. The only way the rank-and-file could get an exemption is by satisfying a bureaucrat that their travel overseas is to receive urgent medical treatment not available in Australia or compassionate or humanitarian grounds. According to reports few of these are approved.

The Minister’s determination is clearly beyond the power granted him in the legislation. It is to control the spread of the virus to another country. This is in effect a filter, one which stops the Minister going beyond that. Parliament’s intention to protect other countries could have been achieved done by requiring testing and requiring a quarantine in the welcoming country. Instead there is an almost total ban on overseas, except in those rare cases where a citizen or permanent resident is able to satisfy a faceless bureaucrat that he or she has a compelling reason to travel.

This subordinate legislation is likely to be as much an actionable misfeasance in public office as was the Gillard government’s total ban on the export of live cattle to Indonesia whether or not the abattoir was up-to-standard. This is but one example of ministers wielding powers unnecessarily and capriciously restricting Australians in the exercise of their fundamental rights.

It would seem that power is going to our politicians’ heads as they almost daily assail the population, like Mussolini from the balcony of the Palazzo Venezia, through the now ubiquitous TV’s, radios and

¹⁶ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020* (Cth).

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mobile telephones. This is always with constant message of fear and panic, calls to do the “right thing” and that “we are all in this together”. Reinforced by a compliant mainstream media which relishes the panic of pointless news about new cases and visitors who test positive, thus seriously damaging the business concerned.

It is difficult not to conclude that this torrent of fear and panic is designed to control the population as if Australia were a dictatorship.¹⁷ Other undemocratic and unrelated measures also seem to be under consideration, as Sky's Paul Murray eloquently put it, all ‘under the cover of Covid’. The most glaring example so far has been when, with surprising Coalition support, Western Australia's McGowan government put through what is a sinister Bill of Attainder against Clive Palmer. Under Bills of Attainder, parliament declared, without the benefit of evidence or a trial, that the target, usually prominent, was guilty of a crime for which he would be punished, often executed, with his property confiscated.

Palmer is entitled, as we all are, to the rule of law even if he is, as claimed, ‘unpopular’. In arbitrations before a former High Court judge, he established that the Western Australian government was legally at fault concerning a mining investment and that he was entitled to damages, the amount still to be determined. Yet under a veritable Bill of Attainder, forbidden under the *US Constitution*, Palmer has been stripped of his rights under the arbitral awards. This was on the spurious ground that the state could not afford to pay damages, they claim, of \$30 billion. Mr Palmer has ridiculed this amount. In any event there can be a vast difference between what is claimed and what would be awarded by an experienced judge.

This legislation, which was retrospective, was given Royal Assent just before midnight on 13 August.¹⁸ But that day, Palmer registered the awards for enforcement in the Queensland Supreme Court, referred to in constitutional usage as a ‘Chapter III’ court —that is, Chapter III of

¹⁷ David Flint, ‘Under the cover of Covid’, *Spectator Australia*, 22 August 2020 <<https://www.spectator.com.au/2020/08/under-the-cover-of-covid/>>.

¹⁸ *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA).

the *Australian Constitution*. This would allow Palmer to challenge the validity of the legislation claiming it breached the federal separation of legislative from judicial powers.

The McGowan government says it had effectively headed this off because the legislation provides that it comes into operation on the day on which it receives Royal Assent, ie, before the sun rose on the day of registration. Either the government sensibly settles this case, or it will end up in the High Court. There Palmer could also argue that the legislation breaches the constitutional guarantee that trade, commerce and intercourse be absolutely free, as well as outlawing discrimination against residents of other states. His foreign shareholders could take action under various treaties and he could argue the untested proposition that federation was only entered into on the understanding or implication that the rule of law would forever apply.

Meanwhile in Queensland, again under the cover of fighting the virus, the Palaszczuk government introduced legislation, to make it an offence, under threat of six months' imprisonment, to report corruption complaints to the official watchdog during an election campaign.¹⁹ This extraordinary attack on the press was far too much for the normally supportive media. The protests, and not only from the media, were such the Bill was almost immediately withdrawn.

This does not mean Australians should not be on their guard. The politicians have already gone too far, setting us back for years. We must not accept their nascent dictatorship.

VII REPARATIONS

Australia has suffered significant losses as a result of COVID-19. For reasons explained below, an inquiry by the World Health Organization ('WHO') will not result in the recovery of our losses.

It is clear that the Chinese government failed significantly both in not advising the world immediately as to its knowledge about the virus and that it was allowing the potentially infected to travel to other

¹⁹ *Crime and Corruption Amendment Bill 2020* (Qld).

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countries from China.²⁰ This has imposed an enormous cost to Australia and other countries.

In April 2020, the London-based Henry Jackson Society released a report on this question.²¹ It contained valuable information on the damage sustained and the complicity of Beijing in failing in its duty to inform the world about the virus. However, there may well be a better method than they propose to obtain just reparations.

According to this and many other reports, the CCP regime behaved irresponsibly when the virus emerged, suppressing information, harassing those medical practitioners who tried to warn about what was happening and, in particular, that the virus was being transmitted between humans.²² The WHO supported Beijing in the suppression of information concerning the virus. Clearly, the WHO leadership is captured.

The irresponsibility of the authorities is graphically illustrated by the arrest of the principal whistleblower, Dr Li Wenliang, who was required to sign a confession that he had made 'false comments' and had disturbed 'the social order.' This was consistent with the regime's position then that there was 'no clear evidence of human-to-human transmission'. Tragically, Li died in February, reportedly from the virus.²³

There is a widespread view that Beijing's attempts to suppress the facts and failure to warn the world led directly to the spread of the virus without the authorities in other countries being aware of the danger. Had Beijing warned the world, the virus could have been contained much earlier than it has been.

²⁰ David Flint, 'CCP Virus: Just Reparations', *The Epoch Times*, 6 April 2020 <https://www.theepochtimes.com/ccp-virus-just-reparations_3300124.html>.

²¹ Matthew Henderson, Alan Mendoza, Andrew Foxall, James Rogers, and Sam Armstrong, 'Coronavirus Compensation? Assessing China's Potential Culpability and Avenues of Legal Response', *Henry Jackson Society*, 5 April 2020 <<https://henryjacksonsociety.org/publications/coronaviruscompensation/>>.

²² Flint (n 20).

²³ 'Li Wenliang: Coronavirus Kills Chinese Whistleblower Doctor', *BBC News*, 7 February 2020 <<https://www.bbc.com/news/world-asia-china-51403795>>.

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It is widely believed that the virus escaped from a bat in a “wet market” where, in particularly unhygienic conditions, bats, rats, dogs, cats, scorpions, and other “exotic” animals are stored in cages stacked on top of one another, sharing fluids, discharge, and excrement with the carcasses of pythons and other animals on slabs. Although closed, the markets were soon operating again.²⁴

Further, Communist Party officials subsequently promoted the myth that the US Army had introduced the virus into Wuhan. Given that the communist system strongly discourages autonomous and independent activity in government, it is highly unlikely that this was done without high-level approval.

According to other reports, the virus escaped from a laboratory in the Wuhan area, one possibly involved in weaponising viruses. A variation of this is that the remains of bats used in experiments were sold at a wet market.

Proponents of these alternative origins of the virus point to the rejection by the leader of the PRC of President Donald Trump’s offer to send US scientists to Wuhan to help. They say this indicates a wish to keep its laboratory activities confidential. In addition, it has been reported that Beijing required the destruction of samples that Li and others had taken of the virus.

Accordingly, there are widespread demands, indeed, an expectation, that the CCP regime should pay reparations to those countries that have suffered, with people dying or seriously ill, and economies significantly damaged.

The question is, how could this be done if, as can be expected, Beijing refuses to take responsibility?

Unfortunately, without Beijing’s cooperation, most of the methods suggested for legal action may fail. Legal proceedings have, in fact, already begun against Beijing with a class action in the US federal court system.

²⁴ George Knowles, ‘Will They Ever Learn? Chinese Markets Are Still Selling Bats And Slaughtering Rabbits On Blood-soaked Floors As Beijing Celebrates ‘Victory’ Over The Coronavirus’, *Daily Mail*, 28 March 2020 <<https://www.dailymail.co.uk/news/article-8163761/Chinese-markets-selling-bats.html>>.

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However justified this class action is, it has no chance of success. This is because of the doctrine of sovereign immunity in public international law that is incorporated into most legal systems. It was consolidated in the United States in 1976 in the *Foreign Sovereign Immunities Act*, with the Supreme Court confirming that a foreign government in cases such as the one brought against Beijing is immune from the jurisdiction of US courts.

An amendment, the *Justice Against Sponsors of Terrorism Act* 2016, does not offer a wide enough window to encompass a claim for damages over the Wuhan virus. Nor would a similar chipping away of sovereign immunity in the UK in House of Lords cases involving a former head of state, the late Augusto Pinochet. An action brought in other domestic courts, including Hong Kong's, would probably meet the same hurdle.

The second suggestion is for a government to bring an action against Beijing in the World Court – the International Court of Justice – and obtain a judgment, which normally takes years, and then, seek an order for reparations.

Although a judge nominated by Beijing sits on the court and is its vice president, the Chinese government has refrained from lodging a declaration accepting the court's jurisdiction and would be most unlikely to accept it in such a case. Similar difficulties would apply to the International Court of Arbitration.

The third avenue would be for the UN Security Council or the General Assembly to seek an advisory opinion from the World Court. The problem is that Beijing would veto any Security Council action and probably be able to discourage a necessary majority to agree to General Assembly moves.

The WHO could also seek an opinion in the unlikely event that a majority of its 194-member assembly or of its 34-member board agreed. But then the court could be persuaded to find that an opinion about the economic consequences of a health issue were beyond the powers of the WHO. In fact, in 1993 the court actually rejected, for a

similar reason, a request from the WHO for an opinion on the use of nuclear weapons.

Although the Australian government has been praised for its role in persuading the WHO to undertake an inquiry into the origins of the virus, it is extremely naïve to believe that anything will come of this. This will never result in an award of reparations. Indeed, it is hard to resist the conclusion that this is a pointless distraction, with some supporting this so as not to annoy the CCP regime who is feared because of its power and record in punishing those who dare offend it. In the unlikely event that an application were successful, the further problem would be that the advisory opinion, delivered many years hence, would be just that, an advisory opinion.

A fourth avenue would be for activists to establish an informal people's tribunal. These have been used to investigate mass human rights abuses in Iran, Vietnam, Indonesia and, more recently, the China Tribunal in relation to forced organ harvesting in the PRC. Decisions of such informal tribunals can provide some resolution for survivors and those close to victims. Moreover, what they discover and what they establish inform the public and the media and can encourage subsequent official action.

The London-based China Tribunal judgment was handed down in 2019.²⁵ It found, on the basis of strong evidence, that the Chinese state was engaging in the forced harvesting of organs for sale on demand. This trade was found to involve the killing of political dissidents, those who belong to religions or sections of religions outside of party control – Muslim, Protestant, and Catholic – and above all, Falun Gong practitioners. Chaired by a respected international lawyer, Sir Geoffrey Nice QC, who had led the prosecution of former Serbian President Slobodan Milosevic at the UN's International Criminal Tribunal for the Former Yugoslavia, the Tribunal consisted of several outstanding members.²⁶

²⁵ China Tribunal Judgement, March 2020 <<https://chinatribunal.com/>>.

²⁶ These included a prominent thoracic transplant specialist and professor of cardiothoracic surgery at University College London, prominent Malaysian, Iranian, and

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Obviously, Beijing would neither take part in a private tribunal over the CCP virus nor observe any ruling. As with the China Tribunal on organ harvesting, the CCP regime would be likely to use its influence to try to ensure that governments and the mainstream media would pay only nominal attention to it. This was surprisingly successful in relation to organ harvesting but would probably be less successful in relation to the CCP virus.

There is a solution in a fifth process, one that would allow the recovery of substantial damages. It would require courage on the part of the governments taking this action. This is what I would call the Nuremberg solution, based as it is on the tribunal of that name. This was established in response to the Moscow Declaration by Churchill, Roosevelt, and Stalin to pursue World War II Nazi criminals 'to the utmost ends of the earth and will deliver them to their accusers in order that justice may be done'. It would be open to selected powers, for example, the United States and similar countries, to enter into a treaty to establish a similar tribunal to hear the claim.

This need not be a treaty as defined in US constitutional law, that is, one by the president requiring the "advice and consent" of two-thirds of the Senate. It could be an executive agreement by the president, which in international law, would constitute a treaty. Now in both US law and that of the UK and Commonwealth realms such as Canada, Australia, and New Zealand, where the Crown enters into and ratifies treaties, legislation would be necessary to give effect to decisions taken by the tribunal.

The initial number of countries would not affect the enforceability of the tribunal decisions, which could be affected in each country against assets available. It would be important to provide for other countries to accede subsequently to the treaty but out of caution, only with the unanimous approval of the original signatories.

Beijing has a poor record in respecting international tribunals, even those rare ones to which it is legally subject, such as one that heard a

U.S. human rights lawyers, a businessman engaged in a range of NGOs in the fields of human rights, and a respected academic on Chinese history.

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case brought by the Philippines concerning the South China Sea and was handed down in 2016. While Beijing would be under no obligation to appear before this tribunal and can be expected to refuse to take part, every opportunity for Beijing to appear and to give evidence at every stage should always be given.

Provision should be made in the treaty that where a government refuses to appear, one of the parties may apply for the tribunal to appoint an *amicus curiae*, a friend of the court, to appear and to present a case for Beijing. An invitation could go, for example, to the Chinese Society of International Law to fill that role.

The treaty should clearly state the questions, which should be determined by the tribunal and would include such questions as how the virus started, the obligation of Beijing to warn, whether that obligation was fulfilled, how the virus spread to the parties and other countries, and the amount of both interim and final damages.

The treaty should rule on evidentiary questions and make broad provisions for the hearing of evidence, including hearsay and in any form. The tribunal should have power to declare that the property of the Chinese state will be available to satisfy any award, a power to freeze that at any time and that such property extend to that of high-level functionaries within the Politburo, the CCP, its associates and partners, as well as all corporations and other entities formed in, domiciled in, or under the control of Beijing, the CCP, its associates and partners, wherever located and whether or not vested in nominees, trustees, or similar cover.

The process would be that once interim orders are handed down, these could be given legislative effect by the parties, for example by the US Congress and say, the Australian Parliament. In the Australian case, Beijing-owned and -controlled property could then be taken to satisfy the outstanding interim and final judgments.

The tribunal should stay in place for five years in the event of further possible accessions or the need, for any reason, to hear requests from any party or the *amicus* (appointed to represent the interests

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of Beijing). There should be a power to make further orders with a continuing power in the court to make or refuse those orders or to take such decisions as it deems necessary or expedient.

Such a tribunal would allow the recovery of full and fair compensation for damages incurred by Beijing's role in the crisis relating to the CCP virus.

VIII CONCLUSION

Government response to COVID-19 has fallen at each stage from preventing entry of Wuhan to Australia to protecting the vulnerable. It was well below world's best practice, the lessons from which have been ignored. This has been at the enormous cost, not only financial and economic, to millions of Australians and those yet to be born. Most of this has been unnecessary. There have been and still are serious incursions into those rights described so memorably by the American Founders when they declared,

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.

When the Australian people 'humbly relying on the blessing of Almighty God have agreed to unite in one indissoluble Federal Commonwealth under the Crown... under the Constitution' thereby established, it was assumed that those rights referred to by the American Founders would prevail in the new Commonwealth and that the elected representatives would not only never so casually remove them even when, as with the travel ban, there can be no justification. They would not be empowered so to do.

It is clear then that there is need for an urgent and in-depth review by the people of the constitutional arrangements of Australia. This could best be achieved under a new version of the path along which we successfully come together as a nation, that is, a Second Corowa Plan. That plan, by taking the issue of federation away from

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the politicians and handing it to the people, ensured its achievement in a remarkably short period of time, less than four years.

The greatest thing the politicians as elected public servants can do now to make up for the terrible burden they have so unnecessarily imposed on the people including the lives they have ruined is to return the Constitution to their masters, the people.

The way this can be done is to follow what our wise predecessors did: invite the people to elect a convention of delegates, not paid but whose only return will be their work for the nation, to conduct the first review by the people of their Constitution in over a century since its adoption. There, after careful and considered study and discussion, the convention would propose amendments which, after wide consultation, would in their final form be put directly to the people as was done under the First Corowa Plan.

This may well be the only way to restore this exceptional nation to its true destiny.