

THE CONSTITUTIONAL LESSONS FROM AUSTRALIA'S COVID-19 INTERNATIONAL BORDER CLOSURE

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Australia closed its international border for almost two years in response to the COVID-19 pandemic, causing immense hardship for many groups of people inside and outside the country. What, if anything, could have been done differently? Constitutional commentary on the issue has tended to focus on rights and federalism. A bill of rights could have given citizens stranded outside the country a right of return. No federal division of responsibility for international arrivals would have avoided conflict between the Commonwealth and states. This article argues that the episode provides weak evidence for a bill of rights and for the failure of federalism. To help make this argument, it draws a comparison with New Zealand, which imposed similar restrictions even though it had a bill of rights with a right of return and no federal division of responsibilities. The article puts forward two alternative constitutional lessons for consideration. First, legislative specification of what government is and is not obliged to do to assist overseas citizens in an emergency may have helped set expectations. Second, a structural mechanism to represent affected persons may have improved the quality of debate by providing comprehensive, accurate and current information about their situation.

I INTRODUCTION

In response to the COVID-19 pandemic, Australia effectively closed its international border. It was an extraordinary step, cutting off the country from the rest of the world for almost two years. Incoming passenger arrivals dropped by approximately 99%, from around 2 million per month to around 20,000.¹ It also dramatically affected outward international travel. Citizens and permanent residents were prohibited from leaving the country, with only limited exceptions.

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1 See below nn 18–20.

The closure caused significant hardship for hundreds of thousands of people, separating them from their families, disrupting their livelihoods and placing them in precarious financial, legal, employment and housing situations. This episode in Australia's history thus raises the question of what, if anything, could have been done differently? What lessons should we take from the country's international border closure?

In legal, and especially constitutional, commentary, the answer to that question has tended to focus on two possible lessons. The first centres on rights. As Australia did not have, for example, a right of return protected in law,² citizens stranded outside the country had little legal recourse. The episode thus provides another argument for a bill of rights. The second centres on federalism. Responsibility for managing the international border was shared between the Commonwealth and state governments. While the Commonwealth was legally responsible for determining the restrictions placed on international travel, the states were, in practice, responsible for determining the number of persons that could enter the country because they set the number of places in hotel quarantine, which was a requirement for entry. While the Commonwealth often wanted more people to be able to enter Australia, the states often wanted fewer as increased numbers of arrivals placed more strain on the quarantine system and increased the risk of an outbreak of COVID-19 in the community. The episode thus provides more evidence that Australia's federal system is a source of dysfunction.

This article argues that there is a considerable risk of overstating both lessons. Australia's COVID-19 international border closure provides weak evidence for a bill of rights and for the failure of Australia's federal system. There is good reason to think that, even if Australia had a right of return, it may have provided little assistance to citizens seeking to enter Australia since rights have limits (eg the restrictions may have been proportionate) and remedies have limits (eg any court order may have come too late to assist). There is also good reason to think that, if management of the international border was controlled entirely by the Commonwealth, the situation may have been even worse for those seeking to enter the country since state-based management of hotel quarantine introduced redundancy into the system and facilitated positive cascade effects.

The article suggests that New Zealand provides particularly good evidence for these conclusions. Although New Zealand has a bill of rights with a right of return and no federal division of responsibilities on border management, it imposed similar restrictions on international travel that caused a similar, if not greater, degree of hardship on affected persons. In particular, the New Zealand comparison demonstrates the potential futility of a bill of rights. While a group of New Zealand citizens successfully challenged the country's border restrictions, the victory concerned a minor aspect of the quarantine system, the judgment was not handed down until after the restrictions were lifted, and the remedy was confined to a

2 There is a common law right for members of the Australian community to leave and enter the country without hindrance, but that right can be abrogated by statute: *Potter v Minahan* (1908) 7 CLR 277, 305 (O'Connor J). For a discussion of its abrogation in the context of COVID-19, see below n 80.

declaration of incompatibility. It also demonstrates the absence of federalism's positive cascade effects. In Australia, once New South Wales decided to remove the requirement for quarantine of vaccinated citizens, it placed pressure on other states to follow. Without that same pressure generated by federalism, New Zealand kept its international border closed for several months after Australia's had reopened.

The article argues that two alternative constitutional lessons should be considered in light of this episode. One is the importance of legislative specification of rights and the other is the importance of structural mechanisms to the representation of groups. Legislative specification refers to the idea of setting out, in some detail, the meaning of a right ahead of time — in this case, for example, what overseas citizens could reasonably expect in terms of assistance from the Commonwealth government in the event of an emergency. Structural representation refers to the idea of creating platforms to assist a group to be heard by the state — in this case, for example, an authority to collect the concerns and experiences of citizens unable to return to the country and relay them to the government. The article does not claim that these responses would have avoided all hardship, but that they might have assisted in setting expectations and improving the quality of public debate on the issue.

While the international travel restrictions imposed hardship on a number of cohorts, this article concentrates on the effects imposed on citizens seeking to enter the country for reasons that are explained later in the article. Part II provides an overview of Australia's international border closure and its effects. Part III reviews the dominant constitutional lessons that are taken from this episode. Part IV sets out the case for the two alternative constitutional lessons.

II THE CLOSURE OF AUSTRALIA'S INTERNATIONAL BORDER

A International Travel Restrictions

As COVID-19 began to spread around the world with increasing speed in early 2020, Australia imposed an escalating series of restrictions on entry into and exit from the country. In February, the Commonwealth government prohibited foreign nationals (except permanent residents) travelling from or transiting through China from entering Australia.³ It extended this ban to foreign nationals travelling from

3 Senate Select Committee on COVID-19, Parliament of Australia, *First Interim Report* (Report, December 2020) 14 [2.35] (*'First Interim Report'*); Grant Hehir, Auditor-General (Cth), *Management of International Travel Restrictions during COVID-19* (Auditor-General Report No 12, 8 December 2021) 16–17 [1.6]–[1.7] (*'Management of International Travel Restrictions'*). These restrictions were implemented by means of a direction given to airlines not to board certain categories of passengers and the cancellation of visas of persons who arrived after the introduction of the restrictions: 'Coronavirus Travel Restrictions Block Arrivals from China, as Government Warns Visas Could Be Cancelled', *ABC News* (online, 2 February 2020) <<https://www.abc.net.au/news/2020-02-02/coronavirus-china-slams-us-ban-as-who-warns-local-outbreaks/11921416>>. See also n 6 below.

Iran, South Korea and Italy in early to mid-March.⁴ On 19 March, the government announced ‘Australia is closing its borders to all non-citizens and non-residents’.⁵ From 20 March, all persons other than Australian citizens and permanent residents were prohibited from entering the country, even if they had a valid visa, unless they first obtained a travel exemption from the Department of Home Affairs.⁶ There was a further escalation of inbound travel restrictions for a brief period during the following year. For a 14-day period in May 2021, the government completely prohibited all persons located in India, including Australian citizens and permanent residents, from entering the country.⁷

Australian citizens and permanent residents were not directly subject to any inbound international travel restrictions over the course of the COVID-19 pandemic, apart from the 14-day India travel ban. However, they were directly subject to outbound international travel restrictions. From 25 March 2020, all Australian citizens and permanent residents were prohibited from leaving the country unless they first obtained a travel exemption from the Department of Home Affairs.⁸

Furthermore, the inbound travel of citizens and permanent residents was indirectly restricted by the introduction of quarantine and passenger caps. In March 2020, the Commonwealth, state and territory governments commenced a system of

4 *First Interim Report* (n 3) 14 [2.35]; *Management of International Travel Restrictions* (n 3) 17 [1.7].

5 Scott Morrison, Marise Payne and Peter Dutton, ‘Border Restrictions’ (Joint Media Release, 19 March 2020) <https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/7250182/upload_binary/7250182.PDF;fileType=application%2Fpdf#search=%22media/pressrel/7250182%22>.

6 *First Interim Report* (n 3) 14–15 [2.36]; *Management of International Travel Restrictions* (n 3) 17 [1.8]. The Commonwealth government was able to prohibit entry of non-citizens into Australia under its existing legislative powers (for example, the Minister for Immigration’s powers to cancel the visas of non-citizens if they might be a risk to the health of the Australian community under *Migration Act 1958* (Cth) s 116(1)(e)): *Management of International Travel Restrictions* (n 3) 38–9 [2.49]. However, doubts were subsequently raised as to whether these powers could be used to suspend entry into Australia of entire classes of visa holders, and the government only enforced the prohibition on entry by means of visa cancellation for a few weeks in February 2020: at 39 [2.52], 41 [2.58]. For most of the time the prohibition on entry was in effect, its scope and operation were regulated by an internal document produced by the Department of Home Affairs and Australian Border Force titled *Inwards Travel Restrictions Operation Directive*: at 18–19 [1.9]. That document, which was publicly released following a freedom of information request, indicated that airlines were responsible for enforcing the prohibition on entry. They did so by checking that passengers met a condition of entry (eg they held an Australian passport or a valid travel exemption) before being allowed to board the aircraft: Department of Home Affairs (Cth), *Inwards Travel Restrictions Operation Directive* (FOI Request FA 21/07/00645) <<https://www.homeaffairs.gov.au/foi/files/2021/fa-210700645-document-released.PDF>>. The Australian Border Force communicated the travel exemption status of non-citizens through the pre-existing Advance Passenger Processing system used by airlines to check a person’s authority to enter Australia prior to travel: *Management of International Travel Restrictions* (n 3) 39–40 [2.50]–[2.56].

7 *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements — High Risk Country Travel Pause) Determination 2021* (Cth).

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

mandatory quarantine, in which all persons entering the country were required to undertake a 14-day period of quarantine, with most people completing it at a designated hotel in one of the capital cities.⁹ Four months later, Victoria ceased accepting international arrivals following an outbreak of COVID-19 in Melbourne.¹⁰ This prompted the Commonwealth, state and territory governments to introduce a cap on international arrivals into hotel quarantine in Australia of approximately 4,000 persons per week in July 2020.¹¹ At National Cabinet, the Commonwealth, state and territory governments reviewed and varied the caps on a regular basis, but did not significantly increase them in 2020 and decreased them over the course of 2021.¹² They reached a low point in September and October 2021, when approximately 2,300 persons per week were allowed into the country through the hotel quarantine system.¹³

The removal of international travel restrictions began in November 2021 when New South Wales and Victoria exempted vaccinated persons from mandatory hotel quarantine,¹⁴ allowing the removal of international arrivals caps in those states for citizens and permanent residents. At the same time, the prohibition on leaving Australia imposed on citizens and permanent residents was removed.¹⁵ Other states progressively followed suit, with Western Australia being the last to remove mandatory hotel quarantine for fully vaccinated persons arriving from overseas in

- 9 *First Interim Report* (n 3) 17 [2.49]; *Management of International Travel Restrictions* (n 3) 18–19 [1.8], 19–20 [1.11]. Mandatory quarantine was enforced by state and territory health legislation conferring broad powers onto the government to deal with public health risks: see, eg, *Public Health Act 2010* (NSW) ss 7–8.
- 10 ‘Victorian Coronavirus Stay-at-Home Orders Reimposed across Melbourne Hotspot Suburbs’, *ABC News* (online, 30 June 2020) <<https://www.abc.net.au/news/2020-06-30/victoria-coronavirus-hotspot-local-lockdowns-in-melbourne/12407138>>.
- 11 *First Interim Report* (n 3) 18 [2.54]; *Management of International Travel Restrictions* (n 3) 19 [1.11]. International arrivals caps were implemented by placing conditions on an airline’s timetable of scheduled international air services into Australia, which require approval by the Commonwealth under pt 5 of the *Air Navigation Regulation 2016* (Cth): *Management of International Travel Restrictions* (n 3) 19 [1.11].
- 12 See *First Interim Report* (n 3) 18–19 [2.55]–[2.56].
- 13 Alexandra Smith, ‘NSW to Halve Number of International Arrivals until October’, *The Sydney Morning Herald* (online, 31 August 2021) <<https://www.smh.com.au/politics/nsw/nsw-to-halve-number-of-international-arrivals-until-october-20210831-p58nmq.html>>; Matt Graham, ‘NSW Halves Overseas Arrivals Yet Again’, *Australian Frequent Flyer* (online, 1 September 2021) <<https://www.australianfrequentflyer.com.au/nsw-halves-overseas-arrivals-september2021/>>. This figure did not include people arriving into the Howard Springs quarantine facility in Darwin, which had a maximum capacity of approximately 2,000 persons per fortnight: *Management of International Travel Restrictions* (n 3) 52 [2.116].
- 14 Dominic Perrotet et al, ‘NSW Flying towards 80 Per Cent Double Dose Target’ (Media Release, 15 October 2021) <https://www.health.nsw.gov.au/news/Pages/20211015_01.aspx>; Daniel Andrews, ‘Thank You, Victoria’ (Media Release, 22 October 2021) <<https://www.premier.vic.gov.au/thank-you-victoria>>.
- 15 ‘Covid: Australia to End Ban on Citizens Leaving Country’, *BBC News* (online, 27 October 2021) <<https://www.bbc.com/news/world-australia-59058945>>.

March 2022.¹⁶ The international border was reopened for fully vaccinated persons in February 2022 and the last international travel restrictions were removed in July 2022.¹⁷ Australia's COVID-19 international travel restrictions thus lasted approximately two years.

B Effect of Restrictions

The international border restrictions had an enormous effect on movement into and out of Australia. The arrival of Australian citizens into the country reduced from 1,160,610, 664,990 and 476,430 in January, February and March 2020 respectively to 15,060, 11,110 and 14,070 in April, May and June 2020 respectively.¹⁸ The numbers further reduced with the introduction of passenger caps in July, with arrival numbers of 10,700, 8,790 and 8,900 in July, August and September respectively, before slightly increasing to between approximately 11,000 and 14,000 per month in the last quarter of 2020 and first quarter of 2021.¹⁹ Non-citizen arrivals experienced declines of a similar magnitude. They went from 1,098,340, 906,500 and 447,550 in January, February and March 2020 respectively to 6,560, 8,290 and 11,700 in April, May and June 2020 respectively. The numbers reached a low of 7,580, 6,650 and 7,820 in July, August and September 2020 before slightly increasing to between approximately 12,000 and 19,000 per month in the last quarter of 2020 and first quarter of 2021.²⁰

The restrictions also significantly increased the financial cost of travelling to Australia. In late March 2020, a number of airlines, including all major Australian airlines, ceased international passenger flights into Australia.²¹ Once the passenger caps were introduced, flights into some cities were permitted to carry only

16 Mark McGowan and Amber-Jade Sanderson, 'WA's Safe Transition Plan and Full Border Opening from March 3' (Media Statement, 18 February 2022) <<https://www.wa.gov.au/government/media-statements/McGowan-Labor-Government/WA's-Safe-Transition-Plan-and-full-border-opening-from-March-3-20220218>>.

17 Christopher Knaus, 'Australia to Reopen International Border on 21 February', *The Guardian* (online, 7 February 2022) <<https://www.theguardian.com/australia-news/2022/feb/07/australia-to-reopen-international-border-on-21-february>>; Clare O'Neil, 'All COVID-19 Border Restrictions to Be Lifted' (Media Release, 3 July 2022) <<https://minister.homeaffairs.gov.au/ClareONeil/Pages/covid-border-restrictions-to-be-lifted.aspx>>.

18 Australian Bureau of Statistics, *Overseas Travel Statistics, Provisional* (Catalogue No 3401.0.55.004, 14 July 2021).

19 *Ibid.* The Bureau ceased collecting statistics in June 2021.

20 *Ibid.*

21 Nassim Khadem, 'Virgin Australia Grounds International Fleet amid Coronavirus Pandemic', *ABC News* (online, 18 March 2020) <<https://www.abc.net.au/news/2020-03-18/virgin-australia-grounds-international-fleet-amid-coronavirus/12065864>>; 'Qantas, Jetstar Flight Cuts amid the Coronavirus Pandemic and How They Will Affect You', *ABC News* (online, 19 March 2020) <<https://www.abc.net.au/news/2020-03-19/qantas-jetstar-flight-cuts-and-how-they-will-affect-you/12070442>>.

approximately 30 passengers per flight.²² That number reduced to approximately 5 passengers per flight at the lowest point in 2021, with one-third of flights into Sydney being given no passenger allocations.²³ As a result, few economy class fares were offered for sale and many persons already holding economy class tickets either had their tickets cancelled or the date of their flights pushed back multiple months on multiple occasions.²⁴ This situation meant that the most viable option to enter Australia was to purchase a business class ticket, which began to be priced at approximately \$10,000 per person for a one-way flight from Europe or the United States in 2020 and reached as much as \$36,000 per person in 2021.²⁵ However, even the purchase of a business class ticket did not guarantee entry into Australia — many business class ticket holders also had their tickets cancelled or delayed indefinitely.²⁶ In the middle half of 2021, almost all airlines completely ceased selling all tickets in all fare classes to Australia.²⁷ In addition to flight costs, persons placed into quarantine were charged for their stay at a rate of approximately \$3,000 for a single person and \$5,000 for a family of two adults and two children.²⁸

The restrictions created significant hardship for several cohorts.²⁹ Most directly, the ban on leaving Australia that applied to citizens and permanent residents, as

- 22 Fiona Carruthers and Lucas Baird, 'Tougher New Flight Restrictions Push Up Prices', *Australian Financial Review* (online, 17 July 2020) <<https://www.afr.com/companies/transport/tougher-flight-restrictions-from-monday-push-up-prices-20200717-p55d0z>>; Elias Visontay, 'Australians Stranded Overseas as Airlines Fly with as Few as Four Economy Passengers', *The Guardian* (online, 19 August 2020) <<https://www.theguardian.com/australia-news/2020/aug/19/australians-stranded-overseas-as-airlines-fly-with-as-few-as-four-economy-passengers>> ('2020 Guardian Article').
- 23 Elias Visontay, 'Planes to Fly Empty into Australia as International Arrivals COVID Cap Bites', *The Guardian* (online, 7 July 2021) <<https://www.theguardian.com/australia-news/2021/jul/07/planes-to-fly-empty-into-australia-as-international-arrivals-covid-cap-bites>> ('2021 Guardian Article').
- 24 See *ibid*; Carruthers and Baird (n 22); Visontay, '2020 Guardian Article' (n 22).
- 25 Visontay, '2021 Guardian Article' (n 23); Vanessa Brown, 'Warnings as Overseas Flight Prices Soar Ahead of New Arrival Caps', *News.com.au* (online, 7 July 2021) <<https://www.news.com.au/travel/travel-advice/flights/warnings-as-overseas-flight-prices-soar-ahead-of-new-arrival-caps/news-story/ceb45e5d3d3c9073bd6e56c96868ace3>>.
- 26 Visontay, '2020 Guardian Article' (n 22).
- 27 Patrick Hatch, 'International Airlines Won't Sell Tickets Home until Rules Clear', *The Sydney Morning Herald* (online, 28 September 2021) <<https://www.smh.com.au/business/companies/international-airlines-won-t-sell-tickets-home-until-rules-clear-20210928-p58vge.html>>.
- 28 The charges varied slightly by jurisdiction. See, eg, Gladys Berejikian and Stuart Ayres, 'NSW to Charge Returned International Travellers for Hotel Quarantine' (Media Release, 12 July 2020) <https://www.treasury.nsw.gov.au/sites/default/files/2020-07/Gladys%20Berejikian%20Stuart%20Ayres%20Med%20Rel%20-%20NSW%20to%20charge%20returned%20international%20travellers%20for%20hotel%20quarantine_0.pdf>; 'Victorian Quarantine Contribution Fee', *Vic.gov.au* (Web Page, 13 November 2023) <<https://www.vic.gov.au/victorian-quarantine-contribution-fee>>.
- 29 For a discussion of the effects of international travel restrictions on a range of cohorts, see Belinda Bennett, Ian Freckelton and Gabrielle Wolf, *COVID-19, Law & Regulation: Rights, Freedoms, and Obligations in a Pandemic* (Oxford University Press, 2023) ch 4.

well as the ban on entering Australia that applied to persons who were not citizens or permanent residents, separated people from their families and disrupted their livelihoods for approximately two years. While some categories of persons were automatically exempt from the bans, they were very limited in scope and narrowed over the course of the pandemic. For example, the exemption from the outward travel ban for Australian citizens and permanent residents who were ordinarily resident in another country was removed in August 2021.³⁰ Persons not subject to an automatic exemption could apply to the Department of Home Affairs for a travel exemption on limited grounds, including compassionate reasons.³¹ However, the system for granting travel exemptions operated in a strict and opaque manner. Unsuccessful applicants were given no specific reasons for the refusal of a travel exemption and were unable to appeal the decision but were allowed to reapply.³² The media regularly reported on situations where persons were not granted exemptions, even in circumstances where an immediate family member had a terminal illness or had recently died.³³

An Australian National Audit Office report in December 2021 concluded that the Department of Home Affairs' 'policies and procedures for managing inward and outward travel exemptions ... [had] not been consistently complied with'.³⁴ With respect to exemptions to enter Australia, it found that:

Decisions about inward travel exemptions [had] not consistently been managed in accordance with policies and procedures. There were also cases where inconsistent decisions were made even where there was conformance with policy. Insufficient feedback [had] been provided to unsuccessful applicants and mechanisms for seeking a review of an exemption decision should [have been] improved.³⁵

And with respect to exemptions to leave Australia, it found that:

Decisions about outward travel exemptions [had] not consistently complied with policies and procedures, and there [were] indications that decision-making [had] not

30 Naaman Zhou, 'Australians Who Live Overseas May Be Unable to Leave Country if They Return for Visit', *The Guardian* (online, 7 August 2021) <<https://www.theguardian.com/australia-news/2021/aug/06/australians-who-live-overseas-now-unable-to-leave-country-if-they-return-for-visit>>.

31 *Management of International Travel Restrictions* (n 3) 19 [1.10].

32 *Ibid* 89 [4.39], [4.42].

33 See, eg, Claudia Jambor, 'Retired Nurse "Doesn't Meet Criteria" to Fly to Australia to Care for Dying Sister, Department Says', *ABC News* (online, 30 April 2020) <<https://www.abc.net.au/news/2020-04-30/retired-nurse-denied-covid-19-exemption-to-care-for-dying-sister/12200198>>; Hannah Ryan, "'I Was Helpless": The Australians Caught Up in a Dysfunctional Covid Travel Exemption System', *The Guardian* (online, 9 August 2020) <<https://www.theguardian.com/australia-news/2020/aug/09/i-was-helpless-the-australians-caught-up-in-a-dysfunctional-covid-travel-exemption-system>>; Kathleen Calderwood, 'Federal Court to Hear Challenge against Ban on Australians Travelling Overseas', *ABC News* (online, 6 May 2021) <<https://www.abc.net.au/news/2021-05-06/federal-court-to-hear-challenge-on-travel-ban/100118998>>.

34 *Management of International Travel Restrictions* (n 3) 8 [12].

35 *Ibid* 10 [21].

always been consistent even when in conformance with policy. The timeliness of outward travel exemptions [had] declined in 2021.³⁶

C The Case of the 'Stranded Australians'

The international border restrictions also created significant hardship for another cohort of persons who were not directly subject to the travel exemption regime — Australian citizens that were overseas and unable to return to the country.³⁷ They came to be called the 'stranded Australians' in the media and Commonwealth Parliament.³⁸ The size of this cohort was considerable, but is difficult to identify with precision. Prior to the COVID-19 pandemic, up to one million Australian citizens were living and working outside the country.³⁹ The Department of Foreign Affairs and Trade ('DFAT') established a registration system for citizens wanting to return to Australia, which put the number between approximately 18,000 and 39,000 at various points in 2020 and over 45,000 at points in 2021.⁴⁰ That number increased over the course of 2020 and 2021 even as approximately 10,000 citizens per month were returning to Australia, suggesting that the total number was much higher than the individual point-in-time figures suggest. The registration list was also far from comprehensive, with people giving evidence to Parliament that DFAT removed people from the list who were still seeking to return to Australia.⁴¹ There was also little incentive for persons to register with DFAT if they were stranded in a location where DFAT was not operating repatriation flights. In August 2020, the executive director of the Board of Airline Representatives of Australia estimated the number to be more than 100,000 based on airline booking data.⁴²

36 Ibid 10 [22].

37 Australian permanent residents were in a similar situation. However, from a constitutional standpoint, their position was akin to that of other non-citizens insofar as the *Australian Constitution* has always permitted the Commonwealth Parliament to restrict their entry into the country: *Australian Constitution* s 51(xix).

38 See, eg, *First Interim Report* (n 3) 20 [2.60].

39 Department of Foreign Affairs and Trade (Cth), 'Going Overseas to Live or Work', *Smartraveller* (Web Page) <<https://www.smartraveller.gov.au/before-you-go/activities/living-overseas>>.

40 *First Interim Report* (n 3) 20 [2.59]; Jessie Gretener, 'Broken Promises: Why Tens of Thousands of Australians Will Be Stranded Abroad This Christmas', *CNN* (online, 14 December 2020) <<https://edition.cnn.com/travel/article/australians-stranded-abroad-christmas/index.html>>; Elias Visontay, 'More than 45,000 Australians Stranded Overseas Registered for Government Help', *The Guardian* (online, 21 September 2021) <<https://www.theguardian.com/business/2021/sep/21/more-than-45000-australians-stranded-overseas-registered-for-government-help>>.

41 Paul Karp, 'Stranded Australians Are Being Reclassified to Avoid Embarrassing PM, Labor Says', *The Guardian* (online, 6 December 2020) <<https://www.theguardian.com/australia-news/2020/dec/06/stranded-australians-are-being-reclassified-to-avoid-embarrassing-pm-labor-says>>.

42 Elias Visontay, 'Airlines Warn Flying Back 100,000 Stranded Australians Will Take Six Months Unless Travel Caps Eased', *The Guardian* (online, 29 August 2020) <<https://www.theguardian.com/australia-news/2020/aug/29/airlines-warn-flying-back-100000-stranded-australians-will-take-six-months-unless-travel-caps-eased>>; Elias Visontay, 'Australian Diplomats Sent to Heathrow Airport to Help Citizens Stranded Due to Travel Caps', *The Guardian* (online, 13 September 2020) <<https://www.theguardian.com/australia>>.

The precise burden placed on the stranded Australians by the country's governments was also difficult to identify. The burdens placed on the other cohorts mentioned above were easy to identify because the bans on entry into and exit from the country were straightforward restrictions on movement directly imposed by actions of the Commonwealth government. By contrast, the Commonwealth government never imposed any direct restrictions on entry into Australia on Australian citizens located outside the country (apart from the 14-day India travel ban). Indeed, it did not even directly implement the international arrival caps. The Commonwealth government imposed restrictions on the number of passengers airlines could carry into Australia through an opaque process that involved adjusting the timetable of their scheduled services,⁴³ which the airlines then had to implement by deciding which passengers they would and would not fly. However, the effect of the Commonwealth, state and territory governments' decisions were immense. The quarantine arrangements and arrivals caps meant that tens, if not hundreds, of thousands of Australian citizens were in practice either unable to return to the country or only able to return after incurring considerable expense, delay, uncertainty and stress.

There are several factors that underscore the extent of the hardship that the stranded Australians faced. First, the international border restrictions meant for many persons that, prior to the advent of a vaccine, they had to remain in a country where there was a far higher risk of catching COVID-19 than if they had been able to return to Australia, with all the dangers to their health that this entailed. More than 50 Australian citizens died from COVID-19 while overseas, including some that wanted to return to Australia but were unable to do so.⁴⁴

Second, the ability to return to Australia was determined, first and foremost, by wealth — that is, the ability to pay for expensive airfares and book multiple tickets due to the high risk of ticket cancellation.

Third, many stranded Australians were left in exceptionally precarious situations.⁴⁵ Some were left in difficult housing situations, having foregone their place of residence in anticipation of relocating back to Australia, only to have their ticket cancelled in the days before their scheduled flight with no available alternatives offered by the airline. Others were left in difficult legal situations, being required to stay in countries where they did not have the legal right to reside because their visa had expired. This left those people in difficult employment situations, as the expiry of their visa meant they could not be legally employed. This, in turn, left

news/2020/sep/13/australian-diplomats-sent-to-heathrow-airport-to-help-stranded-citizens-due-to-travel-caps>.

43 See above n 11.

44 Dan Conifer, 'Data Reveals More than 50 Australian Citizens Have Died from COVID-19 while Overseas', *ABC News* (online, 5 August 2021) <<https://www.abc.net.au/news/2021-08-05/over-50-australian-citizens-died-abroad-from-covid-19/100354220>>.

45 See, eg, Georgina Smyth, 'Australians Stranded in Canada by Coronavirus Couch-Surfing to Get By', *ABC News* (online, 13 March 2021) <<https://www.abc.net.au/news/2021-03-13/coronavirus-stranded-australians-in-canada-speak-out/13237930>>.

those people in difficult financial situations, being unable to earn an income to afford the expensive flights back to Australia.

Fourth, the Commonwealth designed the arrivals cap system to ensure procedural fairness was not afforded to persons denied entry into Australia.⁴⁶ As all the Commonwealth government did was adjust the number of passengers an airline could carry into Australia,⁴⁷ the airline, not the government, was responsible for deciding which persons were and were not allowed to board flights to Australia.

Fifth, throughout the pandemic, a steady stream of international celebrities arrived in Australia to film movies and television shows while tens of thousands of Australians remained stranded overseas.⁴⁸

Sixth, there were many ways in which Australia's governments could have facilitated the return of more stranded Australians in a shorter period of time through, for example, the addition of more spaces in hotel quarantine, the facilitation of alternatives to hotel quarantine such as home quarantine for people coming from low risk countries, quicker reopening of the international border through quicker vaccination of the domestic population, and the provision of greater financial assistance to stranded Australians.⁴⁹

Seventh, this hardship was, by and large, under-appreciated by persons within Australia. The closure of the international border proved to be immensely popular.⁵⁰ In December 2020, for example, a poll of 28 countries found that 83% of Australians surveyed thought the international border should remain closed, placing public support for closure behind only one other country (Malaysia).⁵¹ In February 2021, an Australian poll found that 71% of persons surveyed thought that

46 *Management of International Travel Restrictions* (n 3) 40 [2.55].

47 See above n 11.

48 See, eg, 'Why Was Katie Hopkins Let past Australia's COVID-19 Border Closure? The Same Reason Matt Damon and Caitlyn Jenner Were', *ABC News* (online, 19 July 2021) <<https://www.abc.net.au/news/2021-07-19/katie-hopkins-caitlyn-jenner-celebrities-allowed-in-to-australia/100303928>>.

49 See, eg, Department of Health and Aged Care (Cth), *National Review of Hotel Quarantine* (Report, 23 October 2020) ('*National Review of Hotel Quarantine*'); Stephen Duckett, 'Australia Has Not Learned the Lessons of Its Bungled COVID Vaccine Rollout', *The Conversation* (online, 29 June 2021) <<https://theconversation.com/australia-has-not-learned-the-lessons-of-its-bungled-covid-vaccine-rollout-163481>>.

50 In addition to the sources cited below, see David Crowe, 'One-Third of Voters Back Cuts in Overseas Arrivals to Ease Quarantine Pressure', *The Age* (online, 19 June 2021) <<https://www.theage.com.au/politics/federal/one-third-of-voters-back-cuts-in-overseas-arrivals-to-ease-quarantine-pressure-20210618-p5826w.html>>.

51 Ipsos, 'Majority (83%) of Australians Support the Closing of Their International Borders as Few (21%) Believe COVID-19 Is Contained: Ipsos Poll' (Press Release, 4 December 2020) <https://www.ipsos.com/sites/default/files/ct/news/documents/2020-12/halifax_press_release.pdf>.

‘the border [should] remain shut until the public health crisis ha[d] passed’.⁵² There was, on the whole, only limited concern for the plight of the stranded Australians. In May 2021, a poll found that 59% of persons surveyed thought the Commonwealth government had done about the right amount to bring Australians home from overseas and another poll found that 79% of persons surveyed thought the international border should remain closed until the pandemic was under control around the world.⁵³

When the cumulative effect of these factors is taken into account, it is clear the stranded Australians endured considerable hardship as a result of the Commonwealth, state and territory governments’ COVID-19 actions. What, if any, constitutional lessons might be taken from this episode? That is the focus of the next part.

III CONSTITUTIONAL LESSONS

The treatment of the stranded Australians prompted some comment about its constitutional validity and its constitutional causes. This part argues that the two most commonly cited causes — the absence of a bill of rights⁵⁴ and the federal division of powers — were not necessarily the principal causes, especially given that broadly similar treatment of citizens occurred in New Zealand where there is a bill of rights and no federal division of powers. Before embarking on this analysis, it explains why the treatment of the stranded Australians merits discrete constitutional analysis.

A *Why Focus on the Stranded Australians?*

Australia’s international border restrictions imposed, as mentioned above in Part II, burdens on three cohorts — persons who were not citizens or permanent residents seeking to enter Australia (and, by extension, persons in this category who were inside Australia and seeking to leave then return at a later date), Australian citizens and permanent residents seeking to leave Australia, and the

52 Katharine Murphy, ‘Seventy Per Cent of Australians Think Border Should Stay Shut until Global Covid Crisis Has Passed: Poll’, *The Guardian* (online, 16 February 2021) <<https://www.theguardian.com/australia-news/2021/feb/16/seventy-per-cent-of-australians-think-border-should-stay-shut-until-global-covid-crisis-has-passed-poll>>.

53 Natasha Kassam, *Lowy Institute COVIDpoll 2021* (Report, 3 May 2021) 1 <<https://www.lowyinstitute.org/publications/covidpoll-2021>>; Casey Briggs and Nick Hose, ‘COVID-19 Has Left Australians Like James Stranded Abroad, but 79pc of Us Want to Keep Our Borders Shut’, *ABC News* (online, 24 May 2021) <<https://www.abc.net.au/news/2021-05-24/strong-support-covid-border-closure-australia-talks-survey-shows/100159062>>. See also Essential Research, *The Essential Report* (Report, 13 September 2021) <https://essentialresearch.com.au/wp-content/uploads/2021/09/Essential-Report-130921_V2.pdf>.

54 In this article, the term ‘constitutional’ refers to what is often called the ‘small-c’ constitution — ie all the rules that structure the system of government — rather than the ‘capital-C’ constitution — ie the *Australian Constitution*. References to a bill of rights therefore include a statutory bill of rights, not only a constitutionally entrenched bill of rights.

stranded Australians. The last cohort merits discrete constitutional analysis for two reasons.

First, the treatment of persons who were not citizens or permanent residents was not particularly unusual from the perspective of either domestic or comparative constitutional law. While the ban on entry that applied to non-citizens caused immense hardship for those persons and their families, under Australian constitutional law, the Commonwealth Parliament has always had exceptionally broad discretion to determine the conditions under which non-citizens may enter and remain in Australia. This discretion is regularly exercised through amendments to the *Migration Act 1958* (Cth) and associated regulations.⁵⁵ Consequently, there was little doubt that Parliament could exercise its migration powers to restrict entry into the country of non-citizens.⁵⁶ From a comparative perspective, Australia's move was not unusual. Large numbers of states around the world closed their international borders to non-citizens over the course of the COVID-19 pandemic.⁵⁷ To avoid any doubt, none of this is to say that non-citizens were treated fairly from a moral perspective, but instead that, from a constitutional perspective, nothing particularly out of the ordinary occurred.

By contrast, the restrictions imposed on entry into Australia on citizens were highly unusual from both a domestic and comparative constitutional perspective. Domestically, it is difficult to identify restrictions of a similar scale and gravity imposed on the international movement of citizens since at least the middle of the 20th century.⁵⁸ Indeed, serious questions were raised whether, under the *Australian Constitution*, it was even valid to impose such restrictions on the movement of citizens.⁵⁹ From a comparative perspective, the move was also highly unusual. Few

55 *Australian Constitution* s 51(xix). See, eg, Sangeetha Pillai, 'The Rights and Responsibilities of Australian Citizenship: A Legislative Analysis' (2014) 37(3) *Melbourne University Law Review* 736, 758–65 ('The Rights and Responsibilities of Australian Citizenship').

56 Pillai, 'The Rights and Responsibilities of Australian Citizenship' (n 55) 758–65. There were questions as to whether the Commonwealth government could do so without making amendments to the *Migration Act 1958* (Cth): see above n 6. However, there was little question that the Commonwealth Parliament could make those amendments if it chose to do so. There are some very limited exceptions where the Commonwealth Parliament cannot restrict entry to non-citizens under the migration power but might be able to do so under other heads of legislative power: see *Love v Commonwealth* (2020) 270 CLR 152.

57 See, eg, Phillip Connor, 'More than Nine-in-Ten People Worldwide Live in Countries with Travel Restrictions amid COVID-19', *Pew Research Center* (Web Page, 1 April 2020) <<https://www.pewresearch.org/fact-tank/2020/04/01/more-than-nine-in-ten-people-worldwide-live-in-countries-with-travel-restrictions-amid-covid-19/>>.

58 See generally Kim Moloney and Susan Moloney, 'Australian Quarantine Policy: From Centralization to Coordination with Mid-Pandemic COVID-19 Shifts' (2020) 80(4) *Public Administration Review* 671.

59 A constitutional challenge was launched against the 14-day India travel ban, but that aspect of the challenge was never decided: *Newman v Minister for Health and Aged Care* (2021) 173 ALD 88, 89–90 [3]–[4]. In relation to the imposition of arrival caps, see, eg, Elias Visontay and Daniel Hurst, 'Constitutional Question: Is It Legal to Limit How Many Australian Citizens Can Fly Home Each Week?', *The Guardian* (online, 26 August 2020) <<https://www.theguardian.com/australia-news/2020/aug/26/constitutional-question-is-it-legal-to-limit-how-many-australian-citizens-can-fly-home-each-week>>; Sangeetha Pillai, 'Australia's

governments, especially in liberal democracies, took measures in response to COVID-19 that left tens of thousands of citizens unable to return to their country.⁶⁰ Indeed, the plight of the stranded Australians attracted considerable attention in the international media due to its idiosyncratic character.⁶¹

Second, the stranded Australians were, to a large extent, arguably the reason for the outward travel ban placed on Australian citizens and permanent residents. Once the decision was made to place all persons entering the country into mandatory quarantine at a dedicated quarantine facility and to set the number of places in those facilities at several thousand per week, some way of rationing those places was always going to have to be implemented. Demand for quarantine places necessarily exceeded supply. To avoid any confusion, the claim is not that this was the government's only option for managing the spread of COVID-19, but rather that rationing was the only option *once* it had been decided to manage the spread through mandatory quarantine in a dedicated facility and to limit the supply of places in those facilities.

The ban on citizens and permanent residents leaving Australia was an indirect mechanism for preserving as many quarantine places as possible for the stranded Australians. By restricting exit from the country, the demand for quarantine places was reduced by limiting the number of citizens that were outside of Australia and, therefore, potentially wanting to return. Put simply, the exit ban helped reduce the number of stranded Australians.⁶² To interrogate the constitutional position of the inward travel restrictions imposed on citizens and permanent residents is,

Decision to Ban Its Citizens from Returning from India: Is It Legal? Is It Moral? Is It Just?', *ABC News* (online, 7 May 2021) <<https://www.abc.net.au/religion/is-australias-india-travel-ban-legal-moral-just/13335360>>. In relation to the imposition of the outward travel ban, see, eg, Sophie Meixner, 'Australia's Outbound Travel Ban Is One of the Strictest Coronavirus Public Health Responses in the World', *ABC News* (online, 31 August 2020) <<https://www.abc.net.au/news/2020-08-31/coronavirus-covid-outbound-international-travel-ban-morrison/12605404>>. See also Regina Jefferies, Jane McAdam and Sangeetha Pillai, 'Can We Still Call Australia Home? The Right to Return and the Legality of Australia's COVID-19 Travel Restrictions' (2021) 27(2) *Australian Journal of Human Rights* 211, 216.

60 One of the major exceptions was New Zealand, which imposed broadly similar restrictions, and will, therefore, serve as a useful comparative source of analysis throughout this article.

61 See, eg, Basha Rodell, 'Australia's Never-Ending Travel Ban', *The New York Times* (online, 14 May 2021) <<https://www.nytimes.com/2021/05/14/world/australia/covid-travel-ban.html>>; Frances Mao, 'Australians Stuck Overseas "Abandoned" by Their Own Country', *BBC News* (online, 1 May 2021) <<https://www.bbc.com/news/world-australia-56924188>>; Rachel Pannett, "'We're Prisoners": Australia Locks Out Thousands More Citizens as Virus Slip-Ups Mount', *The Washington Post* (online, 2 July 2021) <<https://www.washingtonpost.com/world/2021/07/02/australia-virus-delta-borders-lockdown/>>.

62 See, eg, Caitlin Fitzsimmons, "'On Par with North Korea": Three Out of Four Requests to Leave Australia Refused', *The Sydney Morning Herald* (online, 16 August 2020) <<https://www.smh.com.au/lifestyle/life-and-relationships/on-par-with-north-korea-three-out-of-four-requests-to-leave-australia-refused-20200814-p551uj.html>>. The government's official reason for the outward travel ban was that it is 'necessary to prevent or control the entry, emergence, establishment or spread of COVID-19 in Australian territory and abroad': *LibertyWorks Inc v Commonwealth* (2021) 286 FCR 131, 136 [20] (Katzmann, Wigney and Thawley JJ).

therefore, to interrogate the constitutional position of the outward travel restrictions imposed on citizens and permanent residents.

B The Absence of a Bill of Rights and the Federal Division of Powers

In discussions of the stranded Australians, two features of the country's constitutional system were commonly said to exacerbate their plight — the absence of a bill of rights and the federal division of powers.

In relation to the bill of rights, the argument was straightforward. In many constitutional systems around the world and at international law, there are guaranteed rights that would be of assistance to a person seeking to enter a country of which they are a citizen. Most directly, there is the right to enter one's country of origin.⁶³ More broadly, there are rights that are impacted by one's ability to enter their country of citizenship in a pandemic, such as the right to a family life, the right to life and the right to be free from cruel, inhuman and degrading treatment.⁶⁴ As Australia does not have a bill of rights at the federal level, the stranded Australians were thus deprived of a constitutional mechanism that may have been of assistance.⁶⁵ This fact limited the options for challenging the legality of the inward travel restrictions before domestic courts. The fact that some stranded Australians brought a challenge to Australia's inward travel restrictions under international human rights law before the United Nations Human Rights Committee hints at what might have been possible if a domestic bill of rights had existed.⁶⁶

63 See, eg, *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 12(4) ('ICCPR'); *New Zealand Bill of Rights Act 1990* (NZ) s 18(2) ('NZ Bill of Rights'); *Canada Act 1982* (UK) c 11, sch B pt I s 6(1) ('Canadian Charter of Rights and Freedoms'); *Constitution of the Republic of South Africa Act 1996* (South Africa) s 21(3).

64 See, eg, Jefferies, McAdam and Pillai (n 59) 221–2.

65 See, eg, Bruce Chen, 'The COVID-19 Border Closure to India: Would an Australian Human Rights Act Have Made a Difference?' (2021) 46(4) *Alternative Law Journal* 320, 325; Olivera Simic and Kim Rubenstein, 'The Challenge of "COVID-19 Free" Australia: International Travel Restrictions and Stranded Citizens' (2023) 27(5) *International Journal of Human Rights* 830; Olivera Simic, 'Australia, COVID-19, and the India Travel Ban' (2022) 9(2) *Griffith Journal of Law and Human Dignity* 35, 46; Elizabeth Hicks, 'A Right to Come Home? Repatriation Rights & Policy in Australia' (Policy Brief No 11, Melbourne School of Government, 15 April 2021) 6; Jefferies, McAdam and Pillai (n 59) 216; Marco Rizzi and Tamara Tulich, 'All Bets on the Executive(s)! The Australian Response to COVID-19' in Joelle Grogan and Alice Donald (eds), *Routledge Handbook of Law and the COVID-19 Pandemic* (Routledge, 2022) 457; Visontay and Hurst (n 59); Nicole Trian, 'Stranded Abroad, Australians Lodge UN Petition against Government for "Right to Return Home"', *France 24* (online, 6 April 2021) <<https://www.france24.com/en/asia-pacific/20210406-stranded-abroad-australians-lodge-un-petition-against-govt-for-right-to-return-home>>; Joshua Aston, 'There Are 209 Australian Kids Stranded in India — They Have Special Legal Rights We Must Not Ignore', *The Conversation* (online, 10 June 2021) <<https://theconversation.com/there-are-209-australian-kids-stranded-in-india-they-have-special-legal-rights-we-must-not-ignore-162176>>.

66 Trian (n 65).

In relation to the federal division of powers, the argument centres on the inefficiency and accountability problems that existed around quarantine. In Australia, responsibility for the international border and, by extension, the stranded Australians was, in effect, shared between the Commonwealth and states.⁶⁷ While the Commonwealth was responsible for the international travel restrictions, the states assumed responsibility for most quarantine facilities. As a result, the arrivals caps were a complicated negotiation between the Commonwealth and states. In general, the Commonwealth wanted higher international arrivals caps to reduce the number of stranded Australians and, consequently, pressure on DFAT. By contrast, in general, the states wanted lower international arrivals caps to reduce the risk of an outbreak of COVID-19 in the community and to reduce the strain on their health resources (quarantine facilities required substantial numbers of nurses and doctors to provide care for persons in quarantine with COVID-19 and other health issues). New South Wales was a partial exception, generally seeking to maintain a higher arrivals cap than other states while mandatory quarantine was in place.⁶⁸ In these circumstances, it could be argued that federalism worsened the situation of the stranded Australians by creating a regime where responsibility for quarantine was divided between governments that had conflicting priorities.⁶⁹

While both the absence of a bill of rights and the federal division of powers contributed to the plight of the stranded Australians by removing one option for challenging the inward travel restrictions before the domestic courts and by blurring the lines of accountability for quarantine, there is, I argue, a risk of overstating their significance and thus taking the wrong constitutional lessons from this episode. It is entirely possible that the stranded Australians would have suffered the same fate if Australia had a bill of rights and there was no federal division of responsibilities. Indeed, it is possible to make this case with some degree of confidence because that is what happened in New Zealand. More will be said about the New Zealand comparison below.

1 *The Bill of Rights*

Beginning with the bill of rights argument, two characteristics must be kept in mind when considering its capacity to assist in a scenario such as the COVID-19 pandemic — rights have limits and remedies have limits. Beginning with the first characteristic, the right of entry is not absolute. It can be limited. Article 12 of the *International Covenant on Civil and Political Rights* states that the right to enter one's own country can be subject to restrictions 'necessary to protect ... public

67 For the most part, the territories did not quarantine international arrivals, with Howard Springs in the Northern Territory being a Commonwealth facility.

68 Phillip Coorey, 'Why Critics Don't Faze the Premier Who Steered a Nation', *Australian Financial Review* (online, 30 April 2021) <<https://www.afr.com/politics/why-critics-don-t-faze-the-premier-who-steered-a-nation-20210413-p57iog>>.

69 See, eg, Liz Hicks, 'Australia and the Right of Repatriation', *Verfassungsblog* (Blog Post, 12 April 2021) <<https://verfassungsblog.de/australia-and-the-right-of-repatriation/>>; Julian R Murphy and Erika Arban, 'Assessing the Performance of Australian Federalism in Responding to the Pandemic' (2021) 51(4) *Publius* 627.

health'.⁷⁰ In domestic bills of rights, there is typically a general limitations clause. For example, the right of every New Zealand citizen to enter the country found in s 18(2) of the *New Zealand Bill of Rights Act 1990* (NZ) is qualified by s 5, which permits rights to be subject 'to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.⁷¹

The restrictions imposed on the right of entry into Australia were for a legitimate reason — to protect the health of persons inside Australia. Therefore, if a right of entry had been guaranteed in Australian law, any legal challenge launched by the stranded Australians would have been fought on proportionality grounds. And it is far from clear that a court, especially an Australian court, would have found the inward travel restrictions to be a disproportionate limit on the right of entry.

Decisions about inward travel restrictions were being made in a highly uncertain and dynamic environment. Governments were required to make decisions about quarantine against a background of uncertainty about the virus — for example, how dangerous it was, how contagious it was and how it spread — and its effect on society — for example, its implications for the health system, the burdens created by different containment measures and the economic consequences of different responses. They were also required to make decisions while the threat posed by the virus was constantly changing with the emergence of new variants and new information about the effectiveness of hotel quarantine. In this environment, it would have been difficult, though of course not impossible, for a court to conclude that the government had not, for instance, chosen the least restrictive means of protecting the health of persons inside Australia or that the burden was disproportionate to the benefit.

While courts in some countries did find that inward travel restrictions imposed unjustifiable limitations on the right of entry, it is also important to remember that courts in different countries approach the issue of deference to government in different ways.⁷² There is good reason for thinking that courts in Australia would have been towards the more deferential end of the spectrum given that is precisely what did occur in relation to a number of legal challenges to COVID-19 measures. The High Court of Australia rejected a challenge to Western Australia's complete closure of its border to other states for violating the freedom of movement of people between states guaranteed by s 92 of the *Australian Constitution*.⁷³ The Court unanimously held that it was a proportionate response to the threat of COVID-19.⁷⁴ The Supreme Court of Victoria rejected a challenge to Victoria's lockdown orders for violating the rights to freedom of movement and to liberty

70 *ICCPR* (n 63) art 12.

71 *NZ Bill of Rights* (n 63) s 5.

72 See Elizabeth Hicks, 'Proportionality and Protracted Emergencies: Australia's COVID-19 Restrictions on Repatriation Rights Compared' (2023) 45(1) *Sydney Law Review* 77.

73 *Palmer v Western Australia* (2021) 272 CLR 505.

74 *Ibid* 518–19 [24]–[26], 533 [77] (Kiefel CJ and Keane J), 536–7 [90] (Gageler J), 576–7 [210] (Gordon J), 607 [292] (Edelman J).

guaranteed by the *Charter of Human Rights and Responsibilities Act 2006* (Vic).⁷⁵ The Court held that the lockdown order was reasonably necessary to protect public health and there were no less restrictive means available to reduce infection rates.⁷⁶ The Supreme Court of Victoria also rejected a challenge to Victoria's lockdown orders on the basis that it prevented persons from demonstrating and thus violated the *Australian Constitution's* implied freedom of political communication.⁷⁷ The Federal Court of Australia rejected a challenge to the 14-day India travel ban on administrative law grounds that the ban was not proportionate and therefore contravened the requirements in s 477 of the *Biosecurity Act 2015* (Cth).⁷⁸ The Court held that the Minister responsible for imposing the ban had turned his mind to how to make the ban no more restrictive or intrusive than necessary (eg exemptions were created for flights that were facilitated by the Commonwealth government and for emergency medical evacuation flights) and that, therefore, the ban was proportionate.⁷⁹ The Court also held that the legislation effectively abrogated the common law right to enter one's country of citizenship.⁸⁰

Moving to the second characteristic that must be kept in mind, remedies also have limits. Even if a court would have found that the inward travel restrictions violated the right of return, it is far from clear that it would have issued a remedy that materially improved the situation of the stranded Australians.⁸¹ In this regard, it is important to remember that, apart from the 14-day India travel ban, Australian citizens and permanent residents were never refused entry into Australia. Consequently, what the stranded Australians primarily required was a commitment of additional state resources to help them access, as a practical matter, the right of return.⁸² The most obvious commitment of state resources would have been to the quarantine system to create more spaces in dedicated facilities and/or to enable people to quarantine at their private place of residence. However, it would have been difficult for a court to issue a remedy of this nature given that these commitments would have placed greater pressure on the health system, requiring more medical staff to supervise and care for people in quarantine with COVID-19 and other illnesses, at a time when health care was already being rationed due to pressures that were being placed on the health system.⁸³ The difficult and dynamic question of how to allocate scarce health resources in the midst of a pandemic is

75 *Loiolo v Giles* (2020) 63 VR 1.

76 *Ibid* 67–8 [249]–[254] (Ginnane J).

77 *Cotterill v Romanes* (2021) 360 FLR 341, 345 [9] (Niall JA).

78 *Newman v Minister for Health and Aged Care* (2021) 173 ALD 88, 100–4 [45]–[62] (Thawley J).

79 *Ibid*.

80 *Ibid* 105–11 [67]–[97].

81 A bill of rights is, of course, not unique in this regard (ie there may also have been limits to what remedies a court could have issued in respect of, say, a successful administrative law challenge to the restrictions).

82 See also Jefferies, McAdam and Pillai (n 59) 221–3.

83 For details of the rationing, see Scott Stephenson, 'The Relationship between Federalism and Rights during COVID-19' (2021) 32 *Public Law Review* 222, 227.

one that a court might have reasonably concluded should be left to the executive and legislature.

2 Federalism

Turning to federalism, it must be kept in mind that the presence of multiple governments can have both positive and negative effects on the protection of individuals and groups. For the stranded Australians, while federalism divided responsibility for quarantine, it also ensured there was never a monolithic position on quarantine.⁸⁴ In comparison to a unitary state, the presence of multiple governments meant there was an ongoing, public debate between officials about the necessity and scope of quarantine. While that debate was not always edifying, it made clear that there was room for different views on the subject and increased the justificatory burden on officials. For example, it required the governments that adopted more restrictive views on quarantine to explain why that position was warranted in light of the less restrictive views of other governments.⁸⁵

Federalism also created cascade effects. Some worked against the interests of the stranded Australians. For example, when quarantine failed in Victoria in 2020, leading it to cease accepting international arrivals, the burden on other states was increased. Even on this example, however, federalism also created redundancy in the system, meaning that a failure in Victoria did not lead to the cessation of international arrivals in other parts of Australia. Quarantine in other states continued to operate. Other cascade effects worked in favour of the interests of the stranded Australians. In 2021, the New South Wales government's decision to end mandatory hotel quarantine for vaccinated arrivals pushed the Victorian and the Australian Capital Territory governments to follow suit given their open border arrangements, and placed pressure on the other state and territory governments to prepare to end mandatory hotel quarantine in their jurisdictions.⁸⁶

3 New Zealand

New Zealand serves as a useful comparator for illustrating that the importance of a bill of rights and the problems with federalism can be overstated. Even though New Zealand has a right of return and a single government responsible for quarantine, citizens seeking to return to the country — the 'grounded Kiwis', as

84 See generally Stephenson, 'The Relationship between Federalism and Rights during COVID-19' (n 83).

85 Ibid 228.

86 After the New South Wales Premier made the unexpected announcement that the State would no longer require hotel quarantine for international arrivals, Victoria followed suit seven days later and the Australian Capital Territory followed five days after that: see Richard Wood, "'Open for Business": NSW Makes Shock Move to Scrap Hotel Quarantine', *9News* (online, 15 October 2021) <<https://www.9news.com.au/national/coronavirus-nsw-update-latest-covid19-cases-regional-travel-restart-date/f9683a50-0cd2-4de3-91aa-740ce867c8b1>>; Andrews (n 14); Kate Midena, 'ACT Announces Further Changes to COVID-19 Restrictions, Including Eased Quarantine Requirements for Fully Vaccinated Canberrans', *ABC News* (online, 27 October 2021) <<https://www.abc.net.au/news/2021-10-27/act-covid-quarantine-changes-unvaccinated-travel-restrictions/100572640>>.

they came to be called — did not necessarily fare any better than the stranded Australians and, in some respects, were treated worse.⁸⁷

In response to COVID-19, New Zealand implemented a broadly similar set of international travel restrictions as Australia. From 10 April 2020 until 28 February 2022, all international arrivals were required to quarantine at a government-managed facility.⁸⁸ Similar to Australia, a cap was placed on arrivals due to limits on the number of spaces available in quarantine facilities. In contrast to Australia, the New Zealand government directly managed the process of determining which individuals were able to enter the country.⁸⁹ Spaces for New Zealand citizens were primarily allocated on a random basis through a virtual lobby that periodically released vouchers to enter quarantine.⁹⁰

Even though a single government was responsible for quarantine in New Zealand, it was not necessarily managed in a way that reduced the burden on the grounded Kiwis when compared to the stranded Australians. Most significantly, mandatory quarantine in New Zealand continued for four months longer than it did in Australia and that four-month difference can be fairly attributed to Australia's federal system.⁹¹ As mentioned above, the timing of Australia's reopening was determined in large part by New South Wales' decision to remove mandatory quarantine from 1 November 2021, prompting Victoria and the Australian Capital Territory to follow suit on the same date.⁹² Moreover, New Zealand's centralised system for allocating spaces in hotel quarantine was not self-evidently better than Australia's decentralised system. New Zealand's virtual lobby did not prioritise citizens over other persons and did not prioritise people based on the period that they had been seeking to return.⁹³ By contrast, in Australia, the Commonwealth's quarantine facility in the Northern Territory was dedicated to returning citizens and permanent residents, especially those that had been classified as 'vulnerable' by DFAT.⁹⁴ To avoid any doubt, the claim is not that Australia's system was managed well or even better than that of New Zealand, but instead that New Zealand's

87 See *Grounded Kiwis Group Inc v Minister of Health* [2022] 3 NZLR 19 ('*Grounded Kiwis Group*').

88 *Ibid* 28 [2].

89 *Ibid* 28 [3].

90 *Ibid* 28 [4], 29 [8].

91 Western Australia's border closure was not lifted until approximately the same date as New Zealand (3 March 2022): James Carmody and David Weber, 'WA Border Opening Date Is March 3, as Mark McGowan Announces New COVID Restrictions', *ABC News* (online 18 February 2022) <<https://www.abc.net.au/news/2022-02-18/mark-mcgowan-announces-wa-border-update/100843126>>. This difference highlights that Australia might have followed the path of New Zealand but for the diversity of approaches to border management that the federal system allowed.

92 See above n 86.

93 *Grounded Kiwis Group* (n 87) 31 [21] (Mallon J).

94 See, eg, Marise Payne and Scott Morrison, 'More Flights Helping Australians Return' (Media Release, 16 October 2020) <<https://www.foreignminister.gov.au/minister/marise-payne/media-release/more-flights-helping-australians-return>>.

unitary system did not unquestionably perform better than Australia's federal system in this instance.

Even though New Zealand has a judicially enforced right of return, it also did not materially improve the situation of the grounded Kiwis. Indeed, the grounded Kiwis brought a challenge to the inward travel restrictions, alleging that it violated s 18(2) of the *New Zealand Bill of Rights Act 1990* (NZ).⁹⁵ The challenge even succeeded.⁹⁶ But it primarily revealed several ways in which a bill of rights can fail to assist even successful litigants.

First, it demonstrated that rights may fail to assist because legal challenges take time. The grounded Kiwis commenced proceedings on 8 October 2021 and were granted a priority hearing.⁹⁷ Nevertheless, judgment was not issued until six and a half months later, 27 April 2022, by which time mandatory quarantine had already come to an end. The case thus came too late to assist a single grounded Kiwi return to the country.

Second, it demonstrated that rights may fail to assist because rights have limits. Justice Mallon held that it was a reasonable and proportionate limit on the right of entry to require mandatory quarantine in a managed facility even when persons within New Zealand that had COVID-19 were not required to quarantine in a managed facility.⁹⁸ The case thus shows that a right of return would not have necessarily increased the ability to enter Australia by, for example, requiring government to allow international arrivals to quarantine at home. The challenge succeeded on a narrow basis. Justice Mallon held that the right of return was violated because '[t]he virtual lobby did not prioritise New Zealand citizens over non-citizens and nor did it prioritise on need or the delay experienced by a citizen'.⁹⁹ Even on this narrow basis, it is not clear that a similar challenge would have succeeded in Australia because, as mentioned above, the Commonwealth sought to prioritise citizens, especially those classified as vulnerable, through the Northern Territory facility.

Third, the case demonstrated that rights may fail to assist because remedies have limits. All that the Court granted to the grounded Kiwis was declaratory relief acknowledging that the *New Zealand Bill of Rights Act 1990* (NZ) had been violated.¹⁰⁰ While symbolically important, it provided no material assistance to the grounded Kiwis.

To avoid any doubt, the purpose of the comparison with New Zealand is not to suggest that events would have transpired in the exact same way if, for example,

95 *Grounded Kiwis Group* (n 87).

96 *Ibid* 31–2 [20]–[22] (Mallon J).

97 *Ibid* 61 [163].

98 *Ibid* 30–1 [17]–[18].

99 *Ibid* 31 [20].

100 *Ibid* 24–5, 117 [433] (Mallon J).

Australia had a bill of rights, but instead, as mentioned above, to highlight that the possible contribution of a bill of rights and federalism to the situation should not be overstated. Are there any alternative constitutional lessons one might take from the case of the stranded Australians? The next section considers that question.

IV DIFFERENT CONSTITUTIONAL LESSONS

It is, of course, impossible to say definitively what, if anything, might have changed the way the stranded Australians were treated. It is necessarily an exercise in speculation. Nevertheless, there are two strands of scholarship that point to a different set of constitutional lessons that might be taken from this episode. In recent years, a group of scholars have sought to emphasise the centrality of legislatures in securing human rights.¹⁰¹ While the point might seem obvious and even trite, its purpose is to push back against the trend in constitutional law to focus on a bill of rights as the primary instrument and the judiciary as the primary institution responsible for the protection of rights.¹⁰² Without seeking to endorse this thesis as a general constitutional matter,¹⁰³ the argument has some merit in the specific context of the stranded Australians.

The second strand of scholarship has sought to emphasise the importance of structural mechanisms to the protection of persons, especially groups, in society. Its purpose is to push back against the trend in constitutional law to focus on rights as the primary protective mechanism. A well-known contemporary example in the Australian context was the proposal to establish a First Nations Voice ('the Voice'). The Voice was a proposal for structural reform that sought to protect the interests of Aboriginal and Torres Strait Islander peoples by empowering them to make representations to the political arms of government. It stood in contrast to a rights-based approach, which might have proposed, for instance, a right to non-discrimination.¹⁰⁴ As Gabrielle Appleby, Ron Levy and Helen Whalan have argued, this structural response speaks more directly to the ongoing relationship between the state and First Nations than a rights-based approach, and may be more

101 Grégoire Webber et al, *Legislated Rights: Securing Human Rights through Legislation* (Cambridge University Press, 2018).

102 This trend is, of course, a simplification given that more recent bills of rights seek to emphasise the role of all three arms of government in protecting rights: see, eg, Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013); Scott Stephenson, *From Dialogue to Disagreement in Comparative Rights Constitutionalism* (Federation Press, 2016). However, the trend is broadly accurate in the context of this article's argument given that a bill of rights was proposed as a COVID-19 constitutional lesson due to its potential to provide people with the ability to seek judicial review of the international travel restrictions: see above n 65.

103 For criticisms of it, see, eg, Lael K Weis, 'Situating *Legislated Rights*: Legislative and Judicial Role in Contemporary Constitutional Theory' (2020) 11(4) *Jurisprudence* 621.

104 While the Voice could be understood as a proposal to give effect to rights, such as the right to self-determination at international law, the way it proposed to do so was different — it was through structural reform rather than a judicially enforceable right or set of rights: see Explanatory Memorandum, Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 (Cth) 7–8.

appropriate at facilitating inter-group accommodation.¹⁰⁵ As they also note, the Voice is not an isolated occurrence — structures of this kind are increasingly common around the world.¹⁰⁶

Applying these two strands of scholarship to the stranded Australians, one of the challenges for both the stranded Australians and Australia's governments was the lack of clarity about what the governments owed the stranded Australians. There was some general sense that the governments needed to provide assistance to the stranded Australians, but there were no rules, standards or principles to guide the task of determining what the governments should do. There were no guideposts to which the stranded Australians could point to allege that the governments were not devoting sufficient resources to, for example, repatriation flights or quarantine facilities. Conversely, there was nothing to which the governments could point to allege that the stranded Australians were expecting too much — that they were labouring under a misapprehension as to what the governments will do in the event of a crisis that affects citizens outside the country.

Another challenge for the stranded Australians and, to some extent, Australia's governments was the lack of a platform for the stranded Australians to speak and be heard. It was difficult for the stranded Australians to inform and petition Australia's governments because they were a disparate and dynamic cohort. Not only were the stranded Australians spread across the world, but individual members of the cohort were also in very different situations from each other. Some needed to return urgently to Australia while others could afford to wait weeks or even months; some needed a seat on a plane and a spot in hotel quarantine while others also needed financial, legal and medical support. More importantly, the composition of the cohort was constantly changing. New people were regularly becoming stranded Australians as they found themselves needing to return to Australia and new people were regularly losing that status as they managed to find a way of entering the country. This fact made it difficult for the stranded Australians to organise as a group to make representations to Australia's governments and, indeed, the media and public. It meant there was little comprehensive data on the situation of the stranded Australians. Public debate was, instead, informed by individual accounts reported in the media.

It is possible that legislative specification and structural representation may have at least partially addressed these challenges. Legislative specification could have, for example, set out principles or guidelines as to what DFAT is and is not required to do to assist Australian citizens stranded in a foreign country in an emergency. While the current Consular Services Charter states that DFAT may 'support Australians trying to leave the [crisis-affected] area',¹⁰⁷ far greater specification

105 Gabrielle Appleby, Ron Levy and Helen Whalan, 'Voice versus Rights: The First Nations Voice and the Australian Constitutional Legitimacy Crisis' (2023) 46(3) *University of New South Wales Law Journal* 761.

106 Ibid 780–1.

107 Department of Foreign Affairs and Trade (Cth), 'Consular Services Charter' (Brochure, May 2019) 6 <https://www.smartraveller.gov.au/sites/default/files/2019-11/consular-services-charter-may19_0.pdf>.

could be envisaged around, for instance, requirements for material assistance (eg financial and logistical support) and timeframes for action. The establishment of an institutional platform to represent the stranded Australians (or, more generally, Australian citizens situated overseas) could have helped address the challenge of communication. That platform could have received individual representations and, after aggregation, conveyed them to the government. The purpose of this article is not to put forward a concrete set of proposals. As the Voice illustrated, reforms of this nature must be developed in stages and should occur with input from the relevant group. Instead, it is to point the debate in a new direction by suggesting that rights and federalism should not be our only focus.

Legislative specification and structural representation may not have *necessarily* reduced the harm suffered by the stranded Australians, but there is good reason to think they *might* have assisted and done so in ways that rights and federalism could not have. As the case of New Zealand demonstrated, a bill of rights would have likely included only a very broad right to return that would have taken months, if not years, to seek specification from a court as to what it required the governments to do. By contrast, legislative specification could have provided guidance from the start of the pandemic. While there would have still been room for disagreement about the interpretation of that guidance, it could have structured the conversation between the stranded Australians and the government in more detailed, practical ways.

While federalism in Australia created multiple institutional voices that contributed to the debate about the management of the international border, none directly represented the stranded Australians. And as the case of New Zealand demonstrated, courts in rights cases do not necessarily serve as effective institutional platforms for affected individuals either. Dean Knight and Jane Norton have highlighted how the *Grounded Kiwis Group Inc v Minister of Health* decision drew in detail on the experiences of just two individuals, neither of which, on close inspection, was representative of the group.¹⁰⁸ By contrast, a platform to represent overseas citizens could have begun to directly advocate for this cohort from the very start of the pandemic. It could have improved public debate on the matter by providing comprehensive, accurate and timely information on the situation of people stranded overseas. It could have increased pressure on the governments to explain why the restrictions continued to be required after COVID-19 was already in the Australian community and a vaccine was being distributed.

The claim is not that legislative specification and structural representation should have been introduced prior to COVID-19. This is a lesson learned with the benefit of hindsight. However, it is also a lesson that likely has future relevance. It is not unreasonable to expect that, in the future, there will be events — health, environmental and political — that require the repatriation of large numbers of Australian citizens. Moreover, an institutional platform for overseas citizens would assist in addressing concerns that citizens abroad have outside the emergency

108 Dean R Knight and Jane Calderwood Norton, 'New Zealand's Pandemic Border Fortress: Community Health and Wellbeing versus Citizens' Right to Return' (2022) 33(3) *Public Law Review* 186, 193, discussing *Grounded Kiwis Group* (n 87).

context, such as in relation to voting and taxation.¹⁰⁹ This is not a niche matter. As mentioned earlier, up to one million Australian citizens were living and working outside the country prior to COVID-19.¹¹⁰

Furthermore, the claim is *not* that a bill of rights or centralised (ie non-federal) responsibility for quarantine would have made no difference to the plight of the stranded Australians (or, more generally, to overseas citizens). While New Zealand is a cogent analogue, it is of course possible that the situation would have played out differently if, for instance, Australia had a bill of rights containing a right to return.

Finally, the claim is not that the situation of the stranded Australians provides an argument against a bill of rights or reform of federalism. Indeed, it is possible that both sets of constitutional lessons can be combined, for example, to have a right to return as well as an institutional platform for overseas citizens. In some respects, they would be additive. An institutional platform could have used a right of return to help petition Australia's governments to take greater action to repatriate citizens. However, it is important to note that, in some respects, they might not be. A common concern with judicially enforced bills of rights is that they encourage legislatures to defer to courts on the specification of rights rather than do that work themselves.¹¹¹ For the purposes of this article, it is not necessary to weigh in on that issue. The argument is that we should not *only* look at rights and federalism when reflecting on the constitutional lessons from the case of the stranded Australians. There is also considerable value in thinking about legislative specification and structural representation as well.

V CONCLUSION

Aspects of Australia's constitutional system routinely get the blame for problematic outcomes. Mistreatment of individuals and groups is commonly attributed to the absence of a bill of rights,¹¹² and inefficiencies in government are commonly attributed to the presence of federalism.¹¹³ While there is often merit in these claims, it is also possible to overstate their significance. Comparative analysis helps confirm this point, illustrating that the same issues can arise even in

109 See, eg, Bryan Mercurio and George Williams, 'The Australian Diaspora and the Right to Vote' (2004) 32(1) *University of Western Australia Law Review* 1.

110 See above n 39.

111 See, eg, Mark Tushnet, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Counter-majoritarian Difficulty' (1995) 94(2) *Michigan Law Review* 245.

112 See, eg, the last major public inquiry into whether Australia should adopt a bill of rights at the federal level: Human Rights Consultation Committee (Cth), *National Human Rights Consultation* (Report, September 2009).

113 See, eg, Anne Twomey's observation that 'Australians have been brought up to regard federalism as an archaic, inefficient and uncompetitive encumbrance that is holding us back economically and socially': Anne Twomey, 'Federalism: The Good, the Bad and the Opportunities', *Analysis & Policy Observatory* (Web Page, 26 April 2007) <<https://apo.org.au/node/6516>>.

countries with a bill of rights and without a federal division of responsibilities. Even more problematically, the instinct to turn to rights and federalism can engender a lack of creative constitutional thinking. An ever-increasing range of constitutional ideas and mechanisms exist for addressing governance problems. To view issues through just two lenses risks missing the full landscape of constitutional responses.

The case of the stranded Australians is a cogent example of this dynamic in action. While it readily lends itself to rights-based and federalism-based analyses, the constitutional lessons are not straightforward. It is far from clear that a bill of rights or centralised responsibility for the international border would have materially improved the situation of the stranded Australians, as the comparison with New Zealand indicates. While it is very possible that no constitutional device would have produced a radically different outcome, this article has argued that it is worth considering other approaches as well. Legislative specification may have helped set expectations about what government should and should not do in the event of an emergency requiring repatriation of citizens. An institutional platform to represent overseas citizens may have helped improve the quality and direction of debate by providing comprehensive, accurate and current information about the situation of the stranded Australians. These are constitutional lessons that are likely to be relevant in the future when other issues involving citizens overseas arise.