



Legal Memorandum

AN ANALYSIS OF THE LEGAL ENFORCEABILITY TO EXACT QUARANTINE FEES
FROM AUSTRALIAN CITIZENS RETURNING FROM ABROAD

Peter Bowden | August 2023

An Analysis of the Legal Enforceability to Exact Quarantine Fees from Australian Citizens Returning from Abroad

Preface

1. This memorandum explores selected legal issues and considerations arising from the mandating of quarantine charges upon returning citizens within the state of Queensland, Australia. The paper seeks to explore whether the charges were compatible with section 55 of the Constitution and the International Health Regulations.¹
2. This memorandum is intended to provide general information only and is not intended to be legal advice. You should not rely on this memorandum without seeking legal advice from a qualified lawyer in relation to your specific circumstances. The author of this memorandum makes no representations or warranties, express or implied, as to the accuracy or completeness of any information contained herein or the appropriateness of any particular course of action. The author will not be liable for any damages whatsoever arising out of or related to the use of this memorandum or the information contained herein.

Background

3. On 29 January 2020, a public health emergency was declared in Queensland under section 319 of the *Public Health Act 2005*² for COVID-19.
4. On 19 March 2020, the *Public Health and Other Legislation (Public Health Emergency) Amendment Act 2020* amended the *Public Health Act* to include powers for the Chief Health Officer (CHO) to make public health directions to assist in containing, or to respond to, the spread of COVID-19 in the community.
5. On 28 March 2020, the CHO public health direction required anyone arriving in Queensland from overseas to quarantine in a hotel or other premises nominated by an emergency officer appointed under the Act.

¹ World Health Organization, *International Health Regulations (2005)* (2nd ed, 2008) <https://www.who.int/publications/i/item/9789241580496> accessed 26 March 2023.

² Queensland Government. (2005). *Public Health Act 2005*. <https://www.legislation.qld.gov.au/view/pdf/inforce/current/act-2005-048>

6. The *Community Services Industry (Portable Long Service Leave) Act 2020* amended the *Public Health Act* to include a head of power for fees to be charged for quarantine and the *Public Health Regulation 2018* to prescribe the fees for a person's quarantine. The amendments commenced on 1 July 2020 and were scheduled to expire on 18 March 2021.
7. On 8 March 2021, the *Public Health and Other Legislation (Extension of Expiring Provisions) Amendment Act 2021* extended part 7AA of the *Public Health Act*, which included the head of power for fees to be charged for quarantine fees, to 30 September 2021.
8. Section 362MC of the *Public Health Act* provided for a regulation making power, which permitted a regulation to prescribe the fees payable for a person who is required to quarantine at a place other than the person's home, for example a hotel. These fees include the types of costs associated with the person's quarantine, for example, the cost of accommodation or the cost of meals.
9. Section 61A of the *Public Health Regulation* set out the fees payable for quarantine. The initial daily accommodation fees were \$135 per room, including a \$15 linen service fee. A daily fee for meals was also payable with the fee being \$65 per day for adults and \$32.50 per day for children.
10. On 1 July 2021, the *Public Health Amendment Regulation (No. 2) 2021* increased the cost of the daily accommodation fee by \$30 per night to \$165 per room per night. The cost of food remained unchanged at \$65 per night. The cost of a single adult to undergo fourteen (14) days of mandatory hotel quarantine under the direction of the CHO is \$3,220.

Issue

11. Pursuant to section 55 of the Constitution (Contention 1) and the International Health Regulations (Contention 2), the issue to be considered is whether it was legal for the Queensland Government to charge fees to Australian citizens (citizens) for mandatory quarantine upon returning to Australia from abroad.

Authorising Law relied Upon By The Queensland Government

12. The Queensland Government relied upon the Part 7AA (Fees for quarantine during COVID-19 emergency) of the Public Health Act³ specifically section 362MC (1) of Part7AA of the Public Health Act which states:

- a. A regulation may prescribe the fees payable for a person who is required to quarantine at a place other than the person's home. (e.g., 'a hotel, a motel').*

And section 362MCD (1) of Part7AA of the Public Health Act states:

- b. A person required to quarantine is liable to pay the fees prescribed by regulation for the person's quarantine.*

13. On 1 July 2021, the *Public Health Amendment Regulation (No. 2) 2021*⁴ sought to increase the cost of the daily accommodation fee by \$30 per night to \$165 per room per night. The cost of food remained unchanged at \$65 per night.

³ Queensland Government, 'Public Health Act 2005', 1 July 2020, <https://www.legislation.qld.gov.au/view/pdf/2020-07-01/act-2005-048> [accessed 26 March 2023].

⁴ Queensland Government, 'Public Health and Other Legislation (Extension of Expiring Provisions) Amendment Act 2021', 23 April 2021, <https://www.legislation.qld.gov.au/view/pdf/published.exp/sl-2021-0082> [accessed 23 March 2023].

CONTENTION ONE

BREACH OF THE INTERNATIONAL HEALTH REGULATIONS (2005)

Contention

14. It is contended that the Queensland Government in charging fees for quarantine, breached its obligations and failed to comply with Article 40 of the World Health Organisation's (WHO) International Health Regulations (IHRs).

International Law

15. The Australian Commonwealth has the power to pass laws with respect to 'external affairs' under section 51(xxix) of the Constitution. The external affairs power is the primary power within the Constitution that enables the Commonwealth to implement international law into Australia. If the Commonwealth enters into a treaty with another nation, it will only come into force if it is given that effect by statute.⁵
16. In the case of *Koowarta v Bjelke-Peterson*⁶, it was held that a law which gives effect within Australia to an international agreement will only be valid law under section 51 (xxix) if the agreement is with respect to a matter which itself can be described as an external affair. It was also held that any subject-matter may constitute an external affair, provided that the manner in which it is treated in some way involves a relationship with other countries or with persons or things outside Australia.
17. The common denominator across the four major judgements in *Koowarta*⁷, established that the implementation of a treaty is a valid use of power under section 51 (xxix), *at least* when the subject matter is of 'international concern'.⁸

⁵ *Kioa v West* (1985) 159 CLR 550.

⁶ (1982) 153 CLR 168.

⁷ *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168.

⁸ Blackshield, T., Williams, G., & Australian Law Reform Commission. (2021). Australian constitutional law and theory: commentary and materials (6th ed.). Annandale, N.S.W: The Federation Press.

Was COVID-19 an International Concern?

18. Gibbs CJ in the case of the *Commonwealth v Tasmania (Tasmania Dam Case)*⁹, stated that whether a matter is of international concern depends on the extent to which it is regarded by the nations of the world as a proper subject for international action, and on the extent to which it will affect Australia's relations with other countries.
19. The World Health Organization (WHO) first declared the COVID-19 outbreak a public health emergency of *international concern* on 30 January 2020¹⁰. At that time, the outbreak had spread to several countries outside of China, where the outbreak was first reported, and there were concerns about the potential for further spread and the impact on global public health.
20. Australia did not officially announce that COVID-19 was an international concern, as the announcement was made by the World Health Organization (WHO) on 20 January 2020. However, the Australian Government immediately began implementing measures to prevent the spread of COVID-19 even prior to the WHO's announcement. For instance, on 23 January 2020, Australia's Chief Medical Officer issued a travel advisory recommending that people avoid travel to Wuhan, China, where the outbreak was first reported. The Australian Government also established a national incident room on 27 January 2020 to coordinate its response to the outbreak and began implementing enhanced border measures on 1 February 2020 to screen incoming travellers for COVID-19. On 18 March 2020, the Governor-General declared that a human biosecurity emergency exists.¹¹
21. Overall, it can be considered that the Australian Government considered the COVID-19 outbreak as an *international concern* and therefore by extension enabled the

⁹ *Commonwealth v Tasmania* (1983) 158 CLR 1

¹⁰ World Health Organization. (2020, January 30). Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV). Retrieved from [https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov))

¹¹ Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020, 18 March 2020, available from <https://www.legislation.gov.au/Details/F2020L00266> [accessed 25 March 2023]. The emergency declaration was extended on 15 May 2020, 4 September 2020, 11 December 2020, 3 March 2021 and 11 June 2021.

Commonwealth to validly carry out its external affairs obligations under section 51 (xxix) with respect to the implementation of treaties.

Treaty - WHO International Health Regulations (2005)

22. The treaty to be considered in this contention is the World Health Organisation (WHO) International Health Regulations (IHRs)¹². The IHRs are a set of legally binding international agreements that aim to prevent, protect against, control, and provide a public health response to the international spread of disease. The IHRs were first adopted by the World Health Assembly in 1969 and were revised in 2005 to consider the emerging global health threats, including bioterrorism, SARS, and avian influenza.
23. The current IHRs are a framework for cooperation between countries and are based on the principles of transparency, respect for human rights and dignity, and protection against unnecessary interference with international travel and trade. The IHRs require countries to establish and maintain core public health capacities, including disease surveillance and response systems, laboratory services, and communication systems.
24. The IHRs were adopted by World Health Assembly in 2005 and entered into force on 15 June 2007. As a member state of the World Health Organization (WHO), Australia is a signatory to the IHRs and is legally bound to comply with the obligations set out in the regulations. Australia implemented the IHRs through the *Biosecurity Act 2015*¹³, which replaced the Quarantine Act 1908. The *Biosecurity Act* provides the legislative framework for responding to public health emergencies, including the management of infectious diseases, and incorporates the provisions of the IHRs.

Article 32

25. The IHRs set out requirements for the treatment of travellers including the provision of accommodation and food for travellers required to quarantine; Article 32 (Treatment of Travellers) states:

¹² World Health Organization, International Health Regulations (2005) 3rd edn (World Health Organization, 2016) <https://www.who.int/publications/i/item/9789241580496> [accessed 27 March 2023].

¹³ BIOSECURITY ACT 2015 (Cth)

- a. In implementing health measures under these Regulations, States Parties shall treat travellers with respect for their dignity, human rights and fundamental freedoms and minimise any discomfort or distress associated with such measures, including by:*
 - i. ...*
 - ii. ...*
 - iii. providing or arranging for adequate food and water, appropriate accommodation and clothing, protection for baggage and other possessions, appropriate medical treatment, means of necessary communication, if possible, in a language that they can understand and other appropriate assistance for travellers who are quarantined, isolated or subject to medical examinations or other procedures for public health purposes.*

Article 40

26. Furthermore, the IHRs set out requirements with respect to charging travellers fees for health measures. Article 40 prohibits member states from charging travellers (except for travellers seeking temporary or permanent residence) for health measures such as vaccination, isolation and quarantine (Charges for health measures regarding travellers). The section 1(c) states:

- a. Except for travellers seeking temporary or permanent residence, and subject to paragraph 2 of this Article, no charge shall be made by a State Party pursuant to these Regulations for the following measures for the protection of public health:*
 - i. appropriate isolation or quarantine requirements of travel.*

27. It is considered that section 1(c) is applicable to all citizens returning from abroad because they enjoy citizenship and therefore cannot be seeking permanent residence as this is already afforded as a citizenship right.

Australian Legislation Giving Effect to the Implementation of the WHO International Health Regulations (2005), Article 32 and 40

28. An issue to be considered is whether the requirements of Article 32 and 40 are legally enforceable within Australia.

29. As mentioned, the *Biosecurity Act 2015 (Cth)* provides the legal basis for Australia's implementation of the IHRs and the management of public health emergencies in the country.

30. The Government at the time of implementation stated that¹⁴:

- a. *"adoption of the IHRs would bring significant benefits to Australia. In meeting international standards for the prevention and control of the international spread of disease, and by cooperating with the WHO and States Parties, Australia will be well placed to respond to public health emergencies, and in particular to combat a global pandemic".*
- b. *Australia would be obliged to implement the IHRs with the principles of non-discrimination, transparency, full respect for human rights, and consistently with other international law instruments.*

31. The Commonwealth has stated that as a member state of the World Health Organization (WHO), Australia *must comply* with the International Health Regulations (2005)¹⁵.

Constitution Section 51(ix) - Quarantine

32. Quarantine falls under the Constitution's power to make laws with respect to "quarantine" as stated in Section 51(ix) of the Constitution of Australia. The Commonwealth can delegate its power and did so for the operation of quarantine to the states in 2008 through the implementation of the National Health Security

¹⁴Parliament of Australia, Joint Standing Committee on Treaties, 'Report 80: Treaty tabled on 24 February 2005', 20 June 2006, chapter 6.

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Completed_Inquiries/jsct/20june2006/chapter6 [accessed 26 March 2023].

¹⁵ Australian Government Department of Health, 'International obligations', Communicable diseases - Biosecurity, Australian Government, 17 June 2020, <https://www.health.gov.au/topics/communicable-diseases/biosecurity/international-obligations>. [accessed 26 March 2023]

Agreement (NHSa).¹⁶ A key feature of the NHSa being that its implementation would support Australia's ability to comply with the IHRs.

Federal and State Biosecurity Legislation and Quarantine Fees

33. Prior to the 8 March 2021, the *Biosecurity Act 2015* (Cth) was the predominate legislation enabling the Commonwealth to manage biosecurity risks at the national level, including the management of quarantine measures to prevent the entry and spread of infectious diseases and pests into the country.
34. In Queensland, the *Biosecurity Act 2014* complements the Federal Act by providing a framework for managing biosecurity risks within Queensland. Both Acts work together to enable effective management of biosecurity risks in Australia. The federal government is responsible for managing biosecurity risks at the national level, while the state government manages biosecurity risks within its borders.
35. The *Biosecurity Regulations 2017* (Cth)¹⁷ and *Biosecurity Regulation 2016* (Qld)¹⁸, enable the prescribing of fees that may be charged in relation to 'fee-bearing activities' carried out by, or on behalf of, the Commonwealth in performing functions and exercising powers under the Act.
36. Both Federal and State legislation do not permit the charging of fees to citizens directed into quarantine because there are no heads of power within the legislation which support the exaction of fees for such purpose. On this basis, it is considered that the State and Federal biosecurity legislation is compliant with Article 40 of the international treaty and confers such rights upon Australian citizens.

¹⁶ Department of Health. (2023). National Health Security Agreement. https://www.health.gov.au/sites/default/files/2023-02/national-health-security-agreement_0.pdf. [accessed 26 March 2023]

¹⁷ Biosecurity Regulation 2016 (Cth)

¹⁸ Legislation.qld.gov.au. Biosecurity Regulation 2016 (Qld) sch 10. Available at: <https://www.legislation.qld.gov.au/view/html/inforce/current/sl-2016-0075#sch.10>

Quarantine Amendment (National Health Security) Act 2008 (Cth)¹⁹

37. Despite the Quarantine Act (1908) being largely repealed and replaced by the Biosecurity Act (2015), it is considered that there are *related provisions* from the Quarantine Act 1908 which are still in force. Section 64C of the Quarantine Amendment Act is one of them.²⁰

38. The Quarantine Amendment Act specifically incorporates the IHRs into domestic law by preventing the charging for quarantine being prescribed health measure. Specifically section 64C of the Act deals with charges for the provision of prescribed health measures such as quarantine in relation to *travellers* and states the following:

64B Traveller definitions

Travellers

- (1) For the purposes of this Act, a person is a *traveller* if:
- (a) the person has entered Australia while undertaking a voyage from another country; and
 - (b) none of the following applies:
 - (i) subject to subsection (2), the person has been immigration cleared (within the meaning of subsection 172(1) of the *Migration Act 1958*);
 - (ii) the person has been detained under section 189 of that Act;
 - (iii) the person has left Australia;
 - (iv) the person is prescribed by the regulations.

Note: The regulations may prescribe the person by reference to a class of persons (see subsection 13(3) of the *Legislative Instruments Act 2003*).

- (2) Subparagraph (1)(b)(i) does not apply in relation to a person who has been immigration cleared (within the meaning of subsection 172(1) of the *Migration Act 1958*) if:
- (a) before the person was immigration cleared, the person was notified that he or she would be required to submit to the provision of a prescribed health measure as soon as practicable after being immigration cleared; and
 - (b) the person submits to the provision of the prescribed health measure as soon as practicable after being immigration cleared; and

¹⁹ *An Act to amend the Quarantine Act 1908, and for related purposes -*

<https://www.legislation.gov.au/Details/C2008A00068#:~:text=Quarantine%20Amendment%20%28National%20Health%20Security%29%20Act%202008%20No.,the%20Quarantine%20Amendment%20%28National%20Health%20Security%29%20Act%202008.>

²⁰ <https://www.legislation.gov.au/Details/C2008A00068#:~:text=Quarantine%20Amendment%20%28National%20Health%20Security%29%20Act%202008%20No.,the%20Quarantine%20Amendment%20%28National%20Health%20Security%29%20Act%202008.>

- (c) the provision of the prescribed health measure is not yet complete.

64C Charges for the provision of prescribed health measures in relation to travellers

Travellers not seeking temporary residence or permanent residence

- (1) If a traveller is not seeking temporary residence or permanent residence in Australia, no person (other than the Commonwealth) is liable, under any law of the Commonwealth, to pay for the provision of a prescribed health measure in relation to the traveller.

39. On 8 March 2021, the *Public Health and Other Legislation (Extension of Expiring Provisions) Amendment Act 2021* extended part 7AA of the *Public Health Act*, which introduced a new head of power for fees to be charged for quarantine fees, to 30 September 2021 (and which was subsequently extended).
40. Of note, it was revealed by the Australian National Audit Office (ANAO) that the State Government did not seek advice on whether charging for mandatory quarantine was consistent with Article 40 of the IHRs.²¹ On face value, the introduction of this power created an inconsistency with the Commonwealth and State government's obligations to comply with the IHR treaty, specifically Article 40.
41. The question to be considered is whether the State law (*Public Health Act 2005*) is inconsistent with Commonwealth law (*Biosecurity Act 2015*), and if so, which law should prevail.

Constitution Section 109

42. Section 109 of the Constitution states, "when a law of the State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

²¹ Australian National Audit Office, 'Management of International Travel Restrictions during COVID-19', Performance Audit Report No. 12 2021–22 (Australian Government, 2022) at 2.87 <https://www.anao.gov.au/work/performance-audit/management-international-travel-restrictions-during-covid-19>. [accessed 25 March 2023]

43. In order for section 109 to apply, there must be a valid State law and valid Commonwealth law.²² On analysis, it is evident that both the State and Commonwealth laws in question are valid (subject to the outcome of Contention One), because the respective parliaments had the power to enact them.
44. In the case of *Clyde Engineering Co Ltd v Cowburn*,²³ Higgins J established three circumstances in which a Commonwealth law is 'inconsistent' with a State law as follows:
- a. It is impossible to follow both laws
 - b. If one law purports to confer a legal right, privilege or entitlement that the other law takes away or diminishes
 - c. If the Commonwealth law evinces a legislative intention to 'cover the field' (not applicable in this instance).

Was it impossible to comply with both laws?

45. The *Biosecurity Act (2015)* gives effect to Article 40 of IHRs by limiting the extent of fees that may be charged in relation to fee-bearing activities and which are set out at section 106 of the *Biosecurity Regulation (2016)*. Specifically, the Act limits the extent of fees that may be charged and excludes charges for persons directed into quarantine. This is in contrast with Queensland's *Public Health Act 2005* (modified 8 March 2020) which gives rise to a head of power at section 362MC to charge such fees.
46. Whilst the Commonwealth has enumerated certain quarantine powers to the states via the National Health Security Agreement (NHSA).²⁴ The states in effect, act for and on behalf of the Commonwealth and therefore have an obligation to comply with Commonwealth law. This includes international treaties to the extent that they have been incorporated into domestic law.

²² Blackshield, T., Williams, G., & Australian Law Reform Commission. (2021). Australian constitutional law and theory: commentary and materials (6th ed.) at 11.3. Annandale, N.S.W: The Federation Press.

²³ *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466.

²⁴ Department of Health. (2023). National Health Security Agreement. https://www.health.gov.au/sites/default/files/2023-02/national-health-security-agreement_0.pdf. [accessed 26 March 2023]

47. It is considered that whilst it was technically possible for Queensland to comply with both laws, i.e., it also had the power to waive all fees. The reality is that the Queensland did not do so and which it had an obligation as it was acting on behalf of the Commonwealth; therefore, it failed to carry out its obligations in complying with the IHRs.

Did the Federal law purport to confer a legal right, privilege or entitlement that the State law took away or diminished?

48. It is contended that the Commonwealth purported to confer the legal rights, privileges and entitlements prescribed by the IHRs upon the Australian people through legislating the Biosecurity Act (Cth). The legislation does not limit or preclude the implementation of Article 32 and 40 and thus the rights of which were intended to be conferred through the Act. Simply put:

- a. The *Public Health Act 2005 (Qld)* purported to have legal permission to exact fees whereas the Biosecurity Act (Cth) did not.

49. On this basis a legal inconsistency arises akin to the case in *Colvin v Bradley Brothers Pty Ltd*,²⁵ because the enactment of section 362MC of the Public Health Act, giving rise to the power to exact quarantine fees, took away and/or diminished the legal right conferred by the Commonwealth through the ratifying of the IHRs.

50. On this basis, because the State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.' i.e., the powers to exact fees available within the *Public Health Act* should be rendered invalid.

Teoh Principle – Breach of Natural Justice

51. In the alternative, should it be found that Article 40 of the IHRs has not been sufficiently incorporated into domestic law by statute and thereby rendering section 362MC valid, alternate legal precedent exists which may still result in its defeat. This contention is made with reference to the case of *Minister for Immigration and Ethnic Affairs v Teoh*²⁶ whereby it was held that where a decision-maker is required to

²⁵ (1943) 68 CLR 151.

²⁶ (1995) (1995) 128 ALR 353.

consider an international treaty as part of the decision-making process, the decision-maker must give genuine consideration to the obligations imposed by that treaty, even if the treaty has not been incorporated into domestic law.

52. In the case of Teoh, Mr. Teoh, a Malaysian national, had applied for a permanent residency visa in Australia on the basis that he had an Australian citizen child. The Minister for Immigration and Ethnic Affairs refused his application, citing a change in policy that excluded children born after their parents' applications were made. Mr. Teoh argued that this policy was inconsistent with Australia's obligations under the Convention on the Rights of the Child.
53. The High Court held that the Minister was required to consider Australia's obligations under the Convention, even though it had not been incorporated into domestic law. The court found that the Convention created a legitimate expectation on the part of Mr. Teoh that the Minister would consider his child's best interests, and that the Minister's failure to do so constituted a breach of natural justice.
54. Based on the Teoh principle, a question arises as to whether the decision makers in amending the Public Health Act, gave genuine consideration to Article 40.
55. As mentioned, it was revealed by the Australian National Audit Office (ANAO) that the State Government did not seek advice on whether charging for mandatory quarantine was consistent with Article 40 of the IHRs²⁷, this alone infers that no consideration let alone genuine consideration was given by the Queensland Government on the issue.
56. Of note, on the 19 April 2021 and in an effort by the WHO to remind signatories like Australia of their legal obligations in ensuring the enforcement of citizen rights conferred by IHRs²⁸, stated that all member states were to:

²⁷ Australian National Audit Office, 'Management of International Travel Restrictions during COVID-19', Performance Audit Report No. 12 2021–22 (Australian Government, 2022) at 2.87 <https://www.anao.gov.au/work/performance-audit/management-international-travel-restrictions-during-covid-19>. [accessed 25 March 2023]

²⁸ World Health Organization, 'Statement on the Seventh Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Coronavirus Disease (COVID-19) Pandemic' (News Release, 19 April 2021) [https://www.who.int/news/item/19-04-2021-statement-on-the-seventh-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-coronavirus-disease-\(covid-19\)-pandemic](https://www.who.int/news/item/19-04-2021-statement-on-the-seventh-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-coronavirus-disease-(covid-19)-pandemic) accessed 26 March 2023.

- a. Reduce the financial burden on international travellers for the measures applied to them for the protection of public health (e.g., testing, isolation/quarantine, and vaccination), in accordance with Article 40 of the IHR.*

57. On the known facts, it appears that the Queensland government failed to consider the statement made by the WHO. On this basis, it is contended that an action to bring about the extinguishment of section 362MC for a failure to consider the treaty should arise.
58. Overall, it is considered that the Queensland Government had no legal power to exact quarantine fees from Australian citizens returning from abroad.

CONTENTION TWO

BREACH OF SECTION 55 OF THE AUSTRALIAN CONSTITUTION

Contention

59. It is contended that the Queensland Government breached section 55 of the Australian Constitution by levying fees for quarantine as a tax within the *Public Health Act*.

Section 55 of the Australian Constitution

60. Section 55 requires that laws imposing taxation shall deal only with the imposition of taxation and any provision therein dealing with any other matter shall be of no effect. It also requires that laws imposing taxation deal with one subject of taxation only.
61. Put simply, if the Australian Parliament passes a law to impose a tax, that law can only deal with the imposition of the tax itself. It cannot include provisions that deal with other matters, such as public health orders or imposing penalties for non-compliance. If such provisions are included in a tax law, they are considered to be of no effect.
62. Section 55 is designed to prevent the government from using its power to impose taxes to achieve other policy objectives that may be unrelated to taxation. By limiting the scope of tax laws to the imposition of taxation only, the Constitution aims to

prevent the Government from using the tax system as a backdoor to circumvent other constitutional provisions or to infringe upon individual rights and freedoms.

63. If it can be determined that the 'fees' levied under section 362MC (1) of Part7AA of the *Public Health Act* are a 'tax' for the purpose of Section 55, then the section will be determined invalid and unenforceable because the *Public Health Act* deals with matters other than the 'imposition of taxation' e.g., Public health risks and orders.

Particulars

64. On 8 March 2021, the *Public Health and Other Legislation (Extension of Expiring Provisions) Amendment Act 2021* extended part 7AA of the *Public Health Act*, which included a new head of power enabling fees to be charged for quarantine, to 30 September 2021 (and which was subsequently extended).
65. Between 28 March 2020 and 16 February 2022, the Queensland Government exacted quarantine fees for from citizens returning from abroad.

Issue

66. The issue to be considered is whether the fees exacted under section 362MC (1) of Part7AA of the *Public Health Act* are to be properly characterised as a law 'imposing taxation' on returning citizens.
67. That being so, section 362MC (1) of Part7AA of the *Public Health Act* will be a law 'imposing taxation' if the fees which it purported to exact from, or with respect to, returning citizens from abroad, for relevant purposes be characterised as a tax²⁹.
68. The only basis upon which it could be suggested that the fees levied under 362MC (1) for the purpose of quarantine was not a tax, was if it represented a 'fee for services'³⁰.

What is a Tax?

69. In referring to the case of *Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Ltd*³¹, Latham CJ defined the term 'tax' by stating that "a

²⁹ *Air Caledonie International V. The Commonwealth* (1988) 165 CLR 462

³⁰ *Air Caledonie International V. The Commonwealth* (1988) 165 CLR 462

³¹ (1933) AC 168, 175.

tax is a compulsory exaction of money by public authority for the purposes, enforceable by law, and is not for payment of services rendered.”

70. In the case of *Matthews v Chicory Marketing Board (Vic)*³², Latham CJ adopted the three features (positive attributes) identified by the Privy Council to characterise a ‘tax’ which were:

- a. The exaction was compulsory
- b. The exaction was for public purposes and
- c. The exaction was enforceable by law.

71. This definition should be caveated and is considered not exhaustive to the underlying principle described per Latham CJ in that “there is no reason in principle why the compulsory exaction of money under a statutory power could not be properly seen as taxation.”³³

72. Furthermore, section 53 of the Constitution states that a proposed law shall not be taken to ‘impose taxation’ if it constitutes a ‘fee for service’ (negative attribute); i.e., A ‘Fee for services’ may not be considered a tax, even if it is compulsory.³⁴

73. The exaction of money will amount to a tax, if the three positive attributes and negative attribute have been sufficed.³⁵ It was determined in *Matthews v Chicory Marketing Board (Vic)*³⁶ and expanded by *Air Caledonie*, that there are several elements, needed to establish that an exaction is a ‘fee for service’:

- a. There is a specific identifiable service
- b. A fee is paid for the service
- c. There is a discernible relationship with the value of what is acquired by the recipient and
- d. The service is rendered to, or at the request of, the person required to make the payment.

³² (1938) 60 CLR 263, 276.

³³ *Air Caledonie International V. The Commonwealth* (1988) 165 CLR 462

³⁴ *Matthews v Chicory Marketing Board (vic)* (1938) 60 CLR 263.

³⁵ *Ibid*

³⁶ (1938) 60 CLR 263.

Were Hotel Quarantine Fees Compulsory?

74. The Hotel Quarantine fees authorised under section 362MC of the Public Health Act, and prescribed within section 61A of the *Public Health Regulation 2018*, were made compulsory upon the CHO public health direction requiring anyone arriving in Queensland from overseas to quarantine (e.g., Quarantine for International Arrivals Direction (No. 9), which was made on 6 May 2021).

75. Furthermore, Section 362MCD (1) of Part7AA of the Public Health Act states:

- a. *A person required to quarantine is liable to pay the fees prescribed by regulation for the person's quarantine.*

76. It can therefore be concluded that hotel quarantine fees were compulsory for persons required to quarantine.

Were Hotel Quarantine Fees For Public Purposes?

77. Pursuant to the *Public Health Regulation (No.2) 2021*³⁷, the purpose of charging a quarantine fee was to offset the cost to government for the running of quarantine. Specifically, the fees were raised by Government to achieve the objectives of the *Public Health Act* for example:

- a. Preventing, controlling and reducing risks to public health; and
- b. Responding to public health emergencies.

78. The government acknowledged³⁸ that the fees exacted from returning citizens would not recover the entire costs of hotel quarantine, as the cost of security overlay for hotels, health support services, transport and logistics was not included in the calculation of the fee.

79. In Australia, the fact that a levy is directed to be paid into the Consolidated Revenue Fund is generally regarded as a conclusive indication that the levy exacted is for public purposes. The Queensland Government received extensive funding from the Consolidated Revenue Fund for the purposes of establishing and running

³⁷ Queensland Government, 'Public Health and Other Legislation (Extension of Expiring Provisions) Amendment Act 2021', 23 April 2021, <https://www.legislation.qld.gov.au/view/pdf/published.exp/sl-2021-0082> [accessed 26 March 2023].

³⁸ Ibid

quarantine³⁹. It is reasonable to presume that upon receipt of quarantine fees exacted from citizens, the Department of Health had the capacity to be remit such fees back into consolidated revenue.

80. On the basis that the exacted fees were used to achieve the objectives of the *Public Health Act*, it can be concluded that the fees were intended for and had the capacity to be used 'for public purposes'.

Were Hotel Quarantine Fees Enforceable by Law?

81. Section 362MF (Payment and recovery of fees) of the *Public Health Act* provides that the fees for hotel quarantine are enforceable by law. The section states:

a. A person liable to pay fees under section 362MD must pay the fees, or any part of the fees not waived under section 362ME.

b. An amount not paid by the person under subsection (1) may be recovered from the person as a debt due to the State.

82. Debts due to the State of Queensland are enforceable under the *State Penalties Enforcement Act 1999 (Qld) (SPE Act)*. Under this legislation, if a person fails to pay the hotel quarantine fee, the State Debt Recovery Office may take enforcement action to recover the debt. This can include taking legal action, issuing a warrant for arrest, or garnishing wages or bank accounts.

83. It can therefore be concluded that hotel quarantine fees were and remain enforceable by law.

Positive Attributes Concluded

84. Overall, the fees exacted from citizens under section 362MC of the *Public Health Act* possessed all three positive attributes because the fees were a compulsory levy by a public authority, imposed for public purposes and enforceable by law. On this basis, it can be concluded that the exaction can be characterised as a 'tax' (subject to any other statutory impositions e.g., fee for service, privilege, penalty).

³⁹ Australian Government, Department of the Treasury, 'National Health Reform Agreement - Schedule A COVID-19 Response Vaccine Amendment', April 2021, https://federalfinancialrelations.gov.au/sites/federalfinancialrelations.gov.au/files/2021-04/covid-19_response_vaccine_amendment_schedule.pdf [accessed 23 March 2023]

Was Hotel Quarantine Fees a 'Fee for Service'?

85. As previously mentioned, section 53 of the Constitution states that a proposed law shall not be taken to 'impose taxation' if it constitutes a 'fee for service' (negative attribute). Therefore, if it can be determined that quarantine fees are considered as a 'fee for service' then it cannot be considered a tax.

86. As determined in *Matthews v Chicory Marketing Board (Vic)*⁴⁰ and expanded in *Air Caledonie*, the following elements are needed to establish that an exaction is a 'fee for service':

- a. There is a specific identifiable service
- b. A fee is paid for the service
- c. There is a discernible relationship with the value of what is acquired by the recipient and
- d. The service is rendered to, or at the request of, the person required to make the payment.

There was no specific identifiable service.

87. The issue to be considered is whether 'quarantine' can be considered a 'service'; the Macquarie Dictionary defines the term 'quarantine' as:

- a. *'a strict isolation designed to prevent the spread of disease'*.⁴¹

88. In conjunction, section 362MB of the *Public Health Act* defined the 'Meaning of quarantine' as:

- a. *'A person is required to **quarantine** if – the person is required, under public health direction or a direction given under section 362H(1)(a) to stay at or in a stated place'*.⁴²

89. The Macquarie Dictionary defines the term 'service' as:

⁴⁰ (1938) 60 CLR 263.

⁴¹ Macquarie Dictionary Online, 'Macquarie Dictionary', n.d., <https://www.macquariedictionary.com.au/> [accessed 18 March 2023].

⁴² Queensland Government. (2005). Public Health Act 2005.

- a. 'an act of helpful activity';⁴³ whereby 'helpful' is defined as 'giving or affording help'.⁴⁴

90. To satisfy this element of the test, it must therefore be demonstrated that quarantine being the 'service' constituted an act of helpful activity.

91. In analysing whether quarantine could be considered a service, particularly in the context of a citizen returning to Australia from abroad, it is crucial to look at the surrounding circumstances of such a situation. The presumption is that an Australian citizen returning home from abroad is doing so for purposes other than participating in quarantine. Quarantine by its nature would generally be considered by a citizen in these circumstances as an unavoidable imposition necessary to endure in order to enter Australia for a particular purpose.

92. Upon arrival, the citizen is directed and compelled to enter an environment of social isolation with movement severely restricted for a period of fourteen days. It is well documented, even by the Qld Government, that enduring such an environment for this period is not conducive to good physiological and psychological outcomes.⁴⁵ It has also been well acknowledged by Government that "*Fourteen days in hotel quarantine system can be a difficult and taxing experience.*"⁴⁶ Based on the nature of quarantine alone, it is difficult to accept that the nature of quarantine could be characterised by the citizen as an act of helpful activity.

93. Furthermore, it is considered that the involuntary unavoidable imposition of quarantine on a returning citizen could never be considered as an 'act of helpful activity' because in such circumstances there is no giving or affording of help. On this basis, quarantine cannot be characterised as a 'service' provided to the person quarantined.

⁴³ Macquarie Dictionary Online, 'Macquarie Dictionary', n.d., <https://www.macquariedictionary.com.au/> [accessed 18 March 2023].

⁴⁴ Macquarie Dictionary Online, 'Macquarie Dictionary', n.d., <https://www.macquariedictionary.com.au/> [accessed 18 March 2023].

⁴⁵ Queensland Government, 'Avoiding Social isolation', n.d., <https://www.qld.gov.au/community/getting-support-health-social-issue/avoiding-social-isolation> [accessed 26 March 2023].

⁴⁶ Australian Government, Department of Health, 'National Review of Hotel Quarantine', October 2020, <https://www.health.gov.au/sites/default/files/documents/2020/10/national-review-of-hotel-quarantine.pdf> [accessed 25 March 2023].

A Contrary Argument

94. A contrary argument could arise in that quarantine could be contended as a service because it was a 'helpful activity' to the public in preventing the spread of disease in the community. It could also be inferred the benefit obtained by a citizen in quarantine would be obtained by subsequently entering an environment free from COVID-19 upon clearance. This unfortunately was never the reality as the Government's data revealed that upon the commencement of quarantine on the 28 March 2020, the Australian Government had recorded 3,588 COVID-19 cases within the community; on the 16 February 2022, the day that mandatory quarantine ended in Queensland, there had been over three million cases of COVID-19 in Australia equating to 12% of the population⁴⁷. It is undeniable that the causation of such prevalence within the community was attributable to the failings in Australia's quarantine system. This is supported by the several studies which identified 'systemic issues with infection control in hotel quarantine'.⁴⁸ In the alternative, if quarantine was characterised as a service, the question becomes whether this service was fit for purpose to achieve the policy objectives – based on the evidence this would be difficult to contend.
95. It is contended that pursuant to the judgement in the case of *Northern Suburbs General Cemetery Reserve Trust v Commonwealth of Australia*,⁴⁹ if a particular citizen who paid quarantine fees derived no more benefit than the community who didn't incur such an impost, it cannot be said to be a fee for service in any sense and therefore the fees would not be prevented from being characterised as a tax.
96. Furthermore, per the case of *Air Caledonie International v The Commonwealth*⁵⁰ it was held that "a requirement that a returning citizen submit, in the public interest, to

⁴⁷ Australian Government, Department of Health, 'Coronavirus (COVID-19) case numbers and statistics', n.d., <https://www.health.gov.au/health-alerts/covid-19/case-numbers-and-statistics> [accessed 25 March 2023].

⁴⁸ Lopez-Ortega, Mariana, Nicole Bates, and Michelle Redman-MacLaren, 'Social media as a tool for knowledge exchange on COVID-19 in the Pacific: case study of the Pacific Community', BMC Public Health, vol. 22, no. 1, 2022, article no. 410, <https://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-022-13339-x> [accessed 30 March 2023].

⁴⁹ *Northern Suburbs General Cemetery Reserve Trust V Commonwealth of Australia* (1993) 112 ALR 87

⁵⁰ (1988) 165 CLR 462

the inconvenience of such administrative procedures at the end of a journey cannot, however, properly be seen as the provision or rendering of 'services' to, or at the request or direction of, the citizen concerned." On the basis that returning citizens involuntarily submitted to an administrative procedure i.e., compliance with the directions issued by the CHO, it is difficult to conclude that quarantine constituted a specific identifiable service.

In the alternative, there was no fee paid for the service.

97. On the basis that quarantine could not be characterised as an identifiable service, any fee for such would automatically be precluded from eventuating.
98. A contrary position could consider that the *Public Health Regulation* prescribes specific fees amounting to \$3,220 for a mandatory 14-day quarantine period under section 61A being:
- a. \$165 per day for accommodation and
 - b. \$65 per day for meals.
99. The regulation attempts to tie the prescribed fees directly to the cost of accommodation and meals; however, it is contended that this is not necessarily accurate and perhaps more so a convenient mechanism by the Government to mount a defence that the fees are charges for services. This contention is on the basis that section 61A(1) states that the fees are "*fees for a person's quarantine,*" whereby it should be considered that the wider object of the legislation is to exact fees to defray the *total* costs of quarantine.
100. In analysing the legislation, there is nothing preventing the Government from using the funds raised for purposes other than accommodation or meals. This view is supported within the Public Health Amendment Regulation (No.2) explanatory notes⁵¹ which state that the purpose of the fees is "*To support costs for hotel quarantine continuing to be sustainably managed*". This statement implies that the purpose of the costs exacted are to partially offset public funds expended on quarantine; therefore, it would be reasonable to conclude that the purpose of the regulation is to appropriate revenue for such purpose.

⁵¹ *Public Health Amendment Regulation* (No. 2) 2021, Explanatory notes for SL 2021 No. 82

101. This issue also gives rise to the question as to whether the Government can cherry-pick specific activities of quarantine and classify them as services. For example, the *Public Health Amendment Regulation* (No. 2) 2021, explanatory notes,⁵² states that fees were calculated without regard for the following costs:

- a. security overlay for hotels,
- b. health support services,
- c. transport and logistics.

However, there was nothing preventing the Government from using the fees raised to pay for such costs; or any other liabilities incurred by the Department of Health.

102. The *Public Health Act* and *Public Health Regulation*, imposes no requirement that the Queensland Government agree to expend the money exacted from citizens on accommodation and meals. On this basis, there is no statutory warrant for concluding that such a charge could amount to a fee for service.⁵³ Therefore, by extension no fee could have been paid for the service.

Rule in Air Caledonie

103. Per *Air Caledonie International V. The Commonwealth*⁵⁴, if the moneys raised by legislation, when paid, were used for the general off-setting of the administrative costs of certain areas of the relevant Department (e.g., Department of Health), then the fee at least in so far as it related to citizens would be considered a tax and the provisions of the law would be a law 'imposing taxation'.

104. In analysing section 362MC (Fees Payable) of the *Public Health Act*, the Act authorises the exaction of fees by the Department of Health without limitation to persons who are required to quarantine at a place other than that person's home. There is no limitation as to how the Department of Health uses the exacted fees, and

⁵² *Public Health Amendment Regulation* (No. 2) 2021, Explanatory notes for SL 2021 No. 82

⁵³ *Northern Suburbs General Cemetery Reserve Trust V Commonwealth of Australia* (1993) 112 ALR 87 at 93

⁵⁴ (1988) 165 CLR 462

therefore without limitation, the fees may be used for the general off-setting of the administrative costs of certain areas. This alone, may be considered sufficient to determine that section 362MC imposed taxation.

105. It can be considered that in any event, the quarantine fees amounted to a mandatory charge imposed upon citizens for the privilege of entering Australia. Per the rule in *Air Caledonie International V. The Commonwealth*⁵⁵, “The right of the Australian citizen to enter the country is not qualified by any law imposing a need to obtain a license or ‘clearance’ from the Executive”.

Conclusion

106. Overall, the *Public Health Act* and *Public Health Regulation* do not by their terms establish any sufficient relationship between the liability to pay the charge and the provision of accommodation and meals with the ultimate expenditure of the money collected to regard the liability to pay the charge as a fee for services. This position was held in *Northern Suburbs General Cemetery Reserve Trust V Commonwealth of Australia*.⁵⁶

In the alternative there was no discernible relationship with the value acquired.

107. In *Air Caledonie*, Latham CJ stated “if the person required to pay the exaction is given no choice about whether or not he acquires the services and the amount of exaction had no discernible relationship with the value of what is acquired, the circumstances may be such that the exaction is, at least to the extent that it exceeds that value, properly to be seen as a tax.” On the basis that quarantine fees amounted to a compulsory exaction, two questions arise being:

- a. Is there a ‘discernible relationship’? and
- b. What value is acquired by a citizen through quarantine?

Discernible Relationship

108. In the case of *Australian Capital Territory v Queanbeyan City Council*, Stone J held that the calculation of the fees is negligible in determining whether a discernible

⁵⁵ (1988) 165 CLR 462

⁵⁶ *Northern Suburbs General Cemetery Reserve Trust V Commonwealth of Australia* (1993) 112 ALR 87 at 93

relationship exists and that there must be a relationship between the charge and the value of the commodity or service in question.⁵⁷ On the basis, it could be inferred that the fees exacted for accommodation and meals by the Government bear no relationship to whether a discernible relationship exists.

109. It should also be considered that the quarantine program exhibited monopoly characteristics because the Government had complete control over its implementation and the legislation did not seek to place any limitation on the amounts it could charge. The approach of Gummow J in *Airservices*⁵⁸ was that the provision of goods and services under monopoly conditions mean that there is no market by reference to which a value can be discerned and therefore some other measure of value is to be used. This means that to assess the value acquired by the citizen, analysis of the environment and surrounding circumstances could be used as an alternate measure of value.

110. In the case of *Australian Capital Territory v Queanbeyan City Council*, a “discernible relationship” was described as a very low threshold in which It does not posit that a fee should represent good value.⁵⁹ In the context of mandatory quarantine, the question then becomes one of how “discernible relationship” with “value” is to be determined in such circumstances?

Air Caledonie Test

111. The test promulgated in *Air Caledonie*, states that there must be a *discernible relationship* with the *value acquired*.

112. The Macquarie dictionary defines the term ‘value’ as:

- a. (noun) “equivalent worth or equivalent return: *for value received*.”
- b. (verb) “to consider with respect to worth, excellence, usefulness, or importance.”

⁵⁷ *Australian Capital Territory v Queanbeyan City Council* (2010) 273 ALR 553

⁵⁸ 202 CLR at 282–284 [444]–[45]

⁵⁹ *Australian Capital Territory v Queanbeyan City Council* (2010) 273 ALR 553

Furthermore, it is suitable that the natural meaning of “value” is “net value” and that a calculative approach which accounts for any detriment, damage or loss should be applied.

113. The Macquarie dictionary defines the term ‘acquired’ as:

- a. “to come into possession of; obtain.”

Value Acquired

114. On the basis that citizens returning to Australia from abroad were given no choice about whether they underwent quarantine, the phraseology of the second half of the test is crucial. The word ‘value’ and the reference to ‘*what is acquired*’ imply that the Court will look at the value of the service as perceived by the recipient, rather than looking at the cost to the Government of providing the service.⁶⁰ The proposition that a fee may bear some relation to the cost of the service has been established⁶¹; however, *Air Caledonie* modifies and expands the definition of ‘fee for service’ in that the service must be ‘of value’ to the recipient rather than a reflection of the cost to the Government in providing the service.

115. Government bodies are accustomed to testing the legality of a ‘fee for service’ by reference to the cost of supporting the service, under the *Air Caledonie* rule, governments can no longer rely on this but rather must determine the actual value of the service to the recipient. The *Public Health Regulation* references the calculation of the fees to the cost of the supporting service without any consideration of the value acquired by the citizen – it is contended that this is a major flaw in the *Regulation* and one which will be difficult for the Government to overcome.

Facts

116. The fees exacted for a single adult in undergoing fourteen (14) days of mandatory quarantine under the direction of the CHO was \$3,220 and which was pursuant to the *Public Health Amendment Regulation (No. 2) 2021* enforced from 1 July 2021.

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⁶¹ *Harper v. Vic. (1966)* 114 C.L.R. 361, 378

117. The fees were levied by the Government to “*support the costs for hotel quarantine continuing to be sustainably managed*”,⁶² this statement alone infers that the calculation is referenced to the cost of providing the service without considering the actual value of the service acquired by the recipient.

118. Prima facie, it would be simple to conclude that the purported value transferred from the Government and acquired by the recipient was the provision of accommodation and food for a fee of \$165 and \$65 per day respectively, and that these fees were proportionate to the actual costs in providing such services. As mentioned, this interpretation would likely to be considered erroneous as it does not consider the “*value as perceived by the recipient*” and which is required and implied by the second half of the test formulated by Latham CJ.

119. It is reasonable to contend that the perceived acquisition of “Value” is inextricably linked and/or akin to acquiring some type of benefit and which is measured in the context of worth, excellence, usefulness, or importance. On this basis, to satisfy the test, it should be demonstrated that the ‘value acquired’ by the citizen is somewhat analogous to the perceived benefit acquired.

Value acquired - worth, excellence, usefulness, or importance

120. The presumption is that in consideration for payment of \$3,220, some form of benefit is acquired by the citizen undergoing quarantine; therefore, it is important to analyse available data which documents the specific outcomes of citizens in such circumstances to determine whether those outcomes could be characterised as a benefit and by extension be characterised as valuable.

121. Prima facie, it could be considered that payment of a fee to enter mandatory quarantine is connected with little if any perceived value and/or benefit by the recipient. This is because in ordinary circumstances, it would be extremely rare that a reasonable person would voluntarily exchange \$3,220 to confine themselves to solitary isolation within a small hotel room and without access to basic amenity such as fresh air for 14 consecutive days.

⁶² Public Health Amendment Regulation (No. 2) 2021

122. It is well acknowledged within Government that “*Hotel quarantine is difficult to endure, particularly for vulnerable people.*”⁶³ This statement made by the Government implies an admission that negligible value is acquired by a person required to undergo quarantine, particularly if it was not done so voluntarily.

123. The adverse effects of quarantine for persons required to undergo 14-days of solitary isolation has been well documented by the Queensland Government. For example, numerous cases in Australia have cited extensive evidence of the harmful effects of social isolation on persons, particularly those who are exposed to prolonged periods of segregation. In the Supreme Court of Queensland case of *Callanan v Attendee X*⁶⁴, Applegarth J referred to the research of Sharon Shalev, who found that all studies of persons held in social isolation for more than 10-days demonstrated negative health effects. Applegarth J also noted Shalev’s finding that social isolation increased a person’s risk of being admitted to hospital for psychiatric reasons by 20 times⁶⁵.

124. The Queensland Government itself has documented⁶⁶ the adverse health impacts of social isolation inherent of a quarantine environment which include:

- a. insomnia and tiredness
- b. increased chance of developing anxiety, depression and other mental illnesses
- c. elevated blood pressure
- d. increased chance of developing dementia
- e. negative feelings, including self-denial, guilt and self-loathing
- f. self-harm

⁶³ Australian Government, Department of Health, 'National Review of Hotel Quarantine', October 2020, <https://www.health.gov.au/sites/default/files/documents/2020/10/national-review-of-hotel-quarantine.pdf> [accessed 25 March 2023].

⁶⁴ [2013] QSC 340.

⁶⁵ McDermott, R, The University of Queensland TC Beirne School of Law, 'Solitary confinement in Queensland prisons: An analysis of law, policy and practice', December 2019, <https://law.uq.edu.au/files/55114/Solitary-Confinement-Report.pdf> [accessed 24 March 2023].

⁶⁶ Queensland Government, 'Avoiding social isolation', Queensland Government, <https://www.qld.gov.au/community/getting-support-health-social-issue/avoiding-social-isolation> [accessed 24 March 2023].

- g. thoughts about suicide
- h. increased risk of substance misuse
- i. physical health implications, including worsening illness, weight loss or gain.

Specific Implications

125. It is well documented that the hotels employed for the purposes of delivering quarantine were largely established without due consideration for compatibility with existing statutes and fundamental human rights. The basic facts are that in many circumstances, the hotels used, lacked the mandatory requirements prescribed under statute and international law for persons in social isolation and were not-fit-for-purpose⁶⁷.

126. It could be concluded that where quarantine environments failed to fulfill the policy objectives, failed to afford basic amenity and deprived persons of their liberty, it would be impossible to conceive that any value was being acquired by the recipient.

127. Examples of where quarantine infringed human rights can be demonstrated by analysing the following law:

- a. *Corrective Services Regulation 2017 (Qld)*
- b. *Queensland Human Rights Act* (Section 30 humane treatment when deprived of liberty)
- c. *United Nations Standard Minimum Rules for the Treatment of Detainees, Rule 45*
- d. *ICESCR Article 12.*

Corrective Services Regulation 2017 (Qld)

128. The minimum requirements for persons subjected to social isolation is governed by the *Corrective Services Regulation 2017 (Qld)*. If it was considered that quarantine should afford citizens with equivalent rights to prisoners then there was an obligation to ensure persons undergoing quarantine were given the opportunity to exercise, in

⁶⁷ Baker, M.G., Wilson, N., Kvalsvig, A., & Telfar Barnard, L. 'Hotel quarantine causes 1 outbreak for every 204 infected travellers. It's far from fit for purpose', *The Conversation*, 1 April 2021, <https://theconversation.com/hotel-quarantine-causes-1-outbreak-for-every-204-infected-travellers-its-far-from-fit-for-purpose-161815> [accessed 26 March 2023].

the fresh air, for at least 2 daylight hours a day which is set out in the Part 2, Division 1 Section 4 (d) of the *Regulation* as follows:

- a. The chief executive must ensure a person undergoing separate confinement is given the opportunity to exercise, in the fresh air, for at least 2 daylight hours a day, unless a doctor or nurse advises that it would not be in the interests of the persons health to exercise for a stated period or indefinitely.*

129. It is fact that persons who underwent hotel quarantine were not given the opportunity to exercise, in the fresh air, for at least two daylight hours a day (and in many instances at all). In such circumstances where a citizen in quarantine was afforded less rights than a citizen in prison then it could not reasonably be perceived that the citizen acquired value.

Human Rights Act 2019 (Act)

130. The passing of the *Human Rights Act 2019 (Qld)*, as well as Australia's ratification of the *Optional Protocol to the Convention Against Torture (OPCAT)*, requires the Qld Government to comply with the *United Nations Standard Minimum Rules for the Treatment of Detainees* (the Nelson Mandela Rules), specifically:

- a. Rule 14 – In all places where the person is required to live or work: The windows shall be large enough to enable the person to read or work by natural light and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation;*
- b. Rule 45 - Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority.*

131. It is fact that the Government's quarantine infrastructure, systems and processes failed to afford citizens these minimum legal requirements or to properly assess that directing a citizen into solitary confinement was 'a last resort'. Again, In such circumstances where a citizen in quarantine was afforded less rights than conferred under the *Human Rights Act 2019 (Qld)*, then it could not reasonably be perceived that the citizen acquired value.

Complaints to the Ombudsman and Human Rights Commission

132. The adverse effects of quarantine have been well documented and reported by persons placed into such with hundreds of complaints issued to government ministers, State Ombudsman's, police departments and other local government authorities. For example, the Queensland Ombudsman's 2020-2021 annual report⁶⁸, noted receiving several '*complaints about the conditions of hotel quarantine, such as access to fresh air and food quality, as well as the cost of hotel quarantine and refusal of applications for waiver of costs.*'

133. The National Review of Hotel Quarantine reported that 'In the period up to 28 August 2020, in the order of 90 complaints were made to the Human Rights Commission about the requirement to quarantine and/or conditions of quarantine including: lack of access to fresh air, food, quality of the accommodation, and size (especially for people with psycho- social disabilities).'⁶⁹

134. It could be concluded these represent instances of where the citizen perceived no acquisition of value.

Lack of Government Evidence

135. The Government has never evidenced the actual conferred or perceived value by the recipient in exacting fees for quarantine. On that basis, it is impossible to conclude that the amount of the exaction has a discernible relationship with the value which was acquired by the recipient.

136. This notion, disposes the idea that the fees exacted for quarantine, can amount to a transfer of value because any claim of such is fundamentally flawed on the basis that there is no discernible relationship with the value acquired by the recipient.

In the alternative, the service was not rendered to, or at the request of, the person required to make the payment.

137. To satisfy the fourth element of the test in *Air Caledonie*, the service must have been rendered to, or at the request of, the person required to make the payment.

⁶⁸ Queensland Ombudsman 2020-21, Report on COVID-19 Complaints, viewed 27 March 2023, <https://www.ombudsman.qld.gov.au/ArticleDocuments/262/QO%20Annual%20Report%202020-21%20-%20PUBLIC%20-%2004%20Report%20on%20COVID-19%20complaints.PDF.aspx>.

⁶⁹ Department of the Prime Minister and Cabinet, National Review of Hotel Quarantine, 2020. <https://www.pmc.gov.au/sites/default/files/resource/download/national-review-of-quarantine.pdf>": Viewed 26 March 2023.

138. The stated objective of quarantine by the Queensland Government was to *“reduce the risk of COVID-19 transmission within the community and protect the health and safety of Australians.”* It would be reasonable to presume that the persons who received the benefits (if any) of quarantine were the Australian public who resided outside of the quarantine system.

139. A perceived benefit to the Australian public could be conferred because the implementation of a quarantine system minimised the risk of exposure to potentially infectious citizens returning from abroad thus minimising their risk of infection.

140. It is simple to reason, that the public would benefit from a community free from Covid in a similar way that a pig farmer benefits from a farm free from African swine fever, due in part, to an effective quarantine system. By analogy, if a farmer wanted to keep his farm disease free, he could establish a quarantine system which would require all new pigs entering his property to spend a suitable amount of time isolated in a pen separated from the rest of the herd. During this time the farmer would ensure his pigs were fed and sheltered so that they didn't die knowing that he would ultimately benefit from doing so. In this instance, the services are rendered to and for the benefit of the farmer and not the pigs in the pen. Similarly, this analogy applies to quarantine in that the public ultimately derive any benefits of quarantine and thus the services are being provide to them.

141. Another key aspect of this contention is that the benefit can only be derived if the quarantine system is effective. As mentioned, over three million COVID-19 cases were recorded in the community during the mandatory quarantine period which indicates that the Covid quarantine system was in fact ineffective.

142. Overall, it can therefore be concluded that quarantine services were rendered to, or at the request of, the Australian public (including the Executive) and not the citizen in quarantine.

Conclusion

143. The issue to be considered is whether the fees exacted under section 362MC (1) of Part7AA of the Public Health Act are to be properly characterised as a law ‘imposing taxation’ on returning citizens.

144. It is evident that quarantine fees satisfied the three positive attributes of a tax being that they were compulsory, were for public purposes and were enforceable by law. It is also evident that the fees exacted failed to satisfy the required negative attribute because there was:

- a. No specific identifiable service
- b. No fee paid for the service
- c. No discernible relationship with the value of what is acquired by the recipient and
- d. The service was not rendered to or at the request of, the person required to make the payment.

As such it is difficult to contend that the fees could be characterised anything other than a 'tax'.

145. On the basis that 'fees' levied can be characterised as a 'tax', pursuant to Section 55 of the Constitution, section 362MC (1) of Part7AA of the *Public Health Act* should be determined invalid and unenforceable because the *Public Health Act* deals with matters other than the 'imposition of taxation.'