



PRIME MINISTER

1 August 2020

The Hon Mark McGowan MLA  
Premier of Western Australia  
1 Parliament Place  
WEST PERTH WA 6005

Dear Premier

In my earlier letter regarding the current High Court proceedings I indicated that the Commonwealth was acting consistent with the convention and our responsibility in relation to constitutional matters of this nature. Namely, that there is a standing expectation of the High Court for the Commonwealth to assist the Court where the constitutional validity of measures taken by a jurisdiction is brought before the Court. This position is confirmed by the advice we have received.

I appreciate that constitutional issues may not be top of mind as we address this pandemic. In the circumstances we currently face this is understandable. That said, while acting to protect the health and safety of all Australians, the Commonwealth also has a special responsibility to seek to uphold and maintain our federation and the integrity of our Constitution in all seasons.

Under section 92 of our Commonwealth Constitution, it is required that movement be 'absolutely free' among the states—including travel across state borders. It is a provision that at its heart has a federating purpose and is one of the central constitutional provisions that establishes Australia as a single indissoluble and federal nation.

Where a State unilaterally places restrictions on interstate travel which are found by the High Court to be disproportionate, this is contrary to the fundamental constitutional guarantee that residents of one State can move to another State. Whether this has occurred will be a matter for the Court.

A further concern is that now this issue has arisen it may also have exposed every State and the Commonwealth to a High Court decision with potentially far-reaching implications for a range of executive government decisions. This includes those relating to interstate border movements, made in a cooperative way under the *Biosecurity Act 2015* (Cth) to protect cross-border indigenous communities.

Decisions taken early in the outbreak of the pandemic were made with the best of intentions and in necessary haste. At the time, when several states, including Western Australia,

Tasmania and South Australia, made these decisions the constitutionality of how these decisions were being taken was not the priority consideration.

Decisions were all made in good faith and on the basis of what was considered at a time of great uncertainty to be in the best health interests of Australians, including those living in Western Australia.

I stress that the Commonwealth raised no objections to these actions, however, did note the risk that constitutional issues could arise at a later time.

We must now deal with the situation as it is.

As you know, the Commonwealth did not bring these proceedings. It is the Commonwealth's preference that this case had never been brought forward. Likewise our actions have not been to support any private interest of the plaintiffs. To suggest such an association would be false. While taking our constitutional responsibilities seriously in seeking to respect established conventions, I also accept that recent events in the eastern states, especially Victoria, are creating real concerns to residents in other states less impacted. I do not wish to see these concerns further exacerbated in Western Australia.

Having taken into account the changed state of the pandemic that has worsened since these matters were first brought to the High Court, the high level of concern regarding public health in the Western Australian community, and our desire to work with you cooperatively on a constitutionally sustainable way forward, I consider, on balance, that we must set aside the normal convention in these circumstances and not continue the Commonwealth's participation in this case.

Having made that decision, I urge you to work with us to minimise constitutional risk so as to ensure that the necessary health protections in place can remain in place for as long as required.

That is why I wish to now propose the following way forward which would mitigate the Commonwealth's concerns with how border issues within our Federation are managed and seek your cooperation.

Firstly, let me be clear, the Commonwealth is not requesting the Western Australian Government to change its current border settings.

While the administration of border arrangements can always be improved to avoid unintended consequences, making any substantive changes to these arrangements, especially now following the outbreak in Victoria, would give rise to significant and unnecessary public concern.

Rather, I propose the following principles to guide our future action:

1. Within our Federation it is important for States not to act arbitrarily or indiscriminately in relation to the restriction of movement of Australian residents between state borders.
2. Where it is considered necessary to restrict such movement it should preferably be done in consultation with the Commonwealth on the basis of clear and transparent

advice addressing the cause and necessity of any proposed restriction, in this case protecting public health and safety.

3. Where any such restriction is to be imposed, the initiating State should also seek to consult with other affected States, especially in relation to land borders that are shared with any such State.

4. Where any restrictions are put in place, administrative arrangements should also be put in place that are preferably nationally consistent, properly resourced, seek to minimise disruption and set out clear criteria and processes for regular assessment to determine when such restrictions can be lifted to provide greater certainty to residents impacted.

This is broadly consistent with what was agreed between NSW, Victoria and the Commonwealth when the decision was recently taken to close the NSW/Victorian border. There has been an ongoing process between these jurisdictions to resolve any unforeseen issues that arise from the closing, and significant Commonwealth resources have been applied through the ADF to support the implementation of this decision.

By working together and proceeding on this basis we would strengthen the constitutional sustainability of any position determined by the Western Australian Government and set a positive precedent for managing these issues more broadly within the Federation. Such an approach could also be adopted through our National Cabinet processes, involving the AHPPC as necessary.

In addition, such a framework would enable a quick solution to be put in place in response to any decision of the High Court.

I also want to stress the advice I receive from the Chief Medical Officer, that has also been regularly conveyed to National Cabinet, that border arrangements are no substitute for a strong public health response capability and maintenance of social distancing principles. The Commonwealth has also been pleased to respond to your request for assistance to bolster Western Australia's quarantine arrangements with ADF resources and to reduce the number of incoming passengers to further reduce your quarantine risk.

If an outbreak were to occur in Western Australia, as has occurred in other states, it will be strength of your State's testing, tracing and outbreak containment capabilities that will determine your success or otherwise. There have been mixed outcomes in other states where this has occurred. It will also be determined by whether social distancing practices are maintained within the community to avoid rapid spread.

We must be careful to protect against any complacency regarding social distancing and maintaining a strong public health response capability. In the event of an outbreak in Western Australia, border controls will provide no protection.

I am sure you would agree that the Commonwealth has acted decisively and provided considerable support to Western Australia throughout the pandemic crisis. We have consistently responded positively to your requests for assistance and cooperation. In turn, I regularly acknowledge the positive and constructive role you have played on Western Australia's behalf both through the National Cabinet and our bilateral arrangements. In good faith, we should now continue with this cooperative approach in the interests of all Western Australians and our federation.

I look forward to your response.

Kind regards

A handwritten signature in blue ink, appearing to read 'Scott Morrison', with a stylized, cursive script.

SCOTT MORRISON