

STATES' POWERS

CREATING COVID-19

CONFUSION

Confused by the different state and federal laws governing Australia's response to the COVID-19 pandemic? JAMES WATT from RMB Lawyers explains that it comes down to the Constitution:

On 25 January 2020 the Federal Government confirmed Australia's first case of novel coronavirus (COVID-19). Since then, governments have escalated their responses to control the spread of the virus.

In order to manage the specific threats and challenges facing their communities, each State and Territory has implemented unique laws, regulations and rules to influence and restrict certain behaviours.

Between the Federal Government announcements and those made by State Premiers, you would be forgiven for being confused about the restrictions that applied to you.

At one point, for example, NSW Authorities had expressed that learner drivers conducting lessons constituted a reasonable excuse to travel, whereas in Victoria police have issued a learner driver with an infringement notice (and large fine).

But what is the reason for the confusion and lack of uniformity?

On 1 January 1901 Australia's States federated under a new Constitution which created Australia as we know it today.

In order to manage the practicalities of such a union, however, the Constitution was required to divide the powers which would be the responsibility of the Federal and State Governments - commonly referred to as the division of powers.

The powers listed in Section 51 of the Constitution are "exclusive powers" which can be exercised only by the Federal Government, whereas the powers omitted (or left out) are predominantly the responsibility of the individual States (called "residual powers").

Examples of the exclusive powers which only the Federal Government can exercise are taxation, marriage, social security and defence.

Examples of the residual powers of the State Governments are criminal law, property law, transport, schools and health/hospitals.

Applying those principles to the current circumstances, the regulation of health and also criminal law rests predominantly with the States, and therefore they are primarily responsible for implementing laws in response to COVID-19. For example, the States have individually decided whether schools will stay open, implemented rules in relation to tenancies (property law) and implemented offences in relation to social distancing and prohibition of certain activities (criminal law).

Certain steps have also been taken by the Federal Government, including in relation to social security payments and also taxation; both of which are the exercise of exclusive powers.

So it is the differences between States that is creating the confusion.