

and courts may exercise discretion when presented with an unlisted reason. First, the ordinary construction of the word “includes” or “including” is as a term of enlargement.³⁶ There must be something specific in the language of the provision which indicates an intention to confine, or in the objects of the Act which justifies an exhaustive meaning.

Second, to consider the list as exhaustive could lead to unreasonable results. “Reasonable excuse” is a phrase of such broad import that it cannot be said that all the items in Sch 1 exhaust the meaning of the phrase. Were it otherwise, the word “reasonable” would be redundant, with no real work to do. It is easy to think of other examples which might strike the average person as “reasonable”, such as leaving the house to search for the family dog which has escaped under the fence — an activity not expressly captured. That reading also comports with the use of the same phrase in other parts of the PHA where it is undefined and interpretation is left open to the courts, including in s 10 which creates the offence.³⁷ In *Taikato v The Queen*,³⁸ the High Court held that although what constitutes a reasonable excuse depends on the circumstances of the individual case and the purpose of the provision, when legislatures enact defences such as “reasonable excuse” they effectively give, and intend to give, to the courts the power to determine the content of such defences.³⁹

Third, because members of the public ought to be able to read the Order and clearly understand the circumstances in which they can leave their home without risking a substantial fine, it is appropriate to look at extrinsic material for guidance. The Explanatory Note begins “Examples of a reasonable excuse include leaving for reasons involving” and then offers four general categories of reasonable excuse which foreshadow the activities listed in Sch 1. This is language designed to be illustrative rather than limited. The same classes of exception are repeated in a “Note” to the direction to stay at home (cl 5(2)) which does not form part of the provision.⁴⁰ They offer a guide to a person thinking about going out for some reason.

Finally, and perhaps most importantly, the First Order seriously curtailed freedom of movement and interfered with private life for all members of the public. Nothing short of unambiguous language could otherwise limit such freedom to the list of 16 reasonable excuses.⁴¹

Conclusion

Emergency measures are essential to respond to the substantial risks posed by COVID-19. While these measures entail unprecedented and wide-ranging restrictions on civil liberties, the PHOs have been drafted to allow police and courts sufficient discretion to ensure that the rule of law is preserved for as long as the threat persists.

36 In *Victims Compensation Fund v Brown* (2002) 54 NSWLR 668 at 674, Spigelman CJ indicates that the primary meaning of “includes” is expansive, but acknowledges that it can also be exhaustive where the context indicates an intention to confine a general word by providing a limited list of words. See also Basten JA in *Cranbrook School v Woollahra Municipal Council* (2006) 66 NSWLR 379 at [88]: “It is undoubtedly true to say that the term ‘include’ may have different meanings in different contexts. One use of the term is to indicate that which was intended to be covered, by way of illustration. Strictly speaking, such inclusions may be mere surplusage.”

37 See PHA ss 17, 23, and 113.

38 (1996) 186 CLR 454.

39 *ibid* at 464, 466.

40 Clause 3(2) Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020.

41 *Coco v The Queen* (1994) 179 CLR 427 at 436–437; 446–447.



Lawcodes report: new criminal penalties for COVID-19 related offences

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The Lawcodes database provides unique codes, called Law Part Codes, for all NSW offences and Commonwealth offences dealt with in NSW. These law part codes are intended to improve the operation of the criminal justice system in NSW through the exchange, between major criminal justice agencies, of standardised electronic information regarding offences.

The Judicial Commission has been monitoring the large amount of legislation that the Commonwealth and NSW Parliaments have introduced concerning COVID-19 measures. This has necessitated the creation (pre-14/5/2020) of four new

Law Part Codes (LPC) under the *Public Health Act 2010* (NSW) (PHA), providing for the key criminal penalties for COVID-19 related offences in NSW.

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Legislative measures taken in NSW

The “Novel Coronavirus 2019” was added to the schedule of medical conditions (Sch 1) under the PHA on 21 January 2020 and later (20 March 2020) the name was amended to “COVID-19”.¹ As the news of the virus’s lethality grew, the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* was the first NSW emergency measures legislation to be enacted as a response. Commencing on 25 March 2020, a number of Acts were amended to “implement emergency measures as a result of the COVID-19 pandemic”.² One of the amendments to s 118 of the PHA authorises police officers to issue penalty notices under the Act.³

Criminal penalties under the public health legislation

Consequently, the *Public Health Amendment (Penalty Notices) Regulation 2020* was published⁴ which led to the creation of the following LPCs under the PHA for offences occurring between 26 March 2020 and 25 March 2021:

- **LPC 95638** under s 10 of the PHA for contravention of Ministerial directions made by the Minister for Health and Medical Research published in the Government Gazette (including orders concerning the closure of certain premises)⁵
- **LPC 95639** under s 11 of the PHA for contravention of an order concerning the closure of public premises not under Ministerial control made by the Secretary of the Ministry of Health and published in the Gazette
- **LPC 95640** under s 70 of the PHA for failure to comply with a public health order issued by an authorised medical practitioner about individuals who may be a risk to public health.

All three LPCs include the full range of penalties under the three provisions, not just a penalty notice. Under ss 10 and 11 of the PHA, a person who commits an offence is liable to a maximum penalty of imprisonment of 6 months and/or a fine of up to \$11,000. If the offence continues, the person is liable for another \$5,500 each day the offence continues. Corporations are liable to a fine of \$55,000 and then \$27,500 for each day the offence continues. Section 70 of the PHA attracts a maximum penalty of imprisonment of 6 months and/or a fine of up to \$11,000. The penalty notice amount for contraventions of ss 10 and 11 is \$1,000 for individuals and \$5,000 for corporations; for s 70 contraventions, it is \$1,000

for individuals only. Section 118(5) provides that the issue of a penalty notice under s 118 does not limit the operation of any other proceedings that may be taken in respect of the offences.

LPC 95638 and LPC 77224: penalties for contraventions of a Ministerial direction

Of the three LPCs, 95638 carries a heavy load. It provides for penalties, including a penalty notice, for the contravention of a Ministerial direction made under s 7 of the PHA to deal with a public health risk. There have been a number of COVID-19 related Ministerial directions published in the Gazettes on or after 26 March 2020, including the Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020.⁶

However, for offences under orders in operation before 26 March 2020, LPC 77224 can be used. One of the first orders was the Public Health (COVID-19 Public Events) Order 2020, made on 15 March 2020, commenced 16 March 2020⁷ and repealed on 18 March 2020 before 5pm, reflecting the quickening pace of developments concerning the pandemic.⁸ For a full list of s 10 orders, see the JIRS COVID-19 webpage.⁹

LPC 95641: penalties for Ministerial direction against coughing and spitting

Before the Easter long weekend, the *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation 2020* was published, accompanied by a ministerial order in NSWGG No 77 of 9 April 2020. Law Part Code 95641 was specifically created for the new offence under s 10 of the PHA of “intentionally spitting at or coughing on public officials, including health workers, in a way that is reasonably likely to cause fear about the spread of COVID-19”, attracting a \$5,000 penalty for individuals. Although the order was later amended,¹⁰ expanding the definition of other worker to include those in retail, the utility and transport industries, airport staff and members of the Australian Defence Force, a different LPC was not required as LPC 95641 does not specify different classes of workers.

Renewal of orders

As each Ministerial direction is made pursuant to s 7, each order expires at the end of 90 days.¹¹ However, it is anticipated that some current orders will need to be renewed if penalty notices continue to be issued for offences committed until 25 March 2021.

1 Public Health Amendment (Scheduled Medical Conditions and Notifiable Diseases) Order 2020, LW 21/1/2020, Public Health Amendment (Scheduled Medical Conditions and Notifiable Diseases) Order (No 2) 2020, LW 20/3/2020.

2 Long title to the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020*.

3 *ibid*, Sch 2.16[5]; *Public Health Regulation 2012*, Sch 4, lists penalty notice offences under the *Public Health Act 2010* and the Regulation.

4 LW 25/3/2020.

5 See Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020, Pt 4, NSWGG No 65 of 30/3/2020 (31/3/2020–14/5/2020) and Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 2) 2020, Pt 3, NSWGG No 99 of 14/5/2020 (commenced 15/5/2020).

6 As amended by the Public Health (COVID-19 Restrictions on Gathering and Movement) Amendment Order 2020 (NSWGG No 72 of 4/4/2020); Public Health (COVID-19 Restrictions on Gathering and Movement) Amendment Order (No 2) 2020 (NSWGG No 94 of 30/4/2020, commenced 1/5/2020); Public Health (COVID-19 Restrictions on Gathering and Movement) Amendment (Real Estate) Order 2020 (NSWGG No 96 of 7/5/2020, commenced 9/5/2020); revoked and remade by Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 2) 2020, *ibid*, see cl 13(1).

7 NSWGG No 48 of 16/3/2020.

8 NSWGG No 50 of 18/3/2020.

9 At <https://jirs.judcom.nsw.gov.au/menus/covid-19.php>, accessed 7/5/2020.

10 Public Health (COVID-19 Spitting and Coughing) Amendment Order 2020, NSWGG No 84 of 19/4/2020, commenced 20/4/2020.

11 *Public Health Act 2010*, s 7(5).