PROTEST BEFORE AND DURING A PANDEMIC

JEFFREY GORDON*

[*This is the accepted manuscript of the article published as:*
Jeffrey Gordon, 'Protest Before and During a Pandemic' (2022) 50(4) *Federal Law Review* 421.]

Abstract. Liberal democracies have struggled recently with protecting freedom of speech and assembly during the COVID-19 pandemic. This is an old, general problem in new, specific guise. In Australia, the Supreme Court of New South Wales has been exercising a statutory jurisdiction to 'authorise' or 'prohibit' proposed public assemblies for 40 years. This article offers the first sustained analysis of the Court's jurisprudence. After describing the operation of the statutory permit scheme and systematising the case law, this article critiques the Court's jurisprudence from the perspective of free speech and freedom of assembly. It then argues that there is a puzzle at the heart of the legislative scheme: the conferral of a wide discretion the exercise of which produces a narrow legal order. This puzzle suggests that the legal effect of an authorising or prohibiting order does not exhaust its broader social significance.

I. INTRODUCTION

When people seek to gather to express their views, authorities in liberal democracies ordinarily ask: How should the freedoms of speech and assembly be balanced against other public interests?[1] In Australia, as elsewhere, this question became urgent for governments in 2020. The COVID-19 pandemic brought some of the broadest and deepest restrictions on liberty, including on free speech and freedom of assembly, since Western occupation. But other critical issues demanded public ventilation. For example, Black Lives Matter ('BLM') advocates, electrified by recent tragedies, organised demonstrations both in solidarity with protesters in the United States and to raise awareness of Black deaths in custody in Australia. Debate continues over the wisdom and legality of in-person protests during the pandemic.

For 40 years, the New South Wales Supreme Court has been empowered to 'authorise' or 'prohibit' a proposed public assembly under a statutory permit scheme. In that time, the Court has 'authorised' or 'prohibited' proposed assemblies canvassing a vast range of topics, including racism, sexual violence, refugee rights, immigration policy,

* Lecturer, Sydney Law School. I am grateful, with the standard disclaimer, to Simon Bronitt, Ben Chen, Andrew Edgar, Peter Gerangelos, Bradley Gooding, Alexandra Grey, Emily Hammond, Carolyn McKay, Simon Rice, Rayner Thwaites, Anne Twomey, Kevin Walton, the two anonymous referees, and participants in three events hosted by Sydney Law School: The Julius Stone Institute of Jurisprudence Seminar in November 2020, the ECA Workshop in May 2021, and the ECA Symposium in Law and Justice in July 2021.

[1] Balancing may or may not be an appropriate methodology, but authorities do describe the regulatory task as striking a balance: *Commissioner of Police v Allen* (1984) 14 A Crim R 244, 251 ('*Allen*'). See also Simon Bronitt and George Williams, 'Political Freedom as an Outlaw: Republican Theory and Political Protest' (1996) 18(2) *Adelaide Law Review* 289, 294–5; Tim Legrand and Simon Bronitt, 'Policing the G20 Protests: "Too Much Order With Too Little Law" Revisited' (2015) 22(1) *Queensland Review* 3, 11.

the environment, the wars in Iraq and Afghanistan, and 'lock out' laws limiting night-time trading. A curious feature of the permit scheme, which was first enacted in 1979[2] and has not been substantively amended,[3] is that the Court exercises a wide discretion: an assembly will be 'authorised' (or 'prohibited') if free speech and freedom of assembly outweigh (or are outweighed by) other public interests.[4] It's surprising to discover that an Australian court has been grappling with such a large discretion, expressly balancing fundamental rights, for four decades.

The discretion that the Court exercises to 'authorise' or 'prohibit' a proposed public assembly is a forward-looking, licensing discretion unaccompanied by statutory criteria. It trades organisers' and participants' fundamental rights to speech and assembly against a broad range of other public interests. This regulatory discretion is different from a court's typical discretionary application of the criminal law. The usual criminal-law discretion — exercised when deciding, say, whether evidence establishes beyond reasonable doubt that a defendant used 'offensive language' in a public place without reasonable excuse[5] — is an ex-post, forensic analysis of the defendant's conduct, as revealed by admissible evidence, to determine whether the elements of the offence are satisfied. Binding precedent can play a central role in the criminal law, but not necessarily for the permit scheme.[6]

Despite recent judicial attention,[7] the legislative scheme for 'authorising' or 'prohibiting' public assemblies remains little-understood. This article offers the first

---

[2] *Public Assemblies Act 1979* (NSW).

[3] *Summary Offences Act 1988* (NSW) pt 4. The *Public Assemblies Act 1979* (NSW) met with some criticism: Robin Handley, '"Serious Affront" and the NSW Public Assemblies Legislation' (1986) 10(5) *Criminal Law Journal* 287. But in 1988 the government regarded the permit scheme as having 'operated successfully for the past nine years': New South Wales, *Parliamentary Debates*, Legislative Assembly, 31 May 1988, 807 (John Dowd, Attorney-General); New South Wales, *Parliamentary Debates*, Legislative Council, 2 June 1988, 1339 (Ted Pickering, Minister for Police and Emergency Services). In 1991, the Queensland Electoral and Administrative Review Commission agreed that the permit system in New South Wales worked well: Queensland Electoral and Administrative Review Commission, *Review of Public Assembly Law* (Report, February 1991) 52 [5.52], 54 [5.65], 65 [6.73], 74 [7.33], 95 [8.27] ('*Review of Public Assembly Law*'). For a more recent sanguine view, see Roger Douglas, *Dealing with Demonstrations: The Law of Public Protest and its Enforcement* (Federation Press, 2004) 68. For some critical perspectives, see Daniel Meyerowitz-Katz and Benjamin Brady, 'Protest Prohibited: *Commissioner of Police v Keep Sydney Open*' (March 2017) *LSJ: Law Society of NSW Journal* 90; Human Rights Law Centre, *Say it Loud: Protecting Protest in Australia* (Report, December 2018) 15.

[4] *Allen* (n 1) 251.

[5] *Summary Offences Act 1988* (NSW) s 4A.

[6] For example, the legal category of 'offensive language' under s 4A of the *Summary Offences Act 1988* (NSW) can and should be given content by binding precedent, even if little is currently available: Julia Quilter and Luke McNamara, 'Time to Define "The Cornerstone of Public Order Legislation": The Elements of Offensive Conduct and Language under the *Summary Offences Act 1988* (NSW)' (2013) 36(2) *University of New South Wales Law Journal* 534, 546; cf Handley (n 3) 290 n 16. When exercising the permit-scheme discretion, however, Bellew J pushed aside prior decisions because they can offer only 'limited assistance … the facts and circumstances of cases necessarily differ': *Commissioner of Police v Holcombe* [2020] NSWSC 1428, [38] ('*Holcombe*').

[7] *Commissioner of Police v Bassi* [2020] NSWSC 710 ('*Bassi*'); *Commissioner of Police v Supple* [2020] NSWSC 727 ('*Supple*'); *Commissioner of Police v Kumar* [2020] NSWSC 804 ('*Kumar*'); *Commissioner of Police v Gray* [2020] NSWSC 867 ('*Gray*'); *Commissioner of Police v Gibson* [2020] NSWSC 953 ('*Gibson*'); *Holcombe* (n 6); *Commissioner of Police v Thomson* [2020] NSWSC 1424 ('*Thomson*'). *Bassi* and *Gibson* were appealed, but the Court of Appeal did not review the primary judge's exercise of discretion: *Bassi v Commissioner of Police (NSW)* (2020) 283 A Crim R 186; *Gibson v Commissioner of Police* (2020) 102 NSWLR 900.

detailed analysis of the Court's 'internationally significant corpus of jurisprudence'.[8] Although prompted by COVID-19 and BLM, this article takes a broader view and examines the four decades of the Court's jurisprudence on the permit scheme. Part II first describes the operation of the permit scheme — a task that is complicated by multifarious police powers for controlling public assemblies — and then systematises and critiques the Court's jurisprudence. That jurisprudence, judged from the perspective of free speech and assembly, is flawed in crucial respects. Part III argues that there is a puzzle at the heart of the legislative scheme: it confers a wide discretion the exercise of which produces a narrow legal order. This puzzle suggests that the significance of the Court 'authorising' or 'prohibiting' a proposed public assembly is not only legal but also symbolic. Finally, Part V briefly concludes with some general and tentative thoughts on reform.

This article critiques the Court's jurisprudence from the perspective of free speech and assembly for two reasons. First, the purpose of the permit scheme was to 'afford the greatest possible recognition of the right of freedom to assemble … as is reasonably consistent with the convenience and safety of the general public'.[9] The Court has interpreted the statute to confer a discretion to weigh free speech and assembly against other public interests. Its reasoning on that balancing task is therefore open to critical interrogation. Second, Australia is committed to the principles of free speech and assembly. This commitment is reflected in Australia's common law,[10] its ratification of certain treaties,[11] and constitutional implications.[12] It is also reflected, more generally, in Australia's status as a liberal democracy. Freedom of speech and assembly are significant for individuals to fully develop and exercise their capacity to assess the justice of Australian society, its institutions, and its policies.[13] Of course other interests like nonviolence and public order are important.[14] But any governmental action that restricts free speech and assembly requires coherent and perhaps special justification.[15]

The focus here is necessarily on New South Wales. Police powers and public-assembly regulations vary by jurisdiction.[16] Careful attention to jurisdictional niceties is

[8] Ian Freckelton, 'COVID-19: Criminal Law, Public Assemblies and Human Rights Litigation' (2020) 27(4) *Journal of Law and Medicine* 790, 797. See also Greg Martin, 'Protest, Policing and Law During COVID-19: On the Legality of Mass Gatherings in a Health Crisis' (2021) 46(4) *Alternative Law Journal* 275, 279–80.

[9] New South Wales, *Parliamentary Debates*, Legislative Assembly, 19 April 1979, 4677.

[10] See generally Dan Meagher, 'Is There A Common Law "Right" to Freedom of Speech?' (2019) 43(1) *Melbourne University Law Review* 269.

[11] Eg *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(2).

[12] The index cases are *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

[13] See John Rawls, *Political Liberalism* (Columbia University Press, rev ed, 2005) 334–56.

[14] Illegitimate force, even if it expresses an important political message, cannot claim the protection of free speech; it is 'too disruptive of the democratic process to be permitted by the rules of order of political debate': Ibid 336.

[15] See Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982) 7–8.

[16] For an Australia-wide treatment, see Douglas (n 3). See also Roger A Brown, '"And Hast Thou Slain the Jabberwock?" The Law Relating to Demonstrations in the ACT' (1974-1975) 6(1) *Federal Law Review* 107; Robin Handley, 'The Right of Peaceful Assembly in the ACT' (Occasional Paper No 8, Human Rights Commission, February 1985); *Review of Public Assembly Law* (n 3).

necessary to tee up the legal issues and analyse judicial reasoning. But it would be wrong to dismiss the arguments as parochial. The Court considers a general public-law issue of weighing free speech and assembly against other public interests. Its jurisprudence is a case study of how common-law courts approach that general issue. In Queensland, for example, there is a similar but nonidentical permit scheme.[17] Outside that scheme, even with the benefit of the *Human Rights Act 2019* (Qld), the Queensland Supreme Court recently exercised a similar discretion when it enjoined organisers from attending, or encouraging others to attend, a sit-in protest in Brisbane.[18] Public-assembly regulation in overseas jurisdictions raises cognate issues.[19] Because this general public-law issue will recur, at different times and in other places, much can be gained from an extended critique of the New South Wales Supreme Court's reasoning.

II. Current Public Assembly Regulation in New South Wales

An appreciation of current public-assembly regulation requires an understanding of, first, police powers to control public assemblies, and second, the permit scheme for 'authorising' or 'prohibiting' proposed public assemblies under Part 4 of the *Summary Offences Act 1988* (NSW). The general tour through police powers reinforces officers' role as 'primary definers of legitimate protest'[20] and lays the foundation for a detailed look at the permit scheme.

A. Police Powers

In New South Wales, public assemblies are presumptively lawful. But this presumption withers in the hands of police officers exercising their discretion.[21] If a public assembly is held, then police can rely on diverse powers to interrupt it. It's helpful to broadly distinguish between powers underwritten by a substantive offence (substantive powers) and those underwritten by a police officer's status as an officer (status powers).

Substantive powers to disrupt assemblies are grounded in an array of public-order offences, which fall into three general categories.[22] The first category comprises summary offences that require neither intimidation nor violence. It's an offence to

---

[17] *Peaceful Assembly Act 1992* (Qld). This legislation has been suspended during prominent events: Legrand and Bronitt (n 1) 3–6, 7. For an overview of permit systems in Australia, see Douglas (n 3) 58–69.

[18] *A-G (Qld) v Sri* [2020] QSC 246.

[19] See, eg, *R (Jones) v Commissioner of Police* [2020] 1 WLR 519; *Leigh v Commissioner of Police* [2021] EWHC 661 (Admin); *DPP v Ziegler* [2021] 3 WLR 179; *Givens v Newsom*, 459 F Supp 3d 1302 (ED Cal, 2020), affd 830 F App 560 (9th Cir, 2020).

[20] Vicki Sentas and Michael Grewcock, 'Criminal Law as Police Power: Serious Crime, Unsafe Protest and Risks to Public Safety' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 75, 84.

[21] Bronitt and Williams (n 1) 307, 314, 323–5.

[22] Importantly, the public-order offences discussed here do not exhaust the substantive offences that can be deployed against protesters. See, eg, *Roads and Crimes Legislation Amendment Act 2022* (NSW); *Inclosed Lands Protection Act 1901* (NSW); Sentas and Grewcock (n 20) 81–2; Murray Lee, 'Policing the Pedal Rebels: A Case Study of Environmental Activism Under COVID-19' (2021) 10(2) *International Journal for Crime, Justice and Social Democracy* 156.

'conduct [oneself] in an offensive manner', or to 'use offensive language', in or near a public place.[23] It's an offence to 'wilfully prevent … the free passage of a person, vehicle or vessel in a public place'.[24] Nor may a person 'wilfully damage or deface' any public shrine, monument, or statue,[25] or 'risk[] the safety of any other person' by 'climbing down or up or on … any part of a building or other structure' without using the stairs or lifts.[26] Finally, a relevant nonviolent and non-intimidatory summary offence is s 10 of the *Public Health Act 2010* (NSW) ('*Public Health Act*'), which criminalises noncompliance with a ministerial public-health direction.[27] In 2021, one COVID-19 public-health order directed that every person in New South Wales must not participate in an outdoor public gathering of more than two persons.[28]

The second category includes offences that require intimidation or an objective apprehension of a breach of the peace. Under s 545C of the *Crimes Act 1900* (NSW), it's an offence to join or continue in an unlawful assembly, defined as an 'assembly of five or more persons whose common object is by means of intimidation or injury to compel any person to do what he is not legally bound to do or to abstain from doing what he is legally entitled to do'. Section 545C created a summary offence designed to crush violent picketing during the timber strike of 1929.[29] Charges are rare.[30] Separately, the common-law misdemeanour of unlawful assembly — three or more persons assembled with intent to commit a crime by force, or to carry out a common purpose that supplies grounds to objectively apprehend a breach of the peace — has not been expressly abolished in New South Wales. It's not settled whether s 545C impliedly displaced the common-law offence.[31]

The third category contains the violent public-order offences. Statutory offences of riot and affray replaced their common-law progenitors in 1988.[32] Riot and affray are dealt with summarily unless the prosecutor or defendant elects to proceed by indictment.[33] There is also the summary offence of violent disorder.[34] The same conduct may amount to riot, affray, or violent disorder; the maximum penalties for riot and affray

---

[23] *Summary Offences Act 1988* (NSW) ss 4, 4A.

[24] Ibid s 6.

[25] Ibid s 8.

[26] Ibid s 8A.

[27] *Public Health Act 2010* (NSW) ss 10, 117.

[28] *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* (NSW) cls 3.13, 4.14.

[29] 'Timber Workers' Strike', *The Sydney Morning Herald* (Sydney, 4 February 1929) 11; 'Riotous Demonstration in City Streets', *The Sydney Morning Herald* (Sydney, 28 March 1929) 15; New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 September 1929, 384–7 (Tom Bavin, Premier), 376 (Jack Lang).

[30] From 1990 to 1999, there were only 14 court appearances for s 545C: David Brown et al, *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 3rd ed, 2001) 1026. From 2010 to 2020, there was only one finalised charge under s 545C: Email from NSW Bureau of Crime Statistics and Research Information Service to Jeffrey Gordon, 31 August 2021.

[31] Young J left the question open in *Black v Corkery* (1988) 33 A Crim R 134, 138 (appeal allowed on other grounds in *Corkery v Black* [1989] NSWCA 49).

[32] *Crimes Act 1900* (NSW) sch 3 cl 3, originally enacted as *Crimes (Amendment) Act 1988* (NSW) sch 1 cl 2.

[33] *Criminal Procedure Act 1986* (NSW) sch 1 tbl 1 cl 10.

[34] *Summary Offences Act 1988* (NSW) s 11A.

are significantly higher than that for violent disorder. Although it should be charged only in very serious violent clashes, affray in fact is frequently charged in minor disturbances as a prosecutorial convenience.[35]

Status powers require, for their lawful exercise, the person wielding authority to be a police officer. They do not fix on criminal conduct or its reasonable apprehension. For example, the controversial 'move-on powers' that are contained in Part 14 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ('*LEPRA*') authorise an officer to give a reasonable direction to a person in a public place if the officer believes on reasonable grounds that the person is obstructing people or traffic, is harassing or intimidating others, or is causing or likely to cause fear to a person of reasonable firmness.[36] A person who, without reasonable excuse, refuses or fails to comply with a direction, and persists in the conduct, is guilty of an offence.[37] A direction may not be given in relation to 'an apparently genuine demonstration or protest' unless the officer reasonably believes that a direction is necessary to deal with a serious safety risk.[38] Police gave directions in relation to 'anti-lockdown' protests during the COVID-19 pandemic.[39] It is unclear whether these protests were considered disingenuous or whether the directions were considered necessary to deal with a serious safety risk.[40]

These substantive and status powers supply ample authority for officers to interrupt public assemblies. Most dramatically, they support warrantless arrest. An officer may arrest, without warrant, a participant in a public assembly if the officer 'suspects on reasonable grounds' that the participant 'is committing or has committed' an offence, and if the officer 'is satisfied that the arrest is reasonably necessary' for an enumerated reason.[41] For example, during a Sydney lockdown in 2021, every person who openly participated in an outdoor public gathering of more than two people was liable to warrantless arrest.[42] There is, moreover, the common-law power of an officer to arrest 'where there is a reasonable apprehension of an imminent breach of the peace'.[43]

---

[35] Jane Sanders and Edward Elliot, 'Affray: What Is It, and What Is It Not?' (2012) 36(6) *Criminal Law Journal* 368.

[36] *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 197. See also Luke McNamara and Julia Quilter, 'Criminalising Protest Through the Expansion of Police "Move-On" Powers: A Case Study from Australia' (2019) 58 *International Journal of Law, Crime and Justice* 22.

[37] *LEPRA* s 199.

[38] Ibid s 200(2). Before 2016, police were generally prohibited from directing protesters to move on: McNamara and Quilter (n 36).

[39] NSW Police, '153 Arrested; 573 PINs to be Issued Over Unauthorised Protest Activity Across NSW' (Latest News, 31 August 2021), archived at <https://perma.cc/3G3W-W5AC?type=image>.

[40] See generally Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook, 4th ed, 2017) 901–2.

[41] *LEPRA* ss 99(1)(a), (b). Leading authorities on reasonable suspicion include *R v Rondo* (2001) 126 A Crim R 562; *Hyder v Commonwealth* (2012) 217 A Crim R 571. Enumerated reasons are listed in *LEPRA* s 99(1)(b).

[42] *Public Health Act* s 10; *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* (NSW) cls 3.13, 4.14.

[43] *Poidevin v Samaan* (2013) 85 NSWLR 758, 763 [18] (Leeming JA); *Binsaris v Northern Territory* (2020) 94 ALJR 664, 670–1 [28] (Gageler J) ('*Binsaris*'); *Forbutt v Blake* (1981) 51 FLR 465 ('*Forbutt*').

Breach of the peace is not an offence in itself; it includes 'a wide range of actions and threatened actions that interfere with the ordinary operation of civil society'.[44]

An officer's substantive and status powers also authorise steps short of arrest, and those steps can be deployed against public assemblies. Move-on powers are an obvious example; indeed, police in 2020 issued move-on directions to shut down a BLM protest in Sydney.[45] Another example is that officers may issue either a penalty notice ('PN') or a court attendance notice ('CAN'), rather than arrest a public-assembly participant. An officer may serve a PN on a person for offensive conduct, offensive language, obstructing traffic, failing to comply with a move-on direction, and, in the recent past, participating in an outdoor public gathering of more than two people.[46] The PN alleges an offence and provides that the matter can be determined either by paying the penalty amount or attending court.[47] Officers may not issue PNs in relation to 'an apparently genuine demonstration or protest'.[48] Alternatively, officers may issue a handwritten (or field) CAN to a public-assembly participant on the spot, describing the offence and requiring the participant to appear before a court at a specified date, time, and place.[49] A final example is a common-law power enjoying a minor Australian renaissance: the power of a constable to commit a trespass against the body or the property of an innocent person to prevent an imminent breach of the peace.[50]

---

[44] *New South Wales v Bouffler* (2017) 95 NSWLR 521, 553–4 [164] ('*Bouffler*'); *R (Laporte) v Chief Constable of Gloucestershire* [2007] 2 AC 105, 124 [28] ('*Laporte*'). Although a centuries-old idea, breach of the peace remains bedevilled by indeterminacy. Glanville Williams wrote in 1954 that breach of the peace 'seems clearer than it is and there is a surprising lack of authoritative definition of what one would suppose to be a fundamental concept in criminal law': Glanville Williams, 'Arrest for Breach of the Peace' [1954] *Criminal Law Review* 578, 578. Since the 1990s, courts in the United Kingdom have hewed closely to a conception of breach of the peace rooted in 'violence or threatened violence': *Laporte* [2007] 2 AC 105, 123 [27]. But in New South Wales, breach of the peace is a 'multifaceted' notion that 'includes a wide range of actions and threatened actions that interfere with the ordinary operation of civil society': *Bouffler* (2017) 95 NSWLR 521, 553–4 [159]–[164]. It is even an open question whether that description of breach of the peace is ambiguous: *Fletcher v New South Wales* [2019] NSWCA 31, [2] (Beazley P), [11] (Basten JA), [32] (Payne JA). See also Bronitt and Williams (n 1) 315–23; Bronitt and McSherry (n 40) 879–85, 889–92.

[45] NSW Police, 'Six Arrested During Unauthorised Public Assembly – Sydney CBD' (Latest News, 28 July 2020), archived at <https://perma.cc/L8T4-TJ47?type=image>. See also Louise Boon-Kuo et al, 'Policing Biosecurity: Police Enforcement of Special Measures in New South Wales and Victoria during the COVID-19 Pandemic' (2021) 33(1) *Current Issues in Criminal Justice* 76.

[46] For offensive conduct, offensive language, and obstructing traffic, see *Criminal Procedure Act 1986* (NSW) ch 7 pt 3; *Criminal Procedure Regulation 2017* (NSW) sch 4. For failing to comply with a move-on direction, see *LEPRA* ss 199, 235; *Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW) r 53. For participating in an outdoor public gathering of more than two people, see *Public Health Act* s 10; *Public Health Regulation 2012* (NSW) sch 4 pt 1 item (c)(ii); *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* (NSW) cls 3.13, 4.14.

[47] *Criminal Procedure Act 1986* (NSW) s 334; *Fines Act 1996* (NSW) s 20.

[48] *Criminal Procedure Act 1986* (NSW) s 339. There is no equivalent provision in the *Fines Act 1996* (NSW).

[49] *Criminal Procedure Act 1986* (NSW) ch 3 pt 2 div 1, ch 4 pt 2 div 1.

[50] *Binsaris* (n 43) 670–1 [28]–[29], 672–3 [39]–[40] (Gageler J); *Poidevin v Samaan* (n 43) 766–7 [33]–[34] (Leeming JA). A 'leading case' is *Humphries v Connor* (1864) 17 ICLR 1: Williams (n 44) 590. The power endorsed by *Humphries v Connor* 'continues to be part of the common law of Australia', at least for those plaintiffs who are witting or unwitting provocateurs: *Poidevin v Samaan* (n 43) 764 [20] (Leeming JA); *Binsaris* (n 43) 673 [40] (Gageler J).

Police powers are not at large. Some offences have been tamed by judicial intervention.[51] Consider *Beatty v Gillbanks*,[52] where a Salvation Army procession organised by Beatty was surrounded by an antagonistic group. The police arrested Beatty and two associates, charging them with unlawful assembly. The lower court sustained the charges; the Divisional Court upheld an appeal. The defendants had not been violent.[53] As Field J noted, the inferior court had effectively held 'that a man may be punished for acting lawfully if he knows that his so doing may induce another man to act unlawfully — a proposition without any authority whatever to support it'.[54] Although some courts later cast doubt on it,[55] *Beatty v Gillbanks* enjoyed renewed approbation in the United Kingdom from the late 1990s.[56]

Similarly, there are important limits on a police officer's warrantless-arrest power under *LEPRA* s 99. At the time of making the arrest the officer must have the intention to charge the participant; an arrest for the purpose of questioning or investigation 'is an arrest for an improper purpose and is unlawful'.[57] The statutory warrantless-arrest power, held a majority of the High Court recently, 'is exercisable only for the purpose of taking the person before a magistrate (or other authorised officer) to be dealt with according to law to answer a charge for that offence'.[58] These limits have a long history in New South Wales. In *Bales v Parmeter*,[59] Jordan CJ said that 'suspicion that a person has committed a crime cannot justify an arrest except for a purpose which that suspicion justifies; and arrest and imprisonment cannot be justified merely for the purpose of asking questions'.[60]

B. The New South Wales Permit Scheme: 'Authorised' and 'Prohibited' Public Assemblies

A permit confers a narrow immunity on participants in 'authorised' public assemblies. The above outline of police powers was necessary to understand the permit scheme; the scope of the immunity depends on the powers that police otherwise enjoy. This section first sets out the effect of a statutory 'authorising' or 'prohibiting' order, and then systematises and critically evaluates the Court's jurisprudence from the perspective of free speech and assembly.

---

[51] See, eg, *Ball v McIntyre* (1966) 9 FLR 237 ('*Ball*'), which has been affectionately referred to as one of our 'old friends': *Burns v Seagrave* [2000] NSWSC 77, [12] (Simpson J). In *Ball* at 241, Kerr J, the future Governor-General, held that a charge of offensive behaviour 'is not available to ensure punishment of those who differ from the majority'.

[52] (1882) 15 Cox CC 138.

[53] Ibid 145 (Field J), 148 (Cave J).

[54] Ibid 147.

[55] In *Duncan v Jones* [1936] 1 KB 218, 222, Lord Hewart CJ described *Beatty v Gillbanks* as a 'somewhat unsatisfactory case'.

[56] In *Redmond-Bate v DPP* (1999) 163 JP 789, Sedley LJ said that he did not understand why Lord Hewart CJ thought *Beatty v Gillbanks* 'somewhat unsatisfactory', and that *Duncan v Jones* represented '[t]he old order'. See also *Forbutt* (n 43) 475.

[57] *New South Wales v Robinson* (2019) 266 CLR 619, 655 [62]–[63], 671–2 [109]–[111] (Bell, Gageler, Gordon and Edelman JJ).

[58] Ibid 665 [93].

[59] (1935) 35 SR (NSW) 182.

[60] Ibid 188.

1. *Statutory Framework*

Part 4 of the *Summary Offences Act 1988* (NSW) supplies a limited criminal immunity to participants in 'authorised' public assemblies. The operative provision is s 24, which provides that a participant in an authorised public assembly 'is not, by reason of any thing done or omitted to be done by the person for the purpose only of participating in that public assembly, guilty of any offence relating to participating in an unlawful assembly or the obstruction of any person, vehicle or vessel in a public place'. The substance of the permit scheme has not changed since its introduction in 1979.[61] It represented a 'more open, less police-dominated, system of regulation' compared to the previous one, which had required the approval of a prescribed authority for every public assembly.[62] Frank Walker, the Attorney-General who introduced the assembly-permit scheme as part of a legislative package repealing the oppressive *Summary Offences Act 1970* (NSW), said that it 'will afford the greatest possible recognition of the right of freedom to assemble … as is reasonably consistent with the convenience and safety of the general public'.[63]

The process for authorising a public assembly starts with an organiser serving on the Commissioner of Police a written notice (in the prescribed form) of an intention to hold a public assembly (with particulars).[64] If the Commissioner notifies the organiser that the planned assembly is not opposed, then it is authorised.[65] If the Commissioner opposes the assembly or fails to respond to the notice, then the pathway to authorisation depends on whether the notice was served less than seven days before the date of the planned assembly (the statute appears to deem seven days to be sufficient time for the Commissioner to consider a notice).[66] In short: if the Commissioner has had sufficient time, then the public assembly will be authorised unless a court prohibits it; if the Commissioner has not had sufficient time, then the public assembly will not be authorised unless a court authorises it. The Commissioner, having been provided sufficient time by the organiser, can apply to a court for an order 'prohibiting the holding' of the proposed public assembly, but only if the parties have met and conferred.[67] The organiser, having not provided the Commissioner with sufficient time, can apply to a court for an order 'authorising the holding' of the proposed public assembly.[68]

The statutory labels attached to the orders ('authorising' and 'prohibiting') are apt to mislead. Authorisation throws an immunity around all participants, not just organisers, for any offence 'relating to' unlawful-assembly participation or traffic

[61] *Public Assemblies Act 1979* (NSW).
[62] Brown et al (n 30) 1028; *Summary Offences Act 1970* (NSW) pt 2 div 6.
[63] New South Wales, *Parliamentary Debates*, Legislative Assembly, 19 April 1979, 4677.
[64] *Summary Offences Act 1988* (NSW) s 23.
[65] Ibid s 23(f).
[66] Ibid.
[67] Ibid s 25.
[68] Ibid s 26.

obstruction.[69] The immunity covers the statutory offence of obstructing traffic.[70] Perhaps it also includes the common-law offence of unlawful assembly — if that offence exists in New South Wales.[71] Whether the immunity extends to the statutory offence of joining an unlawful assembly (s 545C) is less clear: in Parliament, Walker proclaimed '[o]bviously not', but 25 years later Hamilton J thought otherwise (it may not matter given the rarity of charges under s 545C).[72] Interestingly, Hunt J said that the immunity would not cover offensive behaviour: even though that statutory offence might be committed for the purpose only of participating in a public assembly, it is not an offence 'relating to' unlawful-assembly participation.[73] The requirement that any offence must 'relat[e] to' participation in an unlawful assembly was, according to Hunt J, a 'substantial limitation' on the scope of the immunity.[74] And Simpson J noted that an authorisation 'does not protect against criminal prosecution of any person who engages in acts of violence or vandalism in that assembly'.[75] In fact, 'participants should be aware of the very limited nature of the protection that the Act affords them'.[76] Walker similarly reported to Parliament that 'general criminal sanctions' like 'assault and malicious damage to property' will always apply.[77]

In 2020, the scope of the immunity was held to cover the offence of failing to comply with a ministerial direction made under s 7 of the *Public Health Act*.[78] The Minister had made the *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 4) 2020* (NSW) ('*Order*') under s 7 in response to the coronavirus pandemic. In cl 18(1), the *Order* directed 'that a person must not participate in an outdoor public gathering of more than 20 people'. Taylah Gray, a Wiradjuri woman, lawyer, and educator, notified the Commissioner (more than seven days in advance) of an intention to hold a public assembly, with hundreds of participants, to support BLM. Adamson J refused the Commissioner's application for a prohibiting order, but held that the offence of failing to comply with the ministerial direction was an 'offence relating to participating in an unlawful assembly' that attracted the s 24 immunity.[79]

Adamson J commenced by observing the width of s 24's phrase, 'any offence relating to participating in an unlawful assembly'.[80] Because any 'outdoor public gathering' is a public assembly, cl 18(1), when read with the offence of failing to comply with a ministerial direction, made public assemblies with more than 20 people unlawful.[81]

---

[69] Ibid s 24.
[70] Ibid s 6; *Allen* (n 1) 246.
[71] *Allen* (n 1) 246–7.
[72] *Crimes Act 1900* (NSW) s 545C; New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 April 1979, 4932; *Commissioner of Police v Gabriel* (2004) 141 A Crim R 566, 567 [2] ('*Gabriel*').
[73] *Allen* (n 1) 246.
[74] Ibid.
[75] *Commissioner of Police v Rintoul* [2003] NSWSC 662, [24] ('*Rintoul*').
[76] Ibid.
[77] New South Wales, *Parliamentary Debates*, Legislative Assembly, 19 April 1979, 4677.
[78] *Gray* (n 7) [50]–[57]. This point was assumed, but not decided, in *Kumar* (n 7) [30].
[79] If this construction was wrong, Adamson J would have held that participation in an authorised public assembly is a 'reasonable excuse' under s 10 of the *Public Health Act*. *Gray* (n 7) [57].
[80] *Gray* (n 7) [50].
[81] Ibid [51].

Apparently, this interpretation avoided a potential inconsistency between the *Public Health Act* and the permit scheme. 'It would be an odd result', said Adamson J, 'if the participants in a public assembly in respect of which this Court had refused to make a prohibition order were nonetheless liable to prosecution under … the *Public Health Act* for breach of cl 18(1) … merely for participating in that public assembly'.[82] Moreover, this interpretation of the scope of the s 24 immunity supposedly avoided a possible inconsistency with the implied freedom of political communication.[83]

It's unfortunate, as Adamson J reported, that counsel cited no authority on the scope of the s 24 immunity,[84] because her Honour's approach may be in tension with Hunt J's reasoning in *Commissioner of Police v Allen* ('*Allen*'). In *Allen*, Hunt J distinguished between an offence *arising out* of participation in an unlawful assembly (like offensive behaviour) and an offence *relating to* participation in an unlawful assembly. A 'substantial limitation' on the scope of s 24 is that it 'is careful to limit the application of the excuse there afforded to any offence "relating to" that participation in an unlawful assembly'.[85] By contrast, Adamson J in *Commissioner of Police v Gray* ('*Gray*') noted that '[t]he words "relating to" have been held to be of wide import'.[86] Parliament could have chosen 'narrower formulations such as "any offence under this Act" or "any offences relating to public order"'.[87] This tension, however, may be more apparent than real. In *Allen*, Hunt J suggested that an offence is subject to the immunity only if that offence would otherwise be committed solely by participation in an authorised public assembly. That is certainly the case with an offence constituted by a failure to follow cl 18(1) of the *Order*.

The legal benefits of authorisation extend, to a degree, beyond s 24's sickly immunity. A police officer has no power to give a traffic-obstruction direction to participants in an authorised public assembly.[88] The removal of this power, according to Adamson J, 'has a material effect on police powers in respect of a public assembly'.[89] In general, a police officer's statutory power to give directions cannot be exercised in relation to an authorised public assembly, unless the officer reasonably believes that there is a serious risk to safety.[90] But the condition that enlivens the power (namely, a reasonable belief of a serious risk to safety) confers a nontrivial authority on individual officers to decide which assemblies may proceed.[91] Other laws also carve out circumscribed exceptions for authorised public assemblies.[92]

---

[82] Ibid [53].
[83] Ibid [56].
[84] Ibid [50].
[85] *Allen* (n 1) 246.
[86] *Gray* (n 7) [50].
[87] Ibid.
[88] *LEPRA* s 200(4).
[89] *Gray* (n 7) [22].
[90] *LEPRA* s 200(3). Section 200(2) does not refer in terms to authorised public assemblies. Presumably an authorised public assembly will count as an apparently genuine demonstration or protest, a procession, or an organised assembly.
[91] McNamara and Quilter (n 36); Sentas and Grewcock (n 20) 84.
[92] *Sydney Public Reserves (Public Safety) Act 2017* (NSW) s 11; *Roads Regulation 2018* (NSW) rr 48(2), 61(2).

Many judges deciding an application by the Commissioner 'for an order prohibiting the holding of a public assembly' have remarked that the statute does not, in fact, empower the court to prohibit the public assembly. Rather, it empowers the court, at most, to prohibit only the organisers on the notice from participating, because only they would be the named respondents on the Commissioner's application. And Adams J queried whether a court would have even that power.[93] What a prohibition order does, and perhaps all it can do, is deny the immunity for offences relating to unlawful-assembly participation and traffic obstruction to which participants might otherwise be entitled. For this reason, the statutory language ('prohibiting') has attracted curial bemusement as 'unfortunate',[94] 'curious'[95] and, most commonly, 'inapposite'.[96] Here is Hunt J in the first reported case on the permit scheme:

> The statutory description of the order … as a 'prohibiting' order is … unfortunate because it clearly is likely to mislead the public (and perhaps also the litigants) into thinking that the [statute] gives to this Court a power to prevent members of the public exercising their precious democratic rights of freedom of speech, of peaceful assembly and of peaceful demonstration. It is clear, from the television reports … that such a description has certainly misled the media.[97]

A statutory 'prohibiting' order is therefore of 'limited effect' and 'lack[s] … any significant consequences'.[98]

2. *The 'Unenviable Task' of Striking a 'Distasteful' Balance*

When deciding an application for a prohibiting or an authorising order, the Court has assumed 'a wide and unfettered discretion'.[99] The Court must balance the important public interests in free speech and assembly against a range of other public interests, including non-participants' interests to move freely, to engage in lawful activity or business, to avoid unnecessary offence or affront, to avoid physical injury or property damage, to preserve privacy, and to minimise any risks to the community (including public-health risks).[100] An authorising order should be made if the organiser shows that free speech and assembly outweigh other public interests; a prohibiting order should be made if the Commissioner shows that free speech and assembly are outweighed by other public interests.[101] Even before the pandemic, Simpson J

---

[93] *Commissioner of Police v Bainbridge* (2007) 175 A Crim R 226, 229 [15], [17] ('*Bainbridge*'). See also Handley (n 3) 291–2; Douglas (n 3) 63–4.
[94] *Allen* (n 1) 245.
[95] *Gabriel* (n 72) 567 [1].
[96] *Commissioner of Police v Langosch* [2012] NSWSC 499, [19] ('*Langosch*'); *Commissioner of Police v Folkes* [2015] NSWSC 1887, [11] ('*Folkes*'); *Gray* (n 7) [43].
[97] *Allen* (n 1) 245.
[98] *Commissioner of Police v Ridgewell* [2014] NSWSC 1138, [4] ('*Ridgewell*'); *Rintoul* (n 75) [23]–[24]; *Gabriel* (n 72) 568 [4].
[99] *Gabriel* (n 72) 568 [5].
[100] *Allen* (n 1) 250–3; *Rintoul* (n 75) [5]–[7], [21]–[24]; *Gabriel* (n 72) 567–8 [4]; *Bainbridge* (n 93) 229 [16]; *Commissioner of Police v Keep Sydney Open Ltd* [2017] NSWSC 5, [9] ('*Keep Sydney Open*'); *Supple* (n 7) [6]–[7]; *Kumar* (n 7) [24]–[26].
[101] *Bassi v Commissioner of Police (NSW)* (2020) 283 A Crim R 186, 191 [17] (observation (vi)).

described the 'unenviable task' of striking this '[d]istasteful' balance,[102] and Hamilton J observed that the decision 'is always a difficult one'.[103] During the pandemic, the Court of Appeal noted that the 'difficult weighing exercise' can implicate '[c]ompeting public interests of great importance'.[104]

Only a small proportion of notices are taken to the Supreme Court.[105] Proceedings are typically brought by, and the Court rarely disagrees with, the Commissioner. Since 1979, the Court has issued 23 judgments on applications to authorise or prohibit the holding of a public assembly, 21 at first instance and two on appeal. Seven proceedings were brought in 2020, producing nine judgments (including the only two appellate judgments). Since 1979, all applications but one were brought by the Commissioner; authorisation was the result in only five.[106]

(a) Free Speech and Assembly

The cases routinely incant that free speech and assembly are 'important, indeed fundamental',[107] 'vital',[108] 'precious',[109] 'very special',[110] and 'jealously guarded'.[111] But the Court has not specified its conception of free speech. At best, it refers to free speech and assembly as 'democratic' rights.[112] The 'democratic' cognomen can be taken in a general or precise sense. Perhaps all the various judges mean by 'democratic' is that democracies generally enjoy the rights of free expression and assembly. Or maybe the judges are invoking a precise conception of free speech that is underwritten by a commitment to democracy: free speech is necessary for an electorate to intelligently exercise the franchise. Regrettably, no judgment on the permit scheme — a scheme which calls for weighing free speech against other public interests — spells out the content of free speech. Without specifying what free speech is, the Court's balancing process invoking that 'hallmark of a democratic society' is opaque.[113]

---

[102] *Rintoul* (n 75) [6], [23].
[103] *Gabriel* (n 72) 571 [15].
[104] *Bassi v Commissioner of Police (NSW)* (2020) 283 A Crim R 186, 187–8 [7].
[105] See, eg, *Review of Public Assembly Law* (n 3) 54 [5.62]; David Brown et al, *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 6th ed, 2015) 568; Bronitt and McSherry (n 40) 934. Obtaining accurate yearly data on the total number (and outcome) of permits sought across New South Wales is difficult. A request to New South Wales Police under the *Government Information (Public Access) Act 2009* (NSW) was considered too broad and likely to require a substantial and unreasonable diversion of resources.
[106] It is unclear how many applications settle before hearing. See, eg, Christopher Harris, 'Short March to Town Hall, but Long Road to Justice', *CityHub* (online, 18 February 2016) <https://cityhubsydney.com.au/?p=113897>.
[107] *Bainbridge* (n 96) 229 [16].
[108] *Kumar* (n 7) [4].
[109] *Allen* (n 1) 245.
[110] Ibid 252, 255.
[111] *Rintoul* (n 77) [5].
[112] *Commissioner of Police v Vranjkovic* (Supreme Court of New South Wales, Lee J, 28 November 1980) 6–7 ('*Vranjkovic*'); *Commissioner of Police v Willis* (Supreme Court of New South Wales, Lee J, 22 April 1983) 8, 10–11 ('*Willis*'); *Allen* (n 1) 245, 251–2, 255; *Rintoul* (n 75) [5], [22]; *Gabriel* (n 72) [1]; *Bainbridge* (n 93) 229 [15], [17], 233 [33]; *Commissioner of Police v Jackson* [2015] NSWSC 96, [67], [90] ('*Jackson*'); *Keep Sydney Open* (n 100) [9].
[113] *Gray* (n 7) [59].

For instance, the Court has not articulated its criteria for concluding that prohibition is justified because the proposed assembly should be postponed. On occasion, the Court will insist that a proposed assembly can be held 'at some other time, date or place'.[114] *Commissioner of Police v Bassi* ('*Bassi*'), which concerned a proposed BLM protest in Sydney during the COVID-19 pandemic, offered the most striking example. At first instance, Fagan J said that the *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 3) 2020* (NSW) 'deferred' freedom of assembly:

> The exercise of the fundamental right of assembly and of expression of political opinion by gathering in numbers is not taken away by the current Public Health Order; it is deferred. The public health threat that has been encountered by our community through the spread of this disease has asked a great deal of many people in many respects throughout the community.[115]

His Honour seemed to reason that the deferral of free assembly was justified because other important public activities had been curtailed (including open-court legal proceedings) and many other sacrifices had been made (including loss of livelihoods and the inability to attend funerals).[116] Exactly why open justice, livelihood pursuit, and funeral attendance are the operative benchmarks was not explained.[117] Nor did his Honour consider that a protest indefinitely deferred is a protest censored.[118]

The Court's failure to give real content to freedom of speech, and its consequent failure to justify conditions for postponement or deferral of a public assembly, undermine its repeated assertions that free speech and assembly are fundamental. For Fagan J's 'deferral' argument to work, the other activities (legal proceedings in open court, pursuing a livelihood, and attending funerals) must be sufficiently analogous to free speech and assembly, and they must be limited to a similar extent. Earning wages and mourning the loss of loved ones are not analogous to free expression. They are primarily private goods. Free speech, especially in its democratic guise, is largely a public good. It redounds to the benefit of the public at large because it is necessary to representative democracy. The principle of open justice, however, is a public good: it enables public oversight of the judiciary. Even conceding that analogy, the relevant public health order significantly burdened free assembly while leaving open justice relatively untouched. The order, as interpreted by Fagan J, indefinitely deferred free assembly. But it classified 'a gathering at a court or tribunal' as an 'essential gathering'.[119] And two weeks after Fagan J decided *Bassi*, Bathurst CJ rejected a

---

[114] *Allen* (n 1) 252.

[115] *Bassi* (n 7) [31]. The Court of Appeal allowed an appeal from Fagan J's refusal to authorise the assembly, but the appeal involved some 'very narrow' notice issues, not the 'difficult weighing exercise' that the statute requires: *Bassi v Commissioner of Police (NSW)* (2020) 283 A Crim R 186, 187–8 [7]. Indeed, in a subsequent case Lonergan J went so far as to say that the Court of Appeal 'accepted and approved' Fagan J's 'approach to the judicial task' at first instance in *Bassi*: *Kumar* (n 7) [26].

[116] *Bassi* (n 7) [31].

[117] Ibid.

[118] Ibid.

[119] *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 3) 2020* (NSW) cl 10(3)(a), sch 2 item 7.

reporter's suggestion that open justice was 'a casualty of COVID-19'.[120] 'I think it's a bit of a furphy actually', said Bathurst CJ.[121] 'Everyone's been able to come to court and we've given people — if they want to — an audio or telephone connection so they can see and hear it.'[122] That, of course, is laudable. And it illustrates that the rights of free speech and assembly were assigned less respect than the principle of open justice.[123]

Equally troubling is that the Court sometimes assesses for itself the value of the speech at issue. In *Commissioner of Police v Jackson* ('*Jackson*'), the Court granted the Commissioner's application for an order to prohibit a procession commemorating the eleventh anniversary of the death of TJ Hickey. Hickey, a Kamilaroi teenager, died in 2004 as he fled police. His death prompted an outpouring of grief and anger on Gadigal land, which made international headlines and generated annual commemorative rallies.[124] In her Honour's reasons prohibiting the 2015 rally, Schmidt J focused on the possibility that 'problems' with the prior year's rally (namely, the failure of some participants to follow police directions) would recur:

> 86 … That possibility also had to be considered in circumstances where even those intending to march peacefully, including on his own explanation, Mr Jackson, felt that there was nothing wrong or offensive with chanting 'fuck the police' during the march, reflective of the anti-police sentiment which Mr Jackson described.
>
> 87 I did not consider that members of the community would generally support that sentiment. To the contrary, it seemed to me that the work which police officers are called on to perform in protecting the community has wide public support. It might thus be expected that other people present would not have much sympathy for people marching through the CBD, chanting as they were in 2014, 'fuck the police'. That might have a negative impact on their patience with the marchers and the disruption they would cause for a considerable time, throughout the CBD.[125]

In short, Schmidt J's prediction that the protest's chants might annoy non-participants weighed in favour of prohibiting the assembly.

The judgment in *Jackson* violated a central principle of free expression: speech should not be restricted by reason of its content, except in very limited circumstances.[126] A proposed assembly's message or content should not be used as a factor that weighs against authorisation or for prohibition. Yet, when balancing free speech and assembly against other public interests in *Jackson*, Schmidt J suggested that there *was*

---

[120] Michael Pelly, 'A "Different Style" of Justice Post-Pandemic', *The Australian Financial Review* (Sydney, 19 June 2020) 33.

[121] Ibid.

[122] Ibid.

[123] The pandemic certainly posed challenges for open justice. Courts were rightly anxious to protect open justice as much as possible: Michael Legg, 'The COVID-19 Pandemic, the Courts and Online Hearings: Maintaining Open Justice, Procedural Fairness and Impartiality' (2021) 49(2) *Federal Law Review* 161, 166–9.

[124] 'Black Cyclist's Death Sparks Sydney Riot', *The Guardian* (London, 16 February 2004) 12; Nicole Watson, 'Policing of Indigenous People in Australia: Justice is Still Elusive' (2007) 6(25) *Indigenous Law Bulletin* 10; Raul Bassi, 'TJ Hickey: 14 Years and Still No Justice', *Green Left* (Sydney, 13 February 2018) 8.

[125] *Jackson* (n 112) [86]–[87].

[126] See, eg, *City of Melbourne v Barry* (1922) 31 CLR 174, 208–9; *Watson v Trenerry* (1998) 122 NTR 1, 8; *R v Roberts* [2019] 1 WLR 2577, 2589 [37].

something 'wrong or offensive with chanting "fuck the police" during the march'.[127] Her Honour observed that 'members of the community' would not generally support the protest's anti-police sentiment, that police enjoy 'wide public support', and that passers-by 'would not have much sympathy for', and might be impatient with, the marchers.[128] But the reasons in *Jackson* disclose no evidentiary basis for findings about the sentiments of the community or the sympathies of passers-by; rather, those sentiments and sympathies are surmised. Absent reliable evidence to ground such findings, it is difficult to take Schmidt J's prediction of the likely public reaction to an anti-police protest as anything other than a projection of her Honour's own critical views about the protest's message. Those views should not feature in reasons supporting a prohibiting order.

Assume, however, that in *Jackson* reliable findings were available: that is, assume her Honour surmised correctly, on sound evidentiary foundation, that public sentiment was doggedly against the protest and its chants, and that passers-by would be annoyed and impatient. Even so, that assumption does not support prohibiting the assembly. To begin with, generalised suspicions that bystanders 'would not have much sympathy for' the protest, and that the protest 'might have a negative impact on their patience', are too weak to outweigh the countervailing interest in free speech.[129] Indeed, Schmidt J did not hold that the generalised suspicions were sufficient to justify a prohibiting order. More importantly, those suspicions are altogether illegitimate when deployed in support of a prohibiting order. The right of public assembly is not reserved for popular or benign causes. A central purpose of free assembly is to enable the public ventilation of unpopular ideas that generate impatience and antipathy from the community. Freedom of assembly embraces the expression of minority views precisely because they provoke dissension and agitate for change. Bystander outrage, much less impatience, cannot weigh in favour of prohibiting a proposed public assembly. Otherwise, the permit scheme would degrade rather than protect free speech.

(b) Minimising Violence

The judges in the three early cases on the permit scheme were worried about violence. In *Commissioner of Police v Vranjkovic* ('*Vranjkovic*'), Lee J made a prohibiting order for two related reasons: first, the organiser's 'most disturbing' intention to overpower any police presence; and second, similar assemblies (Croatian nationalists protesting the government of the former Yugoslavia) 'have been accompanied by acts of violence and illegality and arrests have been made on most occasions'.[130] The other two early cases, *Commissioner of Police v Willis* ('*Willis*') and *Allen*, concerned attempts by the Sydney Women Against Rape Collective ('SWARC') to hold nonviolent and silent processions through Sydney City on Anzac Day in 1983 and 1984 'to mourn all women

[127] *Jackson* (n 112) [86].
[128] Ibid [87].
[129] Ibid.
[130] *Vranjkovic* (n 112) 5–6.

of all countries raped in all wars'.[131] SWARC planned the processions to coincide with the annual Anzac Day march, which, in 1983 and 1984, drew over 20 thousand marchers and thousands more spectators lining the streets.[132] On both occasions, the Commissioner successfully applied for a prohibiting order. Perhaps it's unsurprising that Lee J granted the prohibiting order in *Willis*; he merely emphasised the size and status of the annual Anzac Day march, stated that the proposed procession would be an affront, and predicted a breach of the peace.[133] In *Allen*, Hunt J observed that 'in most cases' (but not all) a prohibiting order will be supported by a finding that a breach of the peace is likely.[134] Later courts agreed,[135] but the COVID-19 pandemic disrupted that prediction.

A prohibiting order is justified by a finding that a proposed assembly will very likely descend into uncontrolled violence. In *Vranjkovic*, that finding was based on evidence of prior riots and the organiser's stated intention to overpower police.[136] Subsequent courts have not been especially wary about predicting violence. In *Jackson*, for example, Schmidt J relied on the previous year's march, in 2014, to find that there was 'a real prospect' that violence would recur in 2015.[137] The reasons in *Jackson* disclosed neither the number of marchers in 2014 nor the circumstances of any altercations. Schmidt J did note that no injuries occurred and no arrests were made (four arrests were attempted but not completed).[138] Importantly, however, the organiser called evidence from eyewitnesses who disputed the police account of one of the altercations.[139] The diligent reader must turn to media reports to learn that in 2014 two hundred marchers were accompanied by one hundred police on their march to the NSW Parliament. Police apprehended, and then released to cheers from the crowd, three people who were holding a 'fuck the police' sign. A fourth person allegedly pushed an officer off a bicycle — the altercation that eyewitnesses disputed.[140] A minor scuffle also erupted after police pushed into the crowd an 18-year-old man who ventured outside the protest cordon. At the time, police were more anxious about traffic disruption than the occasional scuffle.[141] Oddly, these minor altercations in 2014 — which, it bears repeating, resulted in no injuries, and the circumstances of

---

[131] *Willis* (n 112) 1; *Allen* (n 1) 247–8.

[132] Malcolm Brown, '24,000 on the March: Anzac Spirit Lives On', *The Sydney Morning Herald* (Sydney, 26 April 1983) 3; Greg Roberts, 'Old Soldiers Parade, but it's a Day of Protest for Some', *The Sydney Morning Herald* (Sydney, 26 April 1984) 3.

[133] *Willis* (n 112) 10–11.

[134] *Allen* (n 1) 250.

[135] *Rintoul* (n 75) [7], [23]; *Langosch* (n 96) [22]; *Ridgewell* (n 98) [6]; *Jackson* (n 112) [18]; *Commissioner of Police v Da Costa-Reidel* [2019] NSWSC 198, [21] ('*Da Costa-Reidel*').

[136] *Vranjkovic* (n 112) 5–6.

[137] *Jackson* (n 112) [71].

[138] Ibid [23], [27], [63].

[139] Ibid [50], [60].

[140] Ibid.

[141] On the day of the 2014 march, Detective Superintendent Luke Freudenstein said: 'We had 200 people there. We make an arrest, there's going to be disruption, there's going to be a bit of a brawl. And that's OK, but there's further disruption to the traffic.' 'Thomas "TJ" Hickey Rally in Redfern, Sydney, Could Be Last After Brawls Lead to Traffic Disruption: Police', *ABC News* (online, 14 February 2014) <https://www.abc.net.au/news/2014-02-14/police-warn-tj-hickey-rally-could-be-last/5260536>.

which were contested on the evidence — 'had to tilt the balance towards the grant of the order sought by the Commissioner' in 2015.[142]

When predicting breaches of the peace, courts should be cautious relying on the possible presence of violent provocateurs or antagonists. Two cases demonstrate a regrettable lack of caution. In *Commissioner of Police v Bainbridge* ('*Bainbridge*'), Adams J prohibited the Stop Bush Coalition's intended protest of the Asia-Pacific Economic Cooperation meeting in Sydney in 2007.[143] Intelligence reports tendered by the Commissioner quoted statements from members and non-members of the Coalition which contained 'no exhortation not to use violence'.[144] In *Commissioner of Police v Ridgewell* ('*Ridgewell*'), Hidden J prohibited the Palestine Action Group's planned protest at the opening of the Israeli Film Festival.[145] There was a risk of violent confrontation partly because '[t]his is the type of protest likely to attract people with a different agenda, bent on fermenting [sic] violence'.[146] But just because some possible attendees once failed to denounce violence — as in *Bainbridge* — and just because 'the type of protest' might attract violent participants — as in *Ridgewell* — it does not follow that the organiser's right to peaceably assemble should be jeopardised. Indeed, in *Ridgewell*, Hidden J observed that the organiser was 'an impressive witness, whose evidence was measured and responsible'.[147] Moreover, there was 'no doubt that he, and the majority, if not all, of those allied with the Palestine Action Group who attend the protest, want it to be peaceful and eschew violence of any kind'.[148] And previous demonstrations had 'been well controlled and passed without incident'.[149] It's surprising, considering these findings, that Hidden J prohibited the assembly. His Honour concluded that 'the risk of violent confrontation remains' because the assembly was to be 'confined to a particular location and directed towards a particular event', where 'emotions run high in both the Israeli and Palestinian communities'.[150] The unfortunate effect of *Ridgewell* is an enforcement of the 'heckler's veto'.[151]

Free speech and assembly suffer if genuine, good-faith protests are prohibited on slight evidence of the possibility of violent attendees. The principle that should suffuse the exercise of the Court's large discretion is suggested by *Beatty v Gillbanks*.[152] A peaceful assembly should not be prohibited even though it may induce others to act violently or unlawfully. In *Bainbridge*, Adams J asked: 'Is the risk that others with more malign intents will attend such that the prohibition order sought by the Commissioner

[142] *Jackson* (n 112) [93]. Especially after *Prior v Mole* (2017) 261 CLR 265, it seems that courts will treat police evidence on the likelihood of violence as inherently more probative than organiser evidence.
[143] *Bainbridge* (n 93).
[144] Ibid 231 [24].
[145] *Ridgewell* (n 98).
[146] Ibid [18].
[147] Ibid.
[148] Ibid.
[149] Ibid.
[150] Ibid [15], [18].
[151] David E Pozen, 'From the Heckler's Veto to the Provocateur's Privilege' in David E Pozen (ed), *The Perilous Public Square: Structural Threats to Free Expression Today* (Columbia University Press, 2020) 62.
[152] (1882) 15 Cox CC 138.

should be made?'[153] It's preferable to subsume this question under the more general issue of minimising violence: what weight should be assigned to the probability that violent provocateurs or antagonists will attend? That framing calls attention to two separate issues: the probability of violence and the weight to be accorded that probability. For example, uncontested evidence that an organiser intends to celebrate and commemorate violence weighs heavily in favour of a prohibiting order.[154] But the near-certain occurrence of isolated scuffles may not support prohibiting the assembly if police can be reasonably expected to contain the fracas. Indeed, in *Commissioner of Police v Langosch* ('*Langosch*') Adamson J rightly refused to prohibit a proposed assembly despite the 'significant challenge' for police to prevent or minimise breaches of the peace.[155]

(c) Minimising Disruption

Disruption and inconvenience (traffic obstruction is the major example) caused by a proposed assembly can weigh against authorisation. At first instance in *Bassi*, Fagan J helpfully summarised:

> The usual countervailing consideration that the Court has to weigh up … is the right of other members of the public who are not participating in the assembly to make normal use of roads, footpaths and public open spaces; not to be obstructed in their movements around the city; and the right of business people in locations where large public gatherings might take place not to be impeded in going about the ordinary conduct of their affairs.[156]

In *Commissioner of Police v Da Costa-Reidel* ('*Da Costa-Reidel*'), organisers of a march to protest coal mining intended to use a major thoroughfare in Sydney's inner west.[157] Unfortunately, the date chosen for the procession coincided with an annual Mardi Gras celebration that typically drew 80,000 people to the park where the march would conclude.[158] Davies J prohibited the assembly because of unacceptable disruption:

> It would involve re-routing a number of bus routes on a day when there can be expected to be an increased demand for public transport in that area. It would greatly add to the traffic problems … when parking and traffic movement will already be considerably stretched. It will impede the passage of emergency vehicles, particularly ambulances that are likely to be in higher demand.[159]

If organisers reject the Commissioner's offer of a reasonable and less disruptive alternative route, then that may also weigh against authorisation.[160]

---

[153] *Bainbridge* (n 93) 232 [27].
[154] See, eg, *Folkes* (n 96) [55]–[56], [58].
[155] *Langosch* (n 96) [31].
[156] *Bassi* (n 7) [20].
[157] *Da Costa-Reidel* (n 135).
[158] Ibid [13].
[159] Ibid [24].
[160] *Bainbridge* (n 93) 233 [33].

Courts rightly emphasise that disruption must be very serious to overcome the public interests in free speech and assembly. In *Bassi*, Fagan J said that disruption '[u]sually … can readily be accommodated to the holding of large demonstrations for a few hours at a time, and usually the balance would strongly favour permission for people to conduct a public gathering'.[161] Similarly, in *Bainbridge* Adams J noted that 'a certain degree of disruption and public inconvenience is the price that we must pay as a free society to enable fundamental rights to be exercised'.[162] This remains so 'even where substantial inconvenience might be caused to members of the public, and perhaps substantial costs involved'.[163] And in *Langosch*, Adamson J rightly refused to prohibit an assembly that would result in 'aggravation and a risk of danger caused by the added pedestrian traffic on the footpath and the likely spillage of pedestrians onto the road', as well as 'significant disruption to the routines of many commuters on a single evening and delaying their arrivals home by minutes if not hours'.[164]

Courts err when proposed assemblies are prohibited for trifling inconveniences. *Plumb v Commissioner of Police* ('*Plumb*') is the clearest example where free speech and assembly were outweighed on the slimmest of reasons.[165] An environmental activist intended to protest wood chipping outside Parliament on Macquarie Street in central Sydney between noon and 2pm on a Tuesday.[166] As well as 15 dancers and singers and about 100 attendees, there was to be 'one vehicle, or float, set up as a model woodchip-fired power station' to be parked on the footpath, requiring the closure of one lane of car traffic for about 30 metres to allow pedestrians to walk around the vehicle.[167] For Barr AJ, the 'difficulty' was not safety; rather, it was 'interference' caused to vehicles and pedestrians.[168] 'I do not think', said Barr AJ, having regard to the time and day proposed, 'that the court should authorise this assembly whilever it contains a proposal for the use of a vehicle on the Macquarie Street footpath'.[169]

The Commissioner has recently suggested that the availability of reasonable and less disruptive alternative modes of expression weighs in favour of prohibition. In *Gray* and *Commissioner of Police v Holcombe* ('*Holcombe*'), two cases where the coronavirus pandemic loomed over the application for a prohibiting order, the Commissioner argued that moving the protest online would realise organisers' objectives. In *Gray*, Adamson J rejected that submission; self-evidently the organiser was not content to rely solely on social media.[170] Her Honour also observed that a public demonstration is 'a powerful method' of advocacy and engenders solidarity for those coalescing around the cause.[171] In *Holcombe*, however, the Commissioner's submission was more

[161] *Bassi* (n 7) [20].
[162] *Bainbridge* (n 93) 232 [28].
[163] Ibid.
[164] *Langosch* (n 96) [31], [34].
[165] *Plumb v Commissioner of Police* (Supreme Court of New South Wales, Barr AJ, 28 May 2010) ('*Plumb*').
[166] Ibid [5].
[167] Ibid.
[168] Ibid [16]–[17].
[169] Ibid [18].
[170] *Gray* (n 7) [59].
[171] Ibid.

thoroughly developed. Bellew J agreed that alternative modes of expression — contacting politicians directly, campaigning on social and mass media, preparing and presenting a petition, and holding a virtual gathering — would be just as effective as a physical public assembly.[172] Distinguishing *Gray*, Bellew J said that this organiser was not limited to social-media platforms, and that 'the alternative to the proposed assembly is not silence'.[173]

The argument that a physical public assembly can be prohibited because organisers' objectives are equally achievable online raises nuanced questions about the independent value of freedom of assembly (separate from freedom of expression) and the connection between our physical and digital presences and relations.[174] It's impossible here to interrogate these interesting issues. Suffice it to say that the freedoms of expression and assembly ordinarily include the freedom to select the modes of expression and assembly. It bears emphasising that COVID-19 was crucial to the balancing exercise in both *Gray* and *Holcombe*, because, read in isolation, Bellew J's reasons in *Holcombe* about alternative channels of communication could always be deployed against authorising any public assembly. Without the acute public-health risks created by the coronavirus, it would be remarkable and alarming if the Commissioner or the Court could simply reject an organiser's intention to physically assemble on the basis that online activities are just as effective.

(d) Maintaining Bystander Control over Exposure to Ideas

The two early cases dealing with SWARC rallies, *Willis* and *Allen*, emphasised that the proposed assemblies would be an affront to participants and spectators of the Anzac Day marches. The central theme of Lee J's judgment in *Willis* is that the SWARC procession 'would be an affront to many', 'a slur on the marchers and their dead comrades', a 'provocation', and 'liable to give rise to great resentment'.[175] In *Allen*, Hunt J said that the SWARC assembly and procession 'are likely to cause grave offence, and … are likely to constitute a massive affront, to those who are about to participate in or to view the Anzac Day March'.[176] Importantly, in *Willis* Lee J based the prohibiting order on the likelihood of a breach of the peace. In *Allen*, Hunt J did not.

Allen is best read as a captive-audience case. Although Hamilton J in *Gabriel* interpreted *Allen* as a case of affront 'with a potentiality for feelings to erupt into acts of violence',[177] Hunt J specifically 'rule[d] out any real prospect that breaches of the peace will in fact occur as a result of the provocation'.[178] Rather, the decisive

[172] *Holcombe* (n 6) [65].
[173] Ibid [66]–[67].
[174] See, eg, Michael Hamilton, 'The Meaning and Scope of "Assembly" in International Human Rights Law' (2020) 69(3) *International and Comparative Law Quarterly* 521, 525–34, 552–6. I am grateful to Rayner Thwaites for pressing the distinction between the freedoms of expression and assembly.
[175] *Willis* (n 112) 3, 4, 8, 11.
[176] *Allen* (n 1) 252.
[177] *Gabriel* (n 72) 568 [7].
[178] *Allen* (n 1) 254.

consideration in *Allen* was that participants in, and spectators of, the Anzac Day march — who would themselves be participating in an authorised public assembly — would not be able to avoid SWARC's procession. Ordinarily, observed Hunt J:

> the rights of other members of the community are in no way affected by the expression of views with which they disagree or which are offensive to them or by which they are affronted. If those views are expressed visually, they are not obliged to read them. If the views are expressed orally, they are free to move away. That is the choice open to them in a democracy. But that is not the situation here. What [SWARC] proposes to do here is to take advantage of the presence of the crowds gathered to watch the traditional Anzac Day March to express their views in a dramatic and an unmistakable way which cannot be ignored.[179]

Therefore, '[i]t is not just a question of other members of the community reacting strongly to the exercise by the members of [SWARC] of their democratic right of freedom of speech and assembly'.[180] Rather, the participants and spectators of the Anzac Day March 'are not free to move away from the procession by [SWARC] in order to avoid offence or affront without unnecessary interference with their own very special democratic rights which they wish to exercise'.[181]

The emphasis placed in *Willis* and *Allen* on offence and affront is disconcerting. Both judges emphasised the importance of Anzac Day in Australia. 'It is for many', said Lee J, 'an emotional event of deep personal significance'.[182] 'Evidence is not needed,' said Hunt J, 'to establish or to underline the solemnity which surrounds the traditional Anzac Day March'.[183] And despite some fleeting statements to the contrary,[184] evidently Lee J and Hunt J were themselves offended and affronted by the proposed SWARC rallies. Both Lee J and Hunt J likened the proposed assemblies to crashing a funeral. Lee J said it was as 'if mourners in a funeral procession honouring a loved one were joined by strangers proclaiming their grief for another'.[185] Hunt J went further, saying that it is 'akin to the invasion of a widely attended public funeral or memorial service by a group of strangers making allegations in a prominent way that the deceased was an habitual rapist'.[186] His Honour was inclined 'to remind [SWARC] of the dictates of common decency and good taste'.[187]

Judges should refrain from expressing disapproval of the subject or manner of a proposed assembly. The reasons for authorising or prohibiting a proposed assembly should be expressed, so far as possible, content neutrally. There may be nothing wrong with issuing a prohibiting order because violence is likely or because bystanders would not be able to avoid an unwelcome message. But it is wrong to issue

---

[179] Ibid 251.
[180] Ibid 252.
[181] Ibid.
[182] *Willis* (n 112) 3.
[183] *Allen* (n 1) 249.
[184] *Willis* (n 112) 12.
[185] Ibid 4.
[186] *Allen* (n 1) 252.
[187] Ibid 253.

an extraordinary condemnation of a proposed assembly as offensive or an affront. First, concepts like 'offence' and 'affront' are subjective and malleable. A judge's idiosyncratic assessment that a proposed assembly is likely to cause offence or affront should not figure, even incidentally, in reasons relating to an authorising or prohibiting order. Second, yesterday's affront can be today's dogma: 'time has upset many fighting faiths'.[188] Reflecting on this pair of decisions from the early 1980s, and frankly recognising the scourge of wartime sexual violence, it is difficult to understand why SWARC was refused the weak protection of authorisation.

(e) Privacy

If a proposed assembly targets an individual — as in *Rintoul*, where the planned assembly included a protest against the federal government's refugee policy at the home of Philip Ruddock, Minister for Immigration — then the privacy interests of the targeted individual weigh in favour of granting the Commissioner's application for a prohibiting order. Notably, *Rintoul* is the rare case where a court rejected the Commissioner's application. Simpson J was primarily influenced by two considerations: the low likelihood of a breach of the peace and 'the lack of any significant consequences of making an order'.[189] In *Gabriel*, Hamilton J issued a prohibiting order in respect of a withdrawn notice for a public assembly in the vicinity of a police officer's home. The organiser and the officer had an acrimonious history: the organiser had been arrested for, charged with, and eventually acquitted (on appeal) of assault; the organiser formally complained about the officer; and the organiser believed that the officer conspired to give false evidence on the assault charge. According to Hamilton J, the 'very valid' free-speech interests were outweighed by the organiser's 'obsession about particular police officers and an absolute and spiteful determination to cause unpleasant consequences for those officers'.[190] The organiser was 'motivated in large part not by principle but by vindictive personal spite'.[191]

In general, an organiser's spite of itself should not weigh in favour of a prohibiting order. This is apparent from *Cheng v Tse Wai Chun*, where the Hong Kong Court of Final Appeal held that, at common law, spite or ill-will *simpliciter* is insufficient to rebut the defence of fair comment in defamation.[192] Lord Nicholls of Birkenhead NPJ delivered a judgment that attracted unanimous and unqualified agreement; and his Lordship's explanation that spite should not, without more, defeat a fair-comment defence can be applied here.[193] The purpose and importance of the permit scheme are inconsistent with its immunity being restricted to assemblies organised for particular reasons or purposes, some being regarded as proper, others not. The permit scheme, and the values of free speech and assembly which give it life, are intended to protect

[188] *Abrams v United States*, 250 US 616, 630 (1919) (Holmes J dissenting).
[189] *Rintoul* (n 75) [23].
[190] *Gabriel* (n 72) 571 [15].
[191] Ibid.
[192] (2000) 3 HKCFAR 339.
[193] Ibid 352–4 (Lord Nicholls of Birkenhead NPJ, Li CJ agreeing at 345, Bokhary PJ agreeing at 346, Ribeiro PJ agreeing at 346, Sir Denys Roberts NPJ agreeing at 346).

even spiteful comments. Liberty to make such comments, genuinely held, on matters of public interest lies at the heart of the permit scheme. That is the very object for which the permit scheme exists. There is an important qualification: proof that an organiser is actuated by spite may be evidence from which to infer that violence is likely. But an organiser's spite should not form a standalone ground for prohibiting an assembly.

(f) Public Health

During the COVID-19 pandemic, outdoor public gatherings have been restricted for fear that they will turn into superspreading events. On 18 March 2020, the Minister for Health and Medical Research made the first of many orders that limited public assemblies in response to COVID-19. Each order has been made under s 7 of the *Public Health Act*. If the Minister 'considers on reasonable grounds' that there is a public-health risk, then s 7(2)(b) empowers the Minister to 'by order give such directions … as the Minister considers necessary to deal with the risk and its possible consequences'. If a person is subject to, and has notice of, the relevant order, then it is an offence to fail to comply without reasonable excuse.[194] The various orders set the following upper limits applicable to outdoor public protests in Sydney from 18 March 2020 to 12 September 2021 (excluding limits targeted at specific local government areas):

18 March 2020 at 5pm until 30 March	500
31 March until 14 May	2
15 May until 12 June	10
13 June until 22 October	20
23 October until 6 December	500
7 December until 2 January 2021	3,000
3 January until 28 March	500
29 March until 26 June at 7:08pm	5,000
26 June at 7:08pm until 9 July at 5pm	10
9 July at 5pm until 12 September	2

Public protests were first expressly mentioned in the order that commenced 23 October 2020. The limits imposed in June 2021 responded to an outbreak of the highly

[194] *Public Health Act* s 10.

contagious Delta variant.[195] After 12 September 2021, the upper limit on participants in an outdoor public gathering varied according to vaccination status.[196]

In 2020, the Commissioner brought seven applications for a prohibiting order. The first related to an intended protest in Sydney 'to remember the deaths in similar circumstances of David Dungay, in Long Bay Jail, Sydney, on 29 Dec 2015, and George Floyd, on the streets of Minneapolis, USA, on 25 May 2020'.[197] Three other applications related to proposed assemblies in support of BLM; the remaining three related to refugee rights, transgender rights, and higher education. The judges who determined the Commissioner's applications for prohibiting orders framed the issue as one of balancing organisers' rights to free speech and assembly against the public-health risk that large public gatherings would spread COVID-19.

The Court's approach can be characterised as deferring to public-health experts and government policy. At first instance in *Bassi*, the state's Chief Health Officer testified that large protests increase the risk of community and asymptomatic transmission and complicate contact tracing. Fagan J thought that the relevant public-health order — which at that time limited public gatherings to ten people — 'reflects, very currently, the professional view of those who take responsibility for the government adopting appropriate measures in the interests of community health'.[198] To authorise the proposed assembly 'would amount to defiance of a judgment that has been made by ministers of the government — and the public health officials who advise them — in the interests of the safety of all'.[199] In *Kumar*, which concerned a planned BLM protest in Wollongong of about 500 people, Lonergan J emphasised that 'individuals and organisations whose job it is to protect public health and safety hold a genuine, well-evidenced concern that a planned gathering has a risk that will undo the good work by the people of New South Wales'.[200]

In the result, an expert assessment that the risk of transmission at the proposed assembly is 'low' is necessary, but not sufficient, to refuse the Commissioner's application for a prohibiting order. In *Supple*, where the Refugee Action Coalition planned a 200-person protest in Sydney, the Chief Health Officer regarded the risk of transmission as low. Nevertheless, Walton J prohibited the assembly 'because of the infectious nature of the virus and the grave consequences of further transmission'.[201] *Kumar* was a rerun of *Supple*: Lonergan J acknowledged the 'very low' risk of asymptomatic transmission but prioritised the 'potentially extreme' consequences

[195] Ministry of Health (NSW), 'NSW Public Health Alert – COVID-19 Case' (Media Release, 16 June 2021); Ministry of Health (NSW), 'COVID-19 Weekly Surveillance in NSW: Epidemiological Week 24, Ending 19 June 2021' (Report, 28 June 2021) 7.
[196] *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) Amendment (No 7) Order 2021* sch 1 item 20.
[197] *Bassi v Commissioner of Police (NSW)* (2020) 283 A Crim R 186, 191 [19].
[198] *Bassi* (n 7) [27].
[199] Ibid [33].
[200] *Kumar* (n 7) [2].
[201] *Supple* (n 7) [39].

were that risk to be realised.[202] Predictably, the Commissioner's application was granted where the unchallenged expert testified that the transmission risk is 'medium' (as in *Gibson*) or 'not insubstantial' (as in *Holcombe*).[203]

The Court rejected the Commissioner's application for a prohibiting order twice during the pandemic.[204] In *Gray*, Adamson J stressed that the expert's unchallenged opinion was that transmission risk is low, that time was of the essence for BLM to capitalise on international momentum, that a similar protest the previous month had observed social distancing, and that public-health restrictions on gatherings had recently relaxed.[205] In *Thomson*, Cavanagh J rejected the Commissioner's application to prohibit a proposed assembly of about 100 people in a large open park. His Honour stressed that both experts agreed that transmission risk is low, that the assembly was only open to certain union members (it had not been advertised publicly), and that the organiser had adopted a COVID-19 safety plan.[206]

There are two features of these protest-in-a-pandemic cases that call for comment. First, counsel's arguments and the Court's judgments assume that public health is monolithic and exhausted by COVID-19. But public health is protean and multi-faceted. Everyone accepts (or should accept) that COVID-19 transmission is an urgent public-health issue. It is not the only one. Indigenous deaths in custody, and racially motivated violence against Black people, are also urgent public-health issues. The balancing exercise, then, is not simply public health versus free speech. Rather, it is necessary to interrogate precisely *which* public-health interests oppose the exercise of organisers' speech and assembly rights.

The second feature is the role of expert evidence. In an apparent first for permit-scheme proceedings, third-party expert witnesses testified.[207] The experts were gatekeepers. The door to authorisation could swing open only if the experts uttered the magic words, 'low risk'. The expert characterisation of transmission risk is highly probative. But the cases make it difficult to confidently assert that the expert's assessment is not determinative. If a prohibiting order is always justified when the transmission risk is more than 'low', then the rights of speech and assembly are subordinated to that risk. The ultimate question that the Court must decide — whether organisers' rights to free speech and assembly are outweighed by other public interests — is legal, not factual. Under the statute, the Court is required to undertake a case-specific balancing task. Transmission risk should not enjoy categorical priority over all else.

---

[202] *Kumar* (n 7) [3].
[203] *Gibson* (n 7) [82], [84]; *Holcombe* (n 6) [57].
[204] *Gray* (n 7); *Thomson* (n 7). An appeal was successful in *Bassi* but on narrow notice grounds: *Bassi v Commissioner of Police (NSW)* (2020) 283 A Crim R 186.
[205] *Gray* (n 7) [63], [66], [69].
[206] *Thomson* (n 7) [79], [85], [86], [90]–[92].
[207] In *Jackson*, a police officer who testified for the Commissioner was an expert in crowd control but not a third party. *Jackson* (n 112) [79]. See also Martin (n 8) 5–6.

This is not to argue that every proposed assembly during the pandemic should be authorised. The judicial caution to authorise these public assemblies was understandable. As *Supple* and *Kumar* recognised, the realisation of a concededly small transmission risk could have serious repercussions. No judge would want to authorise an assembly that turns into a superspreading event, particularly when COVID-19 cases in Australia had been so low by global standards. It's also important that an analysis of the protest-in-a-pandemic cases does not fall prey to hindsight bias. Our possession of outcome knowledge — that the number of COVID-19 cases in New South Wales remained relatively low throughout 2020 — may lead us to underestimate the difficulty of transmission-risk assessment at the time. Finally, it must be acknowledged that judges decided these applications under non-ideal conditions. The decisions had to be made quickly, based on necessarily incomplete (and dynamic) scientific data. The only points are that the balancing task should be conducted with analytical precision and that wholesale deference to government experts might abnegate the judicial function.

III. The Puzzle and the Signal of the Permit Scheme

The permit scheme confers a wide judicial discretion which produces a narrow legal order. That order, however, has extra-legal significance. Many judges have observed that the statutory balancing task is difficult and weighty. And many judges have observed that the effect of an authorising or prohibiting order is limited. In *Ridgewell*, Hidden J noted that a prohibiting order 'has a limited effect' and yet 'the power to make the order involves the exercise of a broad discretion'.[208] The enduring puzzle of the permit scheme is the disconnect between the sweeping nature of the judicial inquiry and the admittedly limited effect of authorisation or prohibition.

Consider Hunt J's oft-cited statement in *Allen* that many (perhaps most) prohibiting orders would be based on a finding of likely violence.[209] But if an authorised public assembly turns violent, then police enjoy the full complement of their powers. Authorisation says nothing about police powers to quell violence. It has been repeatedly emphasised, ever since the Attorney-General's second-reading speech in 1979,[210] that authorisation does not immunise acts of violence or vandalism.[211] If authorisation leaves utterly untouched police powers vis-à-vis violence, then why is the likelihood of violence a relevant consideration?

The statutory scheme, as judges have often repeated, is silent on the criteria for authorising or prohibiting a proposed public assembly.[212] Even so, the judicial formulation of criteria for exercising a statutory discretion should be precisely tailored to that discretion. That is all that the statutory language empowers judges to do. The

[208] *Ridgewell* (n 98) [4].
[209] *Allen* (n 1) 250, cited by *Rintoul* (n 75) [7], [23]; *Langosch* (n 96) [22]; *Ridgewell* (n 98) [6]; *Jackson* (n 112) [18]; *Da Costa-Reidel* (n 135) [21].
[210] New South Wales, *Parliamentary Debates*, Legislative Assembly, 19 April 1979, 4677.
[211] See, eg, *Rintoul* (n 75) [24].
[212] See, eg, *Allen* (n 1) 250.

permissible considerations for authorisation or prohibition should be limited to criteria relevant to whether participants in the proposed assembly should enjoy immunity under s 24: is it appropriate that participants be immunised from unlawful-assembly or traffic-obstruction offences for acts or omissions done only for the purpose of participating in the assembly? The judge would decide whether it is appropriate that participants be able to march on roads otherwise reserved for motor vehicles, say, or whether it is appropriate that participants be permitted to air their political grievances even though the assembly might contravene a public-health order. Instead, judges have arrogated to themselves the capacity to consider an extensive range of criteria, including fundamental political rights, when the most dramatic outcome is merely that participants are rewarded with a meagre criminal immunity.

The imprudence of the judicially framed balancing task is borne out in three ways. First, it simultaneously validates statements about free speech that are unnecessary and holdings that free speech is easily outweighed. It's remarkable, for example, that in 2020 two judges said that the relevant COVID-19 public-health order — which, notably, was not legislation that ran the gauntlet of bicameralism — deferred wholesale the rights of speech and assembly.[213] Such sweeping statements should not be necessary in reasons on permit-scheme applications but are possible because the judicial task is so expansive. At the same time, the limited ambit of the permit scheme seems to validate decisions where trifling traffic issues (*Plumb*) or organiser spite (*Gabriel*) were important factors in defeating fundamental rights. Just as Simpson J in *Rintoul* was 'influenced by the lack of any significant consequences' of authorisation,[214] other judges appear to similarly regard prohibition, so that paltry factors are said to outweigh the rights of speech and assembly.

Second, the very fact that the balancing task is unconstrained is troubling. The absence of express statutory criteria creates a risk, realised in some of the cases, that the Court will authorise or prohibit a proposed assembly based on its message. Indeed, the rampant discretion practically dares the Court to prohibit a proposed assembly based on its content. Judicial disapproval of an assembly's message can be explicit, as when it is said that the assembly would cast a grave slur on those who should be honoured (*Willis* and *Allen*), or thinly veiled, as when it is said that members of the community would not support the assembly's message (*Jackson*). Moreover, the untrammelled discretion frees the Court from its prior decisions. In *Holcombe*, Bellew J said that '[a]s a general proposition, limited assistance is to be gained from any [prior] decisions', 'because the facts and circumstances of cases necessarily differ'.[215] To appropriate Isaacs J's phrase, the Court may, within the ambit of the permit scheme, authorise an Oddfellows' assembly today and in precisely similar circumstances prohibit the Foresters tomorrow.[216]

---

[213] *Bassi* (n 7) [31]; *Kumar* (n 7) [57]. It is not entirely clear whether Walton J also agreed. *Supple* (n 7) [42].
[214] *Rintoul* (n 75) [23].
[215] *Holcombe* (n 6) [38].
[216] *City of Melbourne v Barry* (1922) 31 CLR 174, 198.

Finally, the judicially divined balancing task encourages organisers, the public, and the media to infuse a permit-scheme decision with a significance it was not designed to bear. In *Allen*, Hunt J thought that the statutory language ('prohibit') misleads litigants, the public, and the media by suggesting that the Court has 'power to prevent members of the public exercising their precious democratic rights'.[217] Similarly, there is striking video of an organiser's reaction to the Court of Appeal in *Bassi* authorising, with 15 minutes to spare, the 20,000-strong BLM march in central Sydney on 6 June 2020. From Town Hall steps, the organiser shouts through a megaphone to the crowd: 'Breaking news, live, now, from the Supreme Court. THE PEOPLE CAN MARCH!'[218] Examples can be multiplied of media reports claiming, for example, that the Court 'banned' a protest.[219] These statements are incorrect as a matter of law. But plainly the legal effect of an authorising or prohibiting order does not exhaust its broader social significance.

In an important respect, the public and the media have discovered, maybe partly constructed, a symbolic truth in their misstatement of the technical legal effect of an authorising or prohibiting order. The extra-legal function of an authorising or prohibiting order is an admittedly noisy signal.[220] The content of the signal depends on whether the Court has 'authorised' or 'prohibited' the proposed assembly. An authorising order serves as a practical passport. It confers a weak legal immunity, but a relatively strong practical immunity, on public-assembly participants. Police are more cautious exercising their powers when a public assembly has been authorised. Similarly, a prohibiting order serves as a practical passport for police, lending the imprimatur of a Court order to the unfettered exercise of all police powers and ensuring that officers are not inhibited by the immunity that protesters might otherwise enjoy.[221] The public and the media are right, then, to interpret an authorising order as carrying an *approval* signal and a prohibiting order as carrying a *censorious* signal. It could hardly be otherwise, considering the ordinary, plain meaning of the statutory language. So much is acknowledged by Schmidt J in *Jackson* that refusing the Commissioner's application for a prohibiting order 'might have given encouragement to behaviour' that, at least in her Honour's view, should be discouraged.[222]

---

[217] *Allen* (n 1) 245. See also Handley (n 3) 291.

[218] Kevin Nguyen, 'Enormous Crowds March in Sydney Black Lives Matter Protest After Last-Ditch win in Court of Appeal', *ABC News* (online, 6 June 2020) <https://www.abc.net.au/news/2020-06-06/arrests-at-sydney-black-lives-matter-protests/12329066>.

[219] For an early example, see 'Croatian March Banned, but Expected to Proceed', *The Sydney Morning Herald* (Sydney, 29 November 1980) 11. For a more recent example, see Elizabeth Colman and Patricia Karvelas, 'Court Allows Protest Rally at Ruddock's Home', *The Australian* (Sydney, 19 July 2003) 6.

[220] For a particularly noisy signal, witness the *Bassi* appeal. The Court of Appeal was at pains to emphasise that its decision emphatically 'did not … turn on a difficult weighing exercise' but instead on 'very narrow' notice issues: *Bassi v Commissioner of Police (NSW)* (2020) 283 A Crim R 186, 187–8 [7]. Yet the public and the media (among others) wrongly viewed the appellate decision as a substantive validation of the protest. I am grateful to Anne Twomey for pressing this point.

[221] *Folkes* (n 96) [57]; Handley (n 3) 291; Douglas (n 3) 116.

[222] *Jackson* (n 112) [96].

The approval or censorious signal conveyed by an authorising or prohibiting order is illustrated by the rigour of the subsequent exercise of police power. Consider, first, the SWARC rallies in 1983 and 1984 that proceeded despite the prohibiting orders issued in *Willis* and *Allen*. In 1983, the silent and nonviolent procession was halted by a police line and eight paddy wagons.[223] Police deployed the Tactical Response Group and the Special Branch.[224] By loudhailer, a Chief Superintendent announced:

> Your application for a march has been before a court of law. Not only was your application rejected but prohibited. Any person continuing with this march will be arrested and charged with serious affront.[225]

Police used the prohibiting order to justify the forceful exercise of substantive powers to disperse the procession; the robust exercise of those powers was directly and expressly linked to the prohibiting order. The substantive powers selected for that purpose were not based on a traffic-obstruction or unlawful-assembly offence, as might be expected given the effect of the prohibiting order. Rather, police arrested and charged more than 160 marchers, out of a total of around 200, for conduct likely to cause reasonable persons to be seriously alarmed or seriously affronted.[226] Eventually, in a test case, the Supreme Court held that a Magistrate had not erred in dismissing the charge against an organiser,[227] and no charge against any participant was substantiated.[228] In 1984, police again deployed the Special Branch and about 300 members of the Tactical Response Group, with five large police vans.[229] But no arrests occurred because the SWARC marchers avoided confrontation by 'very slowly turning their backs on the waiting police' and reversing course.[230]

Second, take the protest that was authorised because the Commissioner's application for a prohibiting order was rejected in *Rintoul*. About 200 protesters marched from the local train station to the street where the federal Minister for Immigration lived.[231] They were met by a police barricade 50 to 100 metres from the Minister's front yard, preventing access to the area of the street immediately adjacent to his home. Protesters objected that the police line frustrated the decision in *Rintoul*. Police countered that the notice of assembly specified only the street where the Minister lived, not his exact

---

[223] Meredith Burgmann, 'The Women Against Rape in War Collective's Protests Against ANZAC Day in Sydney, 1983 and 1984' (2014) 6 *Cosmopolitan Civil Societies Journal* 116, 119.

[224] Matthew Odlum, '168 Arrested as Women Defy "No March" Order', *The Sydney Morning Herald* (Sydney, 26 April 1983) 3.

[225] *Connolly v Willis* [1984] 1 NSWLR 373, 375; Chris Ronalds, 'Anzac Day and the Aftermath' (1983) 8 *Legal Service Bulletin* 133, 133; Douglas (n 3) 63 n 114.

[226] *Offences in Public Places Act 1979* (NSW) s 5, later amended by *Offences in Public Places (Amendment) Act 1983* (NSW) sch 1 item 1; Ronalds (n 225) 133; Kate Harrison, '"What Did You Do in the War, Mummy?": Supreme Court Order' (1983) 8 *Legal Service Bulletin* 132, 133.

[227] *Connolly v Willis* (n 225).

[228] Burgmann (n 223) 120.

[229] Karen Cooke, Report on the Sydney Women Against Rape March, *The Age* (Melbourne, 26 April 1984) 4.

[230] Rosalind Reines, 'Sydney Anti-Rape March Peaceful', *The Sydney Morning Herald* (Sydney, 26 April 1984) 3.

[231] The description in this paragraph is based on: Angela Cuming and Andrew West, 'Disorder at the House', *The Sun Herald* (Sydney, 20 July 2003) 20; Joe Hildebrand, 'Violence as Police Barricade Marchers from Ruddock's Home', *AAP General News* (Sydney, 19 July 2003), Factiva Accession No AAP0000020030720dz7j0000c.

address. Despite this confrontation and the scuffles that broke out when some protesters tried to breach the police line, only three arrests occurred. Two arrestees were released without charge and the third was charged with assaulting police. A reasonable inference is that police would have arrested more protesters had *Rintoul* been decided differently.

The third and final illustration compares the police response to two BLM protests, one authorised and one prohibited. The BLM protest on 6 June 2020 (the subject of the *Bassi* litigation) was prohibited at first instance the prior evening but authorised on appeal barely 15 minutes before it commenced. By its own account, New South Wales Police 'rapidly changed plans': although '[h]igh-visibility policing operations' were launched on the strength of the initial prohibition order, these pivoted, in response to the last-minute authorisation, to 'facilitate planned protests' and 'ensure the event would run smoothly'.[232] The authorised protest had 20,000 attendees; only three were arrested.[233] By contrast, the BLM protest on 28 July 2020 (the subject of the *Gibson* litigation) was prohibited two days earlier and an appeal was unsuccessful. About 40 protesters turned up; six were arrested.[234] Undeterred by the low turnout, New South Wales Police had launched a 'high-visibility police operation' manned by several hundred general-duty officers, the Public Order and Riot Squad, Police Transport Command, Traffic and Highway Patrol Command, and the Mounted and Dog Units.[235]

Importantly, it is the Court itself, in virtue of the judicially crafted balancing task, that encourages the extra-legal signals that are in fact carried by authorising and prohibiting orders. The wide discretion that the Court exercises takes basic public interests as substantive inputs, at the very least, free speech, free assembly, violence minimisation, disruption minimisation, bystander autonomy, privacy, and public health. The substantive inputs into the balancing inquiry manifest in the output, that is, in the signal that is generated by granting or refusing a permit. If the Court makes a substantive judgment about whether free speech and assembly outweigh, or are outweighed by, other public interests, then the litigants, the public, and the media are entitled to rely on, and assign significance to, that substantive judgment. They are, in short, entitled to take the Court at its word. The discretion that the Court exercises therefore lends credence to, and perhaps validates, the approval or censorious signal that a permit-scheme order conveys.

IV. CONCLUSION

This article examined the permit scheme found in Part 4 of the *Summary Offences Act 1988* (NSW). The fascinating cases decided in 2020 at the intersection of BLM and

---

[232] NSW Police, 'Police Operations Conclude Following Protests Across NSW' (Latest News, 6 June 2020), archived at <https://perma.cc/MSG3-2A6U?type=image>.

[233] Ibid.

[234] Laura Chung, 'Black Lives Matter Protest Over Before It Began', *The Sydney Morning Herald* (Sydney, 29 July 2020) 6.

[235] Ibid; NSW Police, 'Six Arrested During Unauthorised Public Assembly – Sydney CBD' (Latest News, 28 July 2020), archived at <https://perma.cc/L8T4-TJ47?type=image>.

COVID-19 shone a spotlight on the permit scheme. The Court has been exercising a very wide discretion to make narrow orders for 40 years. Candidly, the Court's reasoning over that time has been a mixed bag. Yet a decision to authorise or prohibit a planned public assembly, although of limited legal consequence, takes on symbolic import. The permit scheme has a prominent signalling function.

The bulk of this article is necessarily critical; the constructive work awaits. It would be premature now to offer concrete proposals for reform. But some general and tentative forward-looking thoughts are possible. First, the statute's criteria-less discretion is antithetical to the freedoms of speech and assembly because it can function as a content-based regulation. Carefully drafted statutory criteria might help, but reform need not wait for parliamentary intervention. Any change, regardless of form, should embody principles that promote free speech and assembly. The cautionary tale that is the Court's jurisprudence produces the following broad ideas. The Court should consider casting the onus of proof on the Commissioner who opposes an organiser's application for an authorising order. The Court should avoid assessing for itself the value of the assembly and expression at issue. Expert evidence on risks posed by a planned assembly — including, for example, expert evidence on the public-health risk of transmission of an airborne pathogen — is probative but not solely determinative. And perhaps, as a final suggestion, more a maxim than a principle: a protest indefinitely deferred is a protest denied.