

Protest law in New South Wales

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Key points

- The legal basis of the right to protest in NSW is the common law freedom of assembly. In some other jurisdictions this legal basis is statutory.
- No right to protest is expressly provided by the Australian or NSW Constitutions. However, public assemblies are protected by the implied freedom of political communication under the Australian Constitution because they are an essential form of political communication.
- In NSW, there are public assembly provisions under Part 4 of the *Summary Offences Act 1988*. They establish a process for consultation between police and protesters, and for applying to a court to issue authorisation or prohibition orders for public assemblies.
- A public assembly that occurs without an authorisation order is not illegal. But an authorisation order does provide protesters with a limited protection against offences such as obstruction. A prohibition order does not prohibit a protest or affect the common law right to assembly; it withholds the limited protection that an authorisation order provides.
- There are significant differences between Part 4 of the *Summary Offences Act 1988* and the *Peaceful Assembly Act 1992* (Qld) in terms of their approaches to public assemblies; with the Queensland legislation expressly recognising the right to peaceful assembly and providing greater guidance on interpretation.
- A diverse range of offences can apply to protest activity in NSW, many of which apply generally and are not exclusive to protests. These offences include obstruction of roads, trespass, damage to property, riot, or incitement of violence.
- Police powers relevant to protesters in NSW include common law powers to deal with breaches of the peace. Special powers under the *Law Enforcement (Powers and Responsibilities) Act 2002* enable police to respond to public disorders.
- Section 214A of the *Crimes Act 1900* prohibits causing damage or serious disruption to a 'major facility' in NSW, such as a port or railway station. Environmental activists challenged the constitutional validity of this section, and the Supreme Court found some sub-sections were invalid because they infringed the implied freedom of political communication under the Australian Constitution.
- Several other states in recent years have enacted legislation affecting protest activity.

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1. Introduction

There is no explicit statutory right to protest in NSW. Rather, in NSW the legal basis for what is popularly referred to as the right to protest is the common law freedom of peaceful assembly.¹ The freedom of peaceful assembly is supported by the implied freedom of political communication that the High Court has identified in the Australian Constitution and which can invalidate laws that impermissibly restrict protests.

Although the right to protest is not itself ‘enshrined’ in legislation in NSW, there are many relevant statutory provisions that relate to protests. Part 4 of the *Summary Offences Act 1988* facilitates the exercise of the common law right to peaceful assembly by encouraging mutual co-operation between protesters and police. During this process, the organiser can apply for an authorisation order, while police can apply for a protest to be prohibited. Judicial decisions which have applied and interpreted the provisions of Part 4 are considered in this paper.

It is important to clarify that protest organisers are not automatically acting illegally in holding a protest, march or demonstration that has not been authorised, or even one which has been prohibited, under Part 4. Protesters still retain and can exercise the common law right to protest independently of Part 4. But, depending on the circumstances, their conduct may contravene a number of laws, such as obstructing traffic.

The purpose of this paper is to support a better understanding of a complex and contested area of the law and to provide an account of recent developments. The paper considers contrasting approaches to the legal basis for the right to protest in Queensland, which provides an express legislative right to peaceful assembly; and in Victoria and the ACT, which expressly provide for a right to peaceful assembly in their human rights charters. Relevant statutory provisions of the remaining Australian jurisdictions are also outlined.

There are limitations on the right to protest. This paper focuses on criminal offences that can be charged in relation to protests in NSW, including under the *Summary Offences Act 1988*, *Crimes Act 1900*, *Inclosed Lands Protection Act 1901*, *Roads Act 1993*, *Forestry Act 2012*, *Mining Act 1992* and the *Law Enforcement (Powers and Responsibilities) Act 2002*. It also discusses special police powers that can be used in cases of public disorders.

In 2022 section 214A of the *Crimes Act 1900*, which prohibits protests near major facilities, was challenged as being ‘unconstitutional’ in the Supreme Court of NSW. The challenge also involved an interpretation of section 144G of the *Roads Act 1993* regarding major bridges, tunnels and roads. This decision, *Kvelde v State of New South Wales* [2023] NSWSC 1560, is analysed.

¹ This paper uses the terms ‘protest’, ‘peaceful assembly’ and ‘public assembly’ interchangeably. The term ‘common law’ means ‘law made by the courts’, as distinct from statute law made by parliaments: P Alderson, *Legal Dictionary for Australians*, Second edition, 2006, McGraw-Hill, pp 43-44.

2. What is the 'right to protest'?

The 'right to protest' is 'integral to a democratic system of government and way of life'² and 'indispensable to the exercise of political sovereignty by the people of the Commonwealth'.³ Yet, despite the widely accepted importance of the right to protest, confusion exists about what 'the right to protest' actually is and what it entitles people to do. The confusion derives largely from the 'right to protest' being a popular, rather than legal, term that is often used to invoke an absolute right to all forms of activism. As the discussion of provisions in NSW, Queensland, the ACT and Victoria shows, the legal basis of the right to protest in Australia can be the common law, a statute or human rights. Irrespective of its legal basis, the right to protest is not absolute and, while it supports peaceful assemblies, it does not support all forms of activism.

2.1 In NSW the right to protest is based on the common law

In NSW, the right to protest is based on the exercise of 2 longstanding common law freedoms: principally, the common law freedom of assembly and, secondarily, the common law freedom of speech.⁴ Common law freedoms do not bestow positive rights, as they operate only to the extent that laws do not encroach upon them.⁵ This qualified nature of common law freedoms was discussed by the High Court in *Lange v Australian Broadcasting Corporation*, which said:

Under a legal system based on the common law, 'everybody is free to do anything, subject only to the provisions of the law', so that one proceeds 'upon an assumption of freedom of speech' and turns to the law 'to discover the established exceptions to it'.⁶

Due to its qualified nature, the common law freedom of assembly has been described as 'permitting that which was not prohibited'.⁷ Accordingly, the right to protest in NSW

² *Commissioner of Police v Rintoul* [2003] NSWSC 662 per Justice Simpson at [5].

³ *Brown v Tasmania* [2017] HCA 43 at [88], per Chief Justice Kiefel, Justice Bell and Justice Keane.

⁴ G Martin, *Protest, policing and law during COVID-19: On the legality of mass gatherings in a health crisis*, *Alternative Law Journal*, 2021, Vol 46(4), pp 275-281 at 275. The common law basis of the right to protest has been traced to the signing of the Magna Carta in 1215. Some of the literature on this point is discussed in: T Gotsis, *Protests and the law in NSW*, NSW Parliamentary Research Service, 2015, pp 5-7.

⁵ Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws*, December 2015, p 40.

⁶ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564, quoted in Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws*, December 2015, p 40. The quotes within the *Lange* quote are from *Attorney-General v Guardian Newspapers [No 2]* [1990] 1 AC 109 at 283.

⁷ Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws*, December 2015, p 163, citing *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105 at 126-7.

supports the peaceful assembly of persons but does not support activity that constitutes a criminal offence (as it only permits that which has not been prohibited).⁸

Activity that would constitute a criminal offence includes the intentional obstruction of roads and industrial processes, trespass, offensive conduct, offensive language, property damage, assault and physical violence.⁹ If protesters intentionally undertake such actions to oppose government policy or promote social change, the right to protest is not a legal defence to any charges they may face, irrespective of the merits of their cause and irrespective of the fact that such activism has at times led to significant social progress.¹⁰

When considering the distinction between a peaceful assembly and criminal activity, it is important to recognise that a peaceful assembly conducted in a public space by its very nature involves some incidental obstruction of other persons. This was recognised by Justice Adamson in *Commissioner of Police v Langosch*, where her Honour said that, because public spaces are shared spaces, it is 'of the nature of a protest that others will be affected and that their routines will be, at least ephemerally, interrupted.'¹¹ A current point of contention in NSW is whether the incidental obstruction caused by peaceful assemblies is being criminalised to such an extent that, in practice, the common law freedom of peaceful assembly does not permit any meaningful protest activity.

2.2 The Queensland right to protest is based on legislation

In contrast to the common law basis of the right to protest in NSW, in Queensland the right to protest is based on section 5(1) of the [Peaceful Assembly Act 1992](#) (Qld), which states that a person has the 'right to assemble peacefully with others in a public place.'¹² Section 5(2) adds that the right to peaceful assembly is '... subject only to such restrictions as are necessary and reasonable in a democratic society in the interests of: (a) public safety, or (b) public order, or (c) the protection of the rights and freedoms of other persons.' The reference to the rights of persons in section 5(2)(c) is defined in section 5(3)(b) to include the 'rights of persons to carry on business'. A reading of section 5 suggests that the

⁸ Australian Law Reform Commission, [Traditional Rights and Freedoms: Encroachments by Commonwealth Laws](#), December 2015, p 163, citing *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105 at 126–7.

⁹ The extensive range of offences relating to protests in NSW are discussed in Chapter 5 of this paper, and in: T Gotsis, [Protests and the law in NSW](#), NSW Parliamentary Research Service, 2015, pp 22–33.

¹⁰ The availability of another legal defence depends on the circumstances of each case. For a discussion of whether the legal defence of necessity can or should support climate change activism, see: M Brogan, [The necessity defence and anthropogenic global warming protests: The times they are a-changin'](#), *Alternative Law Journal*, 2021, Vol 46(4), pp 268–274. See also: J Beazley, [Climate activist Deanna 'Violet' Coco's 15-month jail sentence quashed on appeal](#), *The Guardian*, 15 March 2023. For a brief discussion of disruptive activism, including economic sanctions at the national level, that has led to social progress, see: A Naser, [Explainer: What are your rights to protest in Australia?](#) UNSW and UNSW Australian Human Rights Institute, n.d., accessed 2 June 2023.

¹¹ *Commissioner of Police v Langosch* [2012] NSWSC 499 at [33].

¹² As discussed below (at 2.3), the right to protest in Queensland is also based on human rights legislation.

statutory right to peaceful assembly in Queensland is qualified in a similar manner to NSW's common law-based right to peaceful assembly. That is, in Queensland the right to protest extends to peaceful assembly but not to activity that undermines public safety, public order or the rights and freedoms of other persons.

2.3 The ACT and Victoria take a human rights approach

The right to peaceful assembly is afforded the status of a human right in the ACT and Victoria.¹³ The relevant provisions are section 15(1) of the [Human Rights Act 2004](#) (ACT) and section 16(1) of the [Charter of Human Rights and Responsibilities Act 2006](#) (Vic). These sections are nearly identical, with both providing that all persons have 'the right of peaceful assembly'. Queensland also has a human right of public assembly.¹⁴ However, as mentioned earlier (at 2.2), Queensland also has a statutory right to public assembly. For that reason, this discussion of the human rights approach to protest law primarily focuses on the situation in the ACT and Victoria. The situation in these jurisdictions accords with the position at international law, where the right to peaceful assembly is recognised under Article 21 of the International Covenant on Civil and Political Rights (ICCPR).¹⁵

Like common law freedoms, the human right to peaceful assembly in the ACT, Victoria and at international law is not an absolute right that supports all forms of protest activity. The human right to peaceful assembly may be subject to 'reasonable limits' set by laws that can be 'demonstrably justified in a free and democratic society.'¹⁶ Additionally, human rights in Victoria may by express declaration be overridden in exceptional circumstances.¹⁷ Nevertheless, while the right to peaceful assembly is not absolute in either the ACT or Victoria, its operation is protected by additional safeguards, including safeguards against encroachment by new laws.

Table 1 provides an overview of the human rights safeguards in the ACT and Victoria, with some reference also to the situation in Queensland.

¹³ For an overview of how the human right to protest has operated in Victoria, see: Victorian Equal Opportunity and Human Rights Commission, [Protest, the policing response: Selections from the 2020 report on the operation of the Charter of Human Rights and Responsibilities](#), n.d., accessed 24 November 2023. See also: ACT Human Rights Commission website, [Right to Freedom of Association \[and public assembly\]](#), n.d., accessed 24 November 2023.

¹⁴ Section 22 of the [Human Rights Act 2019](#) (Qld). For example, the Supreme Court of Queensland in [Attorney-General for the State of Queensland v Sri & Ors](#) [2020] QSC 246 acknowledged relevant human rights including peaceful assembly (section 22) at [27], [28].

¹⁵ Article 21 of the [International Covenant on Civil and Political Rights](#) (ICCPR), United Nations, adopted 16 December 1966.

¹⁶ Section 28 of the [Human Rights Act 2004](#) (ACT) and section 7(2) of the [Charter of Human Rights and Responsibilities Act 2006](#) (Vic). Note that under Article 21 of the ICCPR the right to assembly can be limited by laws which are 'necessary in a democratic society in the interests of national security or public safety, public order ... the protection of public health or morals or the protection of the rights and freedoms of others.'

¹⁷ Section 31 of the [Charter of Human Rights and Responsibilities Act 2006](#) (Vic). Human rights in Queensland can also be overridden by express declaration in exceptional circumstances: section 43 of the [Human Rights Act 2019](#) (Qld).

Table 1: Human rights safeguards in the ACT and Victoria

Safeguard	Description
Scrutiny of new laws	<ul style="list-style-type: none"> A human rights statement of compatibility must be prepared for each bill¹⁸ In Queensland a human rights certificate must be prepared for subordinate legislation by the responsible minister¹⁹ Victoria's Scrutiny of Acts and Regulations Committee must consider all bills and statutory rules and report to parliament on whether the bill or statutory rule is incompatible with human rights²⁰ In Queensland the portfolio committee responsible for examining a bill must report on whether the bill is compatible with human rights.²¹ The Legislative Assembly may also refer a non-Queensland law to the portfolio committee for consideration of its human rights compatibility²² In the ACT the relevant Legislative Assembly committee must report on human rights issues raised by bills and subordinate legislation²³
Interpretation of existing laws	<ul style="list-style-type: none"> In so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights²⁴ The Supreme Court may issue declarations of inconsistency to which the responsible minister (in Queensland and Victoria) or the Attorney General (in the ACT) must respond to in writing and the response must be laid before parliament²⁵

¹⁸ Section 28 of the [Charter of Human Rights and Responsibilities Act 2006](#) (Vic), section 37 of the [Human Rights Act 2004](#) (ACT) and section 38 of the [Human Rights Act 2019](#) (Qld).

¹⁹ Section 41 of the [Human Rights Act 2019](#) (Qld).

²⁰ Section 30 of the [Charter of Human Rights and Responsibilities Act 2006](#) (Vic) and section 21(1)(ha) of the [Subordinate Legislation Act 1994](#) (Vic).

²¹ Section 39 of the [Human Rights Act 2019](#) (Qld).

²² Section 40 of the [Human Rights Act 2019](#) (Qld). A non-Queensland law means a Commonwealth law containing a power that has been 'referred' to the Commonwealth, or a law of another jurisdiction applying to Queensland.

²³ Section 38 of the [Human Rights Act 2004](#) (ACT). The relevant committee is the [Standing Committee on Justice and Community Safety](#).

²⁴ Section 32 of the [Charter of Human Rights and Responsibilities Act 2006](#) (Vic), section 30 of the [Human Rights Act 2004](#) (ACT) and section 48 of the [Human Rights Act 2019](#) (Qld).

²⁵ Sections 36 and 37 of the [Charter of Human Rights and Responsibilities Act 2006](#) (Vic), sections 32 and 33 of the [Human Rights Act 2004](#) (ACT) and sections 53 and 56 of the [Human Rights Act 2019](#) (Qld).

Safeguard	Description
Obligation on public authorities and entities (which include police and ministers ²⁶)	<ul style="list-style-type: none"> It is unlawful for a public authority or public entity to act in a way that is incompatible with a human right or, when making a decision, to fail to give proper consideration to a relevant human right²⁷

Source: Human rights Acts of the Australian Capital Territory, Queensland and Victoria

Like the situation in the ACT, Queensland and Victoria, jurisdictions without human rights legislation also use parliamentary committees to scrutinise bills and regulations for their compatibility with human rights. In NSW the Legislation Review Committee scrutinises bills and regulations, reporting on whether a law ‘trespasses unduly on personal rights and liberties’ and other criteria outlined in Part 3 of the [Legislation Review Act 1987](#). The Commonwealth and Western Australia also have parliamentary committees which examine both bills and regulations.²⁸ In South Australia, Tasmania and the Northern Territory, only delegated instruments (also known as subordinate legislation) are subject to scrutiny by a parliamentary committee from a personal rights perspective.²⁹

2.4 No express constitutional right to protest in NSW or Australia

Unlike, for instance, the United States, where there is an expressly granted constitutional right to peaceful assembly,³⁰ there is no right to peaceful assembly granted by the Australian or NSW constitutions.³¹

²⁶ Section 4(1)(d) and (f) of the [Charter of Human Rights and Responsibilities Act 2006](#) (Vic), section 40(1)(d) and (e) of the [Human Rights Act 2004](#) (ACT) and section 9(1)(c) and (e) of the [Human Rights Act 2019](#) (Qld).

²⁷ Section 38 of the [Charter of Human Rights and Responsibilities Act 2006](#) (Vic), section 40B of the [Human Rights Act 2004](#) (ACT) and section 58 of the [Human Rights Act 2019](#) (Qld). Exceptions apply to the obligation on public authorities in each jurisdiction.

²⁸ The Australian Parliament’s [Senate Standing Committee for the Scrutiny of Bills](#) and [Senate Standing Committee for the Scrutiny of Delegated Legislation](#) consider whether bills and delegated legislation trespass unduly on personal rights and liberties. The [Parliamentary Joint Committee on Human Rights](#) also examines and reports on all bills and legislative instruments for compatibility with human rights, pursuant to the [Human Rights \(Parliamentary Scrutiny\) Act 2011](#) (Cth). In Western Australia there are 3 relevant standing committees of the Legislative Council. The scrutiny of bills specifically referred by the Legislative Council is undertaken by the [Legislation Committee](#), while any delegated legislation can be examined by the [Delegated Legislation Committee](#). The [Uniform Legislation and Statutes Review Committee](#) considers bills referred to it, with a focus on whether they impact on the sovereignty and law-making powers of the WA Parliament.

²⁹ In South Australia the Legislative Council’s [Legislation Review Committee](#) reviews delegated instruments. Tasmania has a [Joint Standing Committee on Subordinate Legislation](#). In the Northern Territory, the Legislative Assembly’s scrutiny of subordinate legislation has been assigned to the [Legal and Constitutional Affairs Committee](#) rather than undertaken by a separate committee.

³⁰ The First Amendment to the United States Constitution states: ‘Congress shall make no law ...prohibiting the free exercise thereof; or abridging the freedom of ... the right of the people peaceably to assemble, and to petition the Government for a redress of grievances’: United States National Archives, [The Bill of Rights: A Transcription](#), n.d., last update 21 April 2023, accessed 5 May 2023.

³¹ Two Private Member’s Bills in the Legislative Council propose amending the NSW Constitution to protect the freedom of assembly, along with other rights: [Constitution Amendment \(Rights and Freedoms\) Bill 2023](#) and

Under the Australian Constitution, however, legislation which has the effect of restricting political communication can be invalidated by the implied freedom of political communication.³² The freedom of political communication is implied because it is not based on a single provision in the Constitution that expressly protects political communication. Instead, it is implied from the combined effect of provisions that establish Australia's system of representative and responsible government.³³ Peaceful assemblies are protected by the implied freedom of political communication because they are an essential form of political communication.³⁴

The protection afforded to the right to protest by the implied freedom of political communication is indirect and limited, and not a conferral of individual rights:

The implied freedom operates as a constraint on legislative and executive power. It is a freedom from government action, not a grant of individual rights. The freedom that the Constitution protects is not absolute. The limit on legislative and executive power is not absolute. The implied freedom does not protect all forms of political communication at all times and in all circumstances. And the freedom is not freedom from all regulation or restraint. Because the freedom exists only as an incident of the system of representative and responsible government provided for by the Constitution, the freedom limits legislative and executive power only to the extent necessary for the effective operation of that system.³⁵

As discussed later (at 7.1 and 7.2), the implied freedom of political communication is the basis upon which the validity of a recent NSW protest offence was challenged in *Kvelde v State of New South Wales*.³⁶

[Constitution Amendment \(Rights and Freedoms–Referendum\) Bill 2023](#). The bills were introduced on 29 November 2023 and adjourned.

³² See, for instance, *McCloy v NSW* (2015) 257 CLR 178, *Brown v Tasmania* [2017] HCA 43, *Libertyworks Inc v Commonwealth of Australia* [2021] HCA 18 and *Farm Transparency International v State of NSW* [2022] HCA 33.

³³ *Brown v Tasmania* [2017] HCA 43 at [312].

³⁴ *Brown v Tasmania* [2017] HCA 43 at [182].

³⁵ *Brown v Tasmania* [2017] HCA 43 at [312]-[313] (footnotes omitted).

³⁶ *Kvelde v State of New South Wales* [2023] NSWSC 1560; and Environmental Defenders Office, [Constitutional challenge to new NSW anti-protest law](#), 10 May 2023, accessed 9 June 2023. The offence under section 214A of the *Crimes Act 1900* was challenged on a constitutional basis. Also challenged on a different basis was a regulation which had the potential to affect an offence under section 144G of the *Roads Act 1993*.

3. NSW's public assembly provisions

NSW has legislative provisions designed to manage the conduct of public assemblies. The provisions are located in Part 4 of the [Summary Offences Act 1988](#).

This section discusses the NSW public assembly provisions in terms of their aim, location, operation and effect. It also discusses (at 3.3.4) how the NSW provisions do not expressly identify the factors that the courts must refer to when deciding applications made under the provisions.

3.1 The aim and location of the public assembly provisions

3.1.1 Aim

The aim of Part 4 of the [Summary Offences Act 1988](#) is to encourage co-operation between police and protesters engaged in peaceful protests.³⁷ This was noted, for instance, by Justice Hamilton in *Commissioner of Police v Gabriel*, where His Honour said that the aim of Part 4 is '... not to prohibit public assemblies but ... to facilitate them ...'.³⁸

3.1.2 Location

The location of the provisions relating to peaceful protests has been changed 3 times by different governments over the last 54 years.

1970: Under the Askin Coalition Government the [Summary Offences Act 1970](#) enabled an application to be made to the police in metropolitan areas (and local councils in other areas) to hold a procession. The Act also contained provisions relating to police powers and offences in public places. The second reading speech stated that the provisions on processions were 'not designed to inhibit in any way the right of citizens to assemble and to demonstrate in an orderly manner'.³⁹ However, in 'the current mood of protest' (during the Vietnam War) it was also stated that 'if we do not acknowledge and respect the similar rights of others, if we resort to violence, if we seek to disrupt the community, then we must expect that the law will move against us'.⁴⁰

1979: Under the Wran Labor Government the public assembly provisions were revised, with all notifications of intended public assemblies to be made to the Police Commissioner. It was decided to locate the provisions in a stand-alone Act, the [Public Assemblies Act 1979](#). The NSW Attorney General, Frank Walker, stated that the aim of the [Public Assemblies Act 1979](#) was to afford 'the greatest possible recognition of the right of freedom to assemble

³⁷ J Dowd, Attorney General, Summary Offences Bill, Second Reading Speech, [NSW Hansard](#), Legislative Assembly, 31 May 1988, p 807.

³⁸ [Commissioner of Police v Gabriel](#) [2004] NSWSC 31 at [1].

³⁹ E Willis, Minister for Labour and Industry, Chief Secretary and Minister for Tourism, Summary Offences Bill, Second Reading Speech, [NSW Hansard](#), Legislative Assembly, 17 November 1970, p 7870.

⁴⁰ E Willis, Summary Offences Bill, Second Reading Speech, [NSW Hansard](#), Legislative Assembly, 17 November 1970, p 7873.

and/or conduct a procession in public places as is reasonably consistent with the convenience and safety of the general public.’⁴¹ He rejected the concept of ‘lumping in provisions aimed at regulating demonstrations’ with diverse summary offences in the same piece of legislation.⁴²

1988: Under the Greiner Coalition Government several statutes involving conduct in public places were consolidated into one statute, the [Summary Offences Act 1988](#). This was intended to ‘implement the Government’s policy to reintroduce a comprehensive *Summary Offences Act*...so that all members of the community may freely use public space.’⁴³ When the public assembly provisions were relocated from the [Public Assemblies Act 1979](#) to Part 4 of the *Summary Offences Act 1988* they retained almost the same wording.⁴⁴ The provisions have rarely been amended since 1988 and remain in Part 4.

3.2. The operation of the public assembly provisions

The public assembly provisions in Part 4 of the current [Summary Offences Act 1988](#) establish a process for consultation, co-operation and, ultimately, the authorisation or prohibition of proposed public assemblies. As discussed later (at 3.3.1 and 3.3.2), depending on whether a proposed public assembly is authorised or prohibited, protesters are either protected or not protected from being charged with certain offences.

However, in line with their aim of facilitating public assemblies, no offence is created by the public assembly provisions themselves. Nor is the use of Part 4 mandatory. A public assembly can lawfully occur without Part 4 being engaged, although such an assembly will not have the benefit of the protection under Part 4 or the benefit of consultation and co-operation with police.

The key steps in the process established by the public assembly provisions in the [Summary Offences Act 1988](#) are as follows, and are summarised in Figure 1:

1. A protest organiser provides the Commissioner of Police with written notice of the intention to hold a public assembly and all required details or particulars of the assembly (**section 23(1)(a)-(d)**)
2. The notice is signed by the protest organiser, who takes responsibility for the organisation and conduct of the assembly (**section 23(1)(e)**)

⁴¹ F Walker, Cognate Summary Offences Bills, [NSW Hansard](#), Legislative Assembly, 19 April 1979, p 4,677.

⁴² F Walker, Cognate Summary Offences Bills, [NSW Hansard](#), Legislative Assembly, 19 April 1979, p 4,677.

⁴³ J Dowd, Attorney General, Summary Offences Bill, Second Reading Speech, [NSW Hansard](#), Legislative Assembly, 31 May 1988, p 808. The *Prostitution Act 1979*, the *Offences in Public Places Act 1979* and the *Public Assemblies Act 1979* were repealed.

⁴⁴ A comparison of the 1979 provisions ([as introduced](#)) and the 1988 provisions ([as introduced](#)) reveals only stylistic differences. For example, the word ‘notification’ in 1979 became ‘notice’ in 1988 and gender-neutral language was adopted in the 1988 Act.

3. The assembly is deemed to be an 'authorised public assembly' if one of the 3 following possibilities occurs:
 - a) the assembly is not opposed by the Police Commissioner (**section 23(1)(f)**)
 - b) the Police Commissioner initiates legal proceedings and the court⁴⁵ does not issue a prohibition order (**section 23(1)(f)(i)**)
(Legal proceedings can be initiated by the Commissioner if written notice of the intention to hold a public assembly was served on police 7 days or more before the date proposed for the public assembly (**section 25(1)**)
 - c) the protest organiser initiates legal proceedings and the court issues an authorisation order (**section 23(1)(f)(ii)**)
(Legal proceedings can be initiated by the organiser if they served notice of the public assembly on the Police Commissioner less than 7 days before the date specified for the public assembly and the Commissioner has not notified the organiser of a lack of opposition to holding the public assembly (**section 26**))
4. If an authorised public assembly is held substantially in accordance with the particulars provided to (or amended by agreement with) the Police Commissioner, participants are not guilty of any offence relating to participating in an unlawful assembly or obstructing any person, vehicle or vessel in a public place (**section 24**)⁴⁶

Courts are to determine applications made under Part 4 of the [Summary Offences Act 1988](#) 'with the greatest expedition possible so as to ensure that the application is not frustrated by reason of the decision of the Court being delayed until after the date on which the public assembly is proposed to be held.'⁴⁷ However, in [Kvelde v State of NSW](#) Justice Walton observed that Part 4 does not provide for urgency:

An applicant must provide 7 days' notice. In the event of less than 7 days' notice being provided, or the Commissioner indicated that he has no opposition, then the applicant must apply to a Court for authorisation. Thus, the provision does not accommodate spontaneous protests or protests undertaken with urgency.⁴⁸

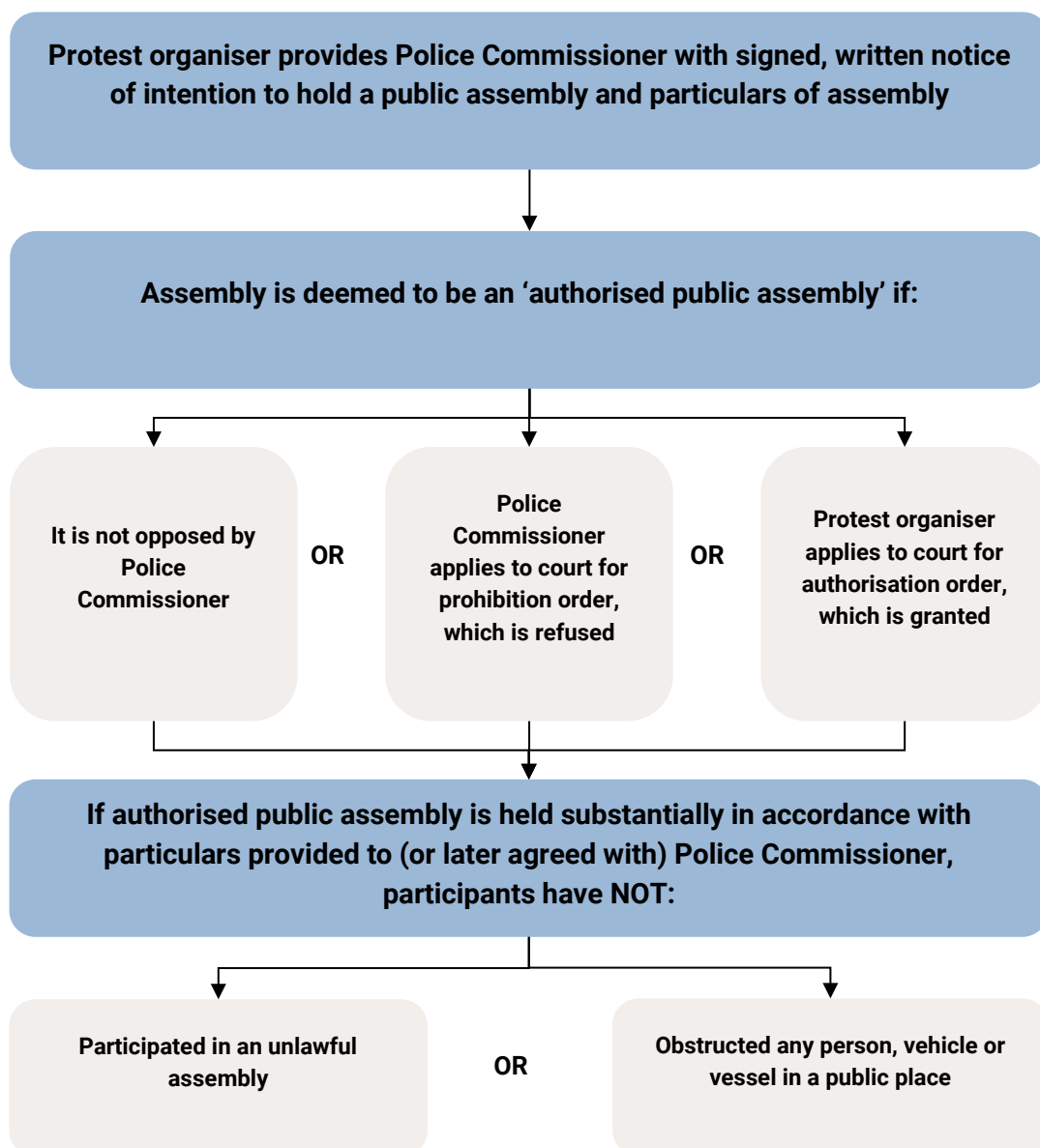
⁴⁵ 'Court' means the Supreme Court or the District Court: section 22.

⁴⁶ The agreed particulars effectively become conditions that the participants must adhere to in order to retain the protection.

⁴⁷ Section 27(1) of the [Summary Offences Act 1988](#).

⁴⁸ [Kvelde v State of NSW](#) [2023] NSWSC 1560 at [281].

Figure 1: Summary of the key steps and outcomes of the public assembly provisions in Part 4 of the *Summary Offences Act 1988*



Source: NSW Parliamentary Library/NSW Parliamentary Research Service

The provisions which authorise an assembly in other jurisdictions are summarised in Appendix 1. In Queensland, South Australia, Tasmania and Western Australia, applications are made to the police, applications in Victoria and the Northern Territory are made to the local council, and applications in the ACT are made to the relevant government authority.

3.3 The effect of the public assembly provisions

The effect of the public assembly provisions in Part 4 of the [Summary Offences Act 1988](#) turns on the 'authorisation' or 'prohibition' of a public assembly. The scope of the protection provided by authorisation is a matter of debate, and this was illustrated starkly during the COVID-19 pandemic. Other issues discussed in this part of the paper relate to: the effect of 'prohibiting' a public assembly; whether the right to assembly can be 'deferred'; the factors considered by courts in the absence of statutory criteria; and the outcome of applications made under Part 4.

3.3.1 The scope of the protection provided by authorisation

The authorisation of a public assembly 'throws an immunity'⁴⁹ around all participants of the assembly. Section 24 states that participants are not:

... by reason of any thing done or omitted to be done...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.⁵⁰

The protection applies only as long as the assembly is conducted 'substantially in accordance' with the particulars provided by the assembly organiser to the Commissioner of Police. In practice, 'substantially in accordance' is a term whose meaning is informed by the circumstances of each case.

3.3.1.1 Protection against obstruction

Part 4 protects participants in a public assembly from being charged with the offence of obstruction under section 6 of the [Summary Offences Act 1988](#), which states:

A person shall not, without reasonable excuse (proof of which lies on the person), wilfully prevent, in any manner, the free passage of a person, vehicle or vessel in a public place.⁵¹

If a public assembly is authorised and is being held substantially in accordance with particulars upon which the authorisation was made, a police officer is also precluded from issuing a direction to participants in a public assembly who are obstructing traffic.⁵²

⁴⁹ J Gordon, [Protest before and during a pandemic](#), *Federal Law Review*, 2022, Vol 50(4), pp 421-448 at 429.

⁵⁰ Section 24 of the [Summary Offences Act 1988](#).

⁵¹ Section 6 of the [Summary Offences Act 1988](#). See also: *Commissioner of Police v Allen* (1984) 14 A Crim R 244 at 246.

⁵² Ordinarily, a direction can be issued under section 197(1)(a) of the [Law Enforcement \(Powers and Responsibilities\) Act 2002](#) for obstruction. Failure to comply with a direction is an offence carrying a maximum penalty of 2 penalty units: section 199(1). A protection against being issued with a direction for obstruction is provided by section 200(4)(a) of the [Law Enforcement \(Powers and Responsibilities\) Act 2002](#). This does not prevent a police officer from issuing a direction to members of an authorised public assembly under section 200(3) if 'the police officer believes on reasonable grounds that the direction is necessary to deal with a serious risk to the safety of the person to whom the direction is given or to any other person.' For judicial commentary on

In *Antaw v R* the court found that a police officer had lawfully directed protesters to leave a road because the public assembly 'was no longer an authorised public assembly held substantially in accordance with the agreed particulars'. The circumstances were that the protest continued hours after the finishing time stated in the notice, and also that tents were erected on the road.⁵³

3.3.1.2 Protection against participating in an unlawful assembly

An 'unlawful assembly' does not refer to a public assembly which lacks authorisation under Part 4 of the [Summary Offences Act 1988](#). Instead, Part 4 protects members of an authorised public assembly from being charged with participating in an unlawful assembly, which is a specific offence under section 545C of the [Crimes Act 1900](#) that involves the use of weapons or coercion through physical intimidation or injury. The benefit this protection provides to members of an authorised assembly is not immediately clear and is open to debate. In particular, if an authorised public assembly became violent, any protection afforded by Part 4 would cease to apply because it would not be 'substantially in accordance' with the particulars provided to the Commissioner of Police.⁵⁴

3.3.1.3 No protection against committing offences of violence

While the exact scope of the protection provided to authorised public assemblies is unclear, it is clear that it 'does not protect against criminal prosecution of any person who engages in acts of violence or vandalism in that assembly.'⁵⁵ The prospect of violence is discussed later (at 3.3.4.4) as being one of the factors that has been taken into account by the courts, in the absence of statutory criteria, when deciding applications under Part 4. Some of the protest offences involving violence for which authorisation provides no protection from prosecution are described later (at 5.1).

3.3.1.4 Uncertainty about protection from breaching public health orders

The lack of clarity about the extent of the protection afforded by Part 4 to public assemblies was highlighted by the COVID-19 pandemic.⁵⁶ In particular, uncertainty arose about whether

the 'immunity' against a police direction for obstruction, see: [Commissioner of Police v Gray](#) [2020] NSWSC 867 at [22].

⁵³ [Antaw v R, Kitson v R, Lee v R](#) [2021] NSWDC 820 at [28]-[30]. The defendants were convicted in the Local Court of failing to comply with a police direction and were each fined \$150. They challenged their convictions on appeal to the District Court, arguing that they were not obstructing traffic. The judge found that the direction under section 197 does not require the actual obstruction of traffic, only that the police officer giving the direction believes on reasonable grounds that the person's presence is obstructing traffic. In this case, the police officer reasonably believed that the direction was necessary to enable the road to be safely reopened to traffic: [35].

⁵⁴ Some commentators have also questioned whether the protection applies at all to section 545C or to the preceding common law offence of joining an unlawful assembly (which may still concurrently exist because it has not been expressly abolished): J Gordon, [Protest before and during a pandemic](#), *Federal Law Review*, 2022, Vol 50(4), pp 421-448 at 425 and 429-30. Either way, there is considerable uncertainty surrounding the use of term 'unlawful assembly' in Part 4 of the *Summary Offences 1988*.

⁵⁵ [Commissioner of Police v Rintoul](#) [2003] NSWSC 662 at [24].

⁵⁶ The global COVID-19 pandemic was declared in March 2020: World Health Organization, [WHO Director-General's opening remarks at the media briefing on COVID-19](#), 11 March 2020.

the protection extended to public health orders issued under the [Public Health Act 2010](#).⁵⁷ If participants were protected, they would not commit an offence of breaching a public health order.⁵⁸

Some of the cases during the pandemic referred to the issue of whether, under Part 4 of [Summary Offences Act 1988](#), section 24 effectively granted protection from the public health orders to people who attended an authorised assembly. The primary judges in the cases of *Commissioner of Police v Gray* and *Commissioner of Police v Gibson* supported the view that section 24 protected protesters from committing the offence of failing to comply with a public health order.⁵⁹ However, the Court of Appeal in *Gibson v Commissioner of Police* disagreed with that interpretation. The court stated that ‘it is by no means obvious’ that the public assembly provisions in the *Summary Offences Act 1988* confer protection from breaching a public health order, especially in circumstances where an authorised public assembly is not one of the exceptions listed under the health order.⁶⁰ This question did not need to be resolved in that case.

3.3.2 The effect of prohibiting an assembly

The public assembly provisions enable courts to issue orders which claim to prohibit public assemblies. The use of the term prohibition in this context has been described by the courts as being ‘particularly curious’ and ‘something of a misnomer’; as the effect of a prohibition order is ‘not to prohibit the assembly in any way’ but only to withhold the limited protection provided by authorisation.⁶¹ Or, as Justice Adams succinctly put it in *NSW Commissioner of Police v Bainbridge*, an order made to prohibit a public assembly ‘prohibits nothing.’⁶² Justice Hunt noted in *Commissioner of Police v Allen* that the term ‘prohibition order’ was potentially misleading; as it could falsely suggest to the public and the media that the right to assembly can be prohibited by the court.⁶³

⁵⁷ The public health orders restricted the size of gatherings. For examples of the public health orders and the size of gatherings see: L Roth, [NSW public health restrictions to deal with the COVID-19 pandemic: A chronology](#), NSW Parliamentary Research Service, November 2020.

⁵⁸ The minister has the power to deal with public health risks by making orders under sections 7-9, and it is an offence under section 10 to fail to comply with such a direction, without a reasonable excuse.

⁵⁹ *Commissioner of Police v Gray* [2020] NSWSC 867 at [57] and *Commissioner of Police v Gibson* [2020] NSWSC 953 at [15]. The term ‘immunity’ was used in those cases but it does not appear in the wording of section 24.

⁶⁰ *Gibson v Commissioner of Police* [2020] NSWCA 160 at [13].

⁶¹ *Commissioner of Police v Gabriel* [2004] NSWSC 31 at [1] and [3].

⁶² *Commissioner of Police v Bainbridge* [2007] NSWSC 1015 at [15].

⁶³ *Commissioner of Police v Allen* (1984) 14 A Crim R 244 at 245. Academic commentary has also noted the symbolic significance of a court’s decision to ‘prohibit’, as well as to ‘authorise’, a public assembly: J Gordon, [Protest before and during a pandemic](#), *Federal Law Review*, 2022, Vol 50(4), pp 421-448 at 448.

3.3.3 Can the freedom of assembly be deferred?

Whether the freedom of assembly can be deferred was an issue that arose in the case of *Commissioner of Police v Bassi*, which was decided during the COVID-19 pandemic.⁶⁴ The health order in force at the time limited public gatherings to 10 people.

Justice Fagan declined to authorise the protest, finding that a ‘gathering of 5,000 people...at a time when the entire community is under direction not to gather in groups of more than ten, is an unreasonable proposition.’ The judge regarded that the fundamental right of assembly was not taken away by the public health order; rather, it was deferred. He noted that many activities had been disrupted by the restrictions, including funerals and legal proceedings.⁶⁵

Justice Fagan’s statement that the right to protest was deferred, not denied, was quoted in several other cases during the pandemic. The concept of ‘deferring’ the freedom of assembly is not confined to the pandemic and could hypothetically apply to other public safety or emergency situations, such as a natural disaster.

In *Commissioner of Police v Kumar*, which involved another assembly held during the pandemic, Justice Lonergan found that the health risks outweighed the right to hold a public assembly. But he considered that the case illustrated the opportunity to defer the right to assembly, rather than extinguishing that right.⁶⁶

In another COVID-19 case, *Commissioner of Police v Supple*, Justice Walton found that health risks outweighed the right to hold a public assembly in support of refugees in detention. Justice Walton noted that:

Justice Fagan was criticised for referring to rights deferred rather than rights extinguished...but it seems to me that the true conclusion is that the balance of these considerations will necessarily shift over time, having regard to the changing public health risks and will be affected as well by the nature and circumstances of any public assembly when viewed against public health restrictions and other factors bearing upon the risks associated with a particular public assembly.⁶⁷

Academic Dr Jeffrey Gordon critiqued the suggestion by Justice Fagan that the deferral of free assembly was justified because other important public activities had also been curtailed, including the conduct of legal proceedings in open court (known as ‘open justice’).⁶⁸ Dr Gordon maintained that the public health orders burdened free assembly,

⁶⁴ *Commissioner of Police v Bassi* [2020] NSWSC 710. The health order in force at the time limited public gatherings to 10 people: *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 3) 2020*.

⁶⁵ *Commissioner of Police v Bassi* [2020] NSWSC 710 at [31]. The Court of Appeal reversed the result of the case due to a procedural issue to do with the notice: *Bassi v Commissioner of Police* [2020] NSWCA 109 at [35]-[39].

⁶⁶ *Commissioner of Police v Kumar* [2020] NSWSC 804 at [57].

⁶⁷ *Commissioner of Police v Supple* [2020] NSWSC 727 at [42].

⁶⁸ *Commissioner of Police v Bassi* [2020] NSWSC 710 at [31].

whereas open justice was ‘relatively untouched’ because telephone connections and audiovisual links were available to people who sought access to proceedings.⁶⁹ Associate Professor Maria O’Sullivan argued that protests should have been recognised as ‘essential’ activities and permitted during the pandemic, provided they otherwise accorded with COVID-19 restrictions such as social distancing and wearing masks. She noted that attending a protest was not listed among the exceptions from stay-at-home directives, unlike activities such as real estate inspections.⁷⁰

3.3.4 Factors taken into account by courts in the absence of statutory criteria

In the absence of express statutory criteria to determine whether a public assembly should be authorised or prohibited, the courts determine each case on its own merits. Justice Simpson in *Rintoul* acknowledged that the power under section 24 to authorise an assembly is ‘entirely silent as to the considerations that ought to be taken into account’. Similarly, section 25 does not prescribe the matters to be considered by the court when determining an application for a prohibition order. The courts are then left to balance:

... the right, jealously guarded, of the citizen to exercise freedom of speech and assembly integral to a democratic system of government and way of life, and the right of other citizens not to have their own activities impeded... . When these competing rights collide one must give way to the other. This Court has been given the unenviable task of determining which is to surrender to the other.⁷¹

Although the Act does not identify relevant criteria for authorising an assembly under section 24 or making a prohibition order under section 25, court decisions ‘provide illustrations of the matters to be taken into account in light of the purpose of the legislation.’⁷² Matters which the courts have considered include the purpose and message of the assembly; the prospects of the assembly causing harm, violence or invasion of privacy; and the willingness of organisers to consider a different route, date or time, or other methods of protest than assembling in person.

3.3.4.1 Purpose of assembly

The notice of intention to hold a public assembly sets out relevant particulars about the assembly, such as the time, duration, location or route, its purpose, and the approximate number of participants.⁷³ The purpose of a public assembly is closely related to its content or message.

⁶⁹ J Gordon, [Protest before and during a pandemic](#), *Federal Law Review*, 2022, Vol 50(4), pp 433-434.

⁷⁰ M O’Sullivan, [Protest in a Pandemic – The Special Status of Public Spaces](#), *Australian Public Law* (online), 27 July 2020.

⁷¹ [Commissioner of Police v Rintoul](#) [2003] NSWSC 662 at [5]-[6].

⁷² [NSW Commissioner of Police v Folkes](#) [2015] NSWSC 1887 at [12].

⁷³ The purpose of the proposed assembly is one of the particulars required to be stated on the notice for an assembly to be an authorised public assembly under section 23(1)(c) of the [Summary Offences Act 1988](#). The

Judges in some cases have referred to the purpose of the assembly and appear to have taken it into account in determining an application to prohibit an assembly. In *Commissioner of Police v Jackson*, Justice Schmidt observed that although the matters to be considered by the court when determining an application are not prescribed, 'relevant considerations include those flowing from the notice requirements.'⁷⁴ The purpose of the assembly is one of these requirements.

The purpose of the assembly in *Jackson* was to commemorate the anniversary of the death of an Aboriginal teenager, TJ Hickey, in 2004 during a police pursuit. Justice Schmidt took into account that members of the community were likely to have sympathy for the purpose of the march, but also that some onlookers might not support the chanting of anti-police slogans during the march.⁷⁵ In all of the circumstances, the judge decided to grant the application by police to prohibit the assembly, concerned that the opposite decision 'might have given encouragement to behaviour which could give rise to...real risks to safety...'⁷⁶

According to Dr Jeffrey Gordon, the absence of express statutory criteria for authorising or prohibiting a proposed public assembly 'practically dares the Court to prohibit a proposed assembly based on its content.' Dr Gordon argues that a proposed assembly's message should not be a factor in weighing for or against authorisation, and that 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...'⁷⁷

The Human Rights Law Centre has outlined 10 principles guiding how protests should and can be protected and regulated, including that lawmakers should not prohibit a protest based on its message, except in narrow circumstances of causing harm, such as race hate.⁷⁸

3.3.4.2 Protesting in person rather than online

Legal academics have analysed the symbolic value and visual impact of public protests. Associate Professor Maria O'Sullivan argues that the ability of people to protest at a particular public site can be directly linked to the communicative value of that protest, such

form of the notice is prescribed by clause 13 and Schedule 1 of the [Summary Offences Regulation 2020](#), and includes stating the purpose of the proposed assembly.

⁷⁴ [Commissioner of Police v Jackson](#) [2015] NSWSC 96 at [14].

⁷⁵ [Commissioner of Police v Jackson](#) [2015] NSWSC 96 at [84], [87].

⁷⁶ [Commissioner of Police v Jackson](#) [2015] NSWSC 96 at [96].

⁷⁷ J Gordon, [Protest before and during a pandemic](#), *Federal Law Review*, 2022, Vol 50(4), pp 434, 435, 445.

⁷⁸ Human Rights Law Centre, [Say it Loud: Protecting Protest in Australia](#), 2018, Principle 8, p 16.

as environmental protests at logging sites.⁷⁹ Judicial statements have also recognised the resonance of protesting at significant sites.⁸⁰

Commissioner of Police v Gray concerned a police application to prohibit a public assembly in Newcastle in 2020 to recognise the Black Lives Matter movement, deaths in custody and anti-racism. Declining to prohibit the assembly, Justice Adamson referred to the importance of free speech as a hallmark of a democratic society and rejected the police's submission that social media could achieve the same effect as a protest. Justice Adamson stated:

Demonstrations in public spaces remain a powerful method of advancing particular causes to governments and the general community, as well as engendering a feeling of solidarity among participants and those associated with them who may be unable to be present.⁸¹

In *Commissioner of Police v Holcombe*, the police sought to prohibit a public assembly in 2020 to protest proposed legislation about transgender issues in schools. Justice Bellew agreed with the observations in *Commissioner of Police v Gray* about the impact of demonstrations in public places, but reasoned that other methods were available beyond social media to draw attention to the asserted detrimental impact of the proposed legislation. Those methods included contacting politicians directly to express concerns and presenting a petition. Justice Bellew therefore found it was relevant to the balancing exercise that there were other methods through which the concerns could be communicated without holding a public assembly and posing a health risk during the pandemic.⁸²

3.3.4.3 Availability of alternative route, date or time

Commissioner of Police v Da Costa-Reidel concerned a rally in Newtown, Sydney. In granting a prohibition order, Justice Davies found that the proposal to hold the rally along a 'major thoroughfare' on the same day as another event would cause disruption at an 'unacceptable level', including re-routing buses and impeding the access of ambulances to a hospital.⁸³ The police offered 2 alternative routes which were rejected by the protest organiser until the matter came to court.⁸⁴

⁷⁹ M O'Sullivan, [Protest in a Pandemic – The Special Status of Public Spaces](#), *Australian Public Law* (online), 27 July 2020.

⁸⁰ For example, in the High Court case of *Brown v State of Tasmania* (2017) 261 CLR 328, Nettle J noted that 'on-site protests against forest operations and the broadcasting of images of parts of the forest environment at risk of destruction are the primary means of bringing such issues to the attention of the public and parliamentarians': at [240].

⁸¹ *Commissioner of Police v Gray* [2020] NSWSC 867 at [59].

⁸² *Commissioner of Police v Holcombe* [2020] NSWSC 1428 at [12], [14], [65], [66].

⁸³ *Commissioner of Police v Da Costa-Reidel* [2019] NSWSC 198 at [18], [23]-[24].

⁸⁴ *Commissioner of Police v Da Costa-Reidel* [2019] NSWSC 198 at [30]-[31], [40].

The context of *Commissioner of Police v Kumar* was an assembly and procession to be held in the centre of Wollongong in 2020. Justice Lonergan found the health risks of COVID-19 outweighed the right to hold a public assembly of the type, timing and circumstances proposed. The judge took into account that the police sought to explore other options for the date, place or time of the proposed gathering, but the organiser rejected those options.⁸⁵

3.3.4.4 Prospect of violence

The prospect of violence may influence the court to grant an order to prohibit an assembly. In *Commissioner of Police v Folkes*, the police sought an order to prohibit a public assembly in 2015 to commemorate the 10-year anniversary of the Cronulla riots. The organiser estimated between 400 and 1,000 people would attend the event, which was planned to include a mock funeral service for multiculturalism. The police submitted that there was a substantial risk that the assembly would degenerate into violent clashes between attendees holding differing views on immigration.⁸⁶ In making the prohibition order, the judge found the potential for conflict and public disorder was high and would present a significant challenge to the police to keep the peace.⁸⁷

The prospect of a violent confrontation was also a factor in the decision of *Commissioner of Police v Ridgewell*. The judge prohibited the Palestine Action Group's planned protest at the opening of the Israeli Film Festival in 2014, finding that it was 'the type of protest likely to attract people...bent on fermenting violence.'⁸⁸

3.3.4.5 Privacy issues

Judges in some cases have given weight to the location of a proposed protest as impinging on the privacy of a particular individual. *Commissioner of Police v Rintoul* concerned a protest against the government's refugee policy, to be held on the street where the Minister for Immigration resided. Justice Simpson described the difficulty of either 'taking a step towards an inhibition of the importance of freedom of expression and assembly' by making a prohibition order, or 'providing some sanction to a significant invasion of privacy' by rejecting a prohibition order. Her Honour decided against granting a prohibition order, while noting that the participants could face criminal prosecution if the protest was not held in accordance with the law.⁸⁹

⁸⁵ *Commissioner of Police v Kumar* [2020] NSWSC 804 at [55], [56].

⁸⁶ *NSW Commissioner of Police v Folkes* [2015] NSWSC 1887 at [2].

⁸⁷ *NSW Commissioner of Police v Folkes* [2015] NSWSC 1887 at [62].

⁸⁸ *Commissioner of Police v Ridgewell* [2014] NSWSC 1138 at [18].

⁸⁹ *Commissioner of Police v Rintoul* [2003] NSWSC 662 at [23]-[24].

In *Commissioner of Police v Gabriel*, Justice Hamilton found that the protest organiser, who was attempting to hold a public assembly near a police officer’s home, was ‘motivated in large part not by principle but by vindictive personal spite’ against the police officer.⁹⁰

3.3.5 The outcome of applications

A search of legal databases indicates that, between 1 January 2003 and 14 November 2023, 18 applications were made under Part 4 of the *Summary Offences Act 1988*, with 7 (39%) made in 2020.⁹¹ Of the 18 applications, 16 applications (89%) for prohibition orders were made by the Commissioner of Police, and 2 applications (11%) for authorisation orders were made by protesters.⁹² Figure 2 shows the outcome of the 18 applications.⁹³

Figure 2: Outcome of applications made under Part 4 Summary Offences Act 1988, between 1 January 2003 and 14 November 2023



⁹⁰ *Commissioner of Police v Gabriel* (2004) 141 A Crim R 566; NSWSC 31 at [13], [15].

⁹¹ Searches were conducted on multiple legal databases, including Caselaw NSW and AustLii, using the terms ‘public assemblies’, ‘protests’, ‘Part 4’ and ‘Summary Offences Act’. The cases identified were: *Commissioner of Police v Rintoul* [2003] NSWSC 662, *Commissioner of Police v Gabriel* (2004) 141 A Crim R 566; NSWSC 31, *Commissioner of Police v Bainbridge* [2007] NSWSC 1015, *Commissioner of Police v Langosch* [2012] NSWSC 499, *Commissioner of Police v Ridgewell* [2014] NSWSC 1138, *Commissioner of Police v Jackson* [2015] NSWSC 96, *NSW Commissioner of Police v Folkes* [2015] NSWSC 1887, *Commissioner of Police v Keep Sydney Open Ltd* [2017] NSWSC 5, *Commissioner of Police v Marshall* [2017] NSWSC 1589, *Commissioner of Police v Da Costa-Reidel* [2019] NSWSC 198, *Commissioner of Police v Kumar* [2020] NSWSC 804, *Commissioner of Police v Thomson* [2020] NSWSC 1424, *Commissioner of Police v Holcombe* [2020] NSWSC 1428, *Commissioner of Police v Gray* [2020] NSWSC 867, *Commissioner of Police v Bassi* [2020] NSWSC 710, *Commissioner of Police (NSW) v Supple* [2020] NSWSC 727 and *Commissioner of Police (NSW) v Gibson* [2020] NSWSC 953. Additionally, the case of Noel Plumb v Commissioner of Police (NSW Supreme Court, Barr AJ 28 May 2020) was provided by the Law Courts Library.

⁹² One application for an authorisation order was made by a protester as the plaintiff and the other application for an authorisation order involved a cross-application by the protester as a defendant in *Commissioner of Police v Bassi* [2020] NSWSC 710.

⁹³ The data in Figure 2 does not include the number of times that protest organisers submitted to the Commissioner of Police a notice to hold a public assembly, or the response of the Police Commissioner to each notice. Statistics on the number of notices could not be located from publicly available sources.

Of the 16 applications for prohibition orders made by the Commissioner of Police, 12 (75%) were successful and resulted in the court granting a prohibition order. Of the 2 applications for authorisation orders, both (100%) were unsuccessful and resulted in the court refusing to grant an authorisation order.

3.4 No right of appeal under Part 4

Section 27(2) of the [Summary Offences Act 1988](#) states that a decision of the court 'on an application under section 25(1) or 26 is final and is not subject to appeal'. The rationale for the lack of a right of appeal from sections 25 and 26 was explained in *Gibson v Commissioner of Police*:

It is important that people who may consider participation in an assembly know and understand with certainty whether or not the assembly has been prohibited by an order of this Court, or authorised. That knowledge should not be clouded by the prospect of an appeal, carrying with it the possibility of a last minute reversal of the status of the assembly.⁹⁴

The same lack of an appeal right characterised the previous version of the public assembly provisions under the [Public Assemblies Act 1979](#).⁹⁵

While there is no right for an appeal from Part 4 of the *Summary Offences Act 1988*, some preliminary technical issues relating to Part 4 have been considered by the Court of Appeal.⁹⁶

⁹⁴ *Gibson v Commissioner of Police* [2020] NSWCA 160 at [18].

⁹⁵ Section 8(2) stated that the court's 'decision...is final and is not subject to appeal'.

⁹⁶ For example, in *Gibson v Commissioner of Police* [2020] NSWCA 160, the Court of Appeal confirmed that section 27(2) did not stop the court from using its general powers to deal with the case: [37]-[41].

4. Queensland's public assembly provisions

It is in the public interest for a state's public assembly provisions to be clear about what the right to protest is and how it can be exercised lawfully. There may be lessons from other jurisdictions that could assist in assessing the operation of the public assembly provisions in NSW. Queensland provides an example of a contrasting approach to this area of the law. Its public assembly provisions:

- Are located in a separate and dedicated Act, the [Peaceful Assembly Act 1992](#) (Qld)
- Have clearly stated legislative objects⁹⁷
- Expressly recognise the right to peaceful assembly and define its scope⁹⁸
- Set out the parameters of a 'legal immunity' provided to participants of an authorised public assembly⁹⁹
- Set out factors that the courts must consider when determining applications¹⁰⁰
- Allow, to an extent, the police and the court to specify conditions that are to apply to the holding of a public assembly.¹⁰¹

The Queensland provisions also eschew the term 'prohibited assembly'. Instead, the Queensland provisions relate to the authorisation of public assemblies and the refusal to authorise public assemblies.¹⁰²

4.1 A separate and dedicated Act

NSW's public assembly provisions are located in the [Summary Offences Act 1988](#), which contains a miscellaneous collection of offences. To people unfamiliar with protest law, this may falsely imply that participating in a public assembly is inherently unlawful, unless an authorisation order is first granted. The [Peaceful Assembly Act 1992](#) (Qld) is solely dedicated to public assemblies and does not include any offences.

⁹⁷ [Section 2](#) of the *Peaceful Assembly Act 1992* (Qld).

⁹⁸ [Section 5](#) of the *Peaceful Assembly Act 1992* (Qld).

⁹⁹ [Section 6](#) of the *Peaceful Assembly Act 1992* (Qld).

¹⁰⁰ [Section 16\(2\)](#) of the *Peaceful Assembly Act 1992* (Qld).

¹⁰¹ Sections [6](#), [12\(3\)\(b\)](#) and [14\(3\)](#) of the *Peaceful Assembly Act 1992* (Qld).

¹⁰² Sections [7](#), [12](#) and [14](#) of the *Peaceful Assembly Act 1992* (Qld). Queensland's provisions are also discussed in Appendix 1.

4.2 Statutory objects

Unlike the situation in NSW, where there is no express legislative statement of the objects of Part 4 of the *Summary Offences Act 1988*, the objects of the *Peaceful Assembly Act 1992* (Qld) are clearly stated as being:

- To recognise the right to peaceful assembly
- To ensure that, so far as it is appropriate to do so, persons may exercise the right to peaceful assembly
- To ensure that the right to peaceful assembly is subject only to such restrictions as are necessary and reasonable in a democratic society in the interests of public safety, public order, or the protection of the rights and freedoms of other persons (including the right of people to carry on business and the right of the public to enjoy the environment)
- To ensure that the right to peaceful assembly is exercisable without payment of a fee, charge or other amount for a licence, permit or other authorisation.¹⁰³

4.3 Recognising the right to peaceful assembly and defining its scope

Part 4 of the *Summary Offences Act 1988* (NSW) neither recognises a right to peaceful assembly nor provides any criteria for its lawful exercise.¹⁰⁴ In contrast, both of those functions are performed by section 5 of the *Peaceful Assembly Act 1992* (Qld), which states:

(1) A person has the right to assemble peacefully with others in a public place.

(2) The right is subject only to such restrictions as are necessary and reasonable in a democratic society in the interests of—

(a) public safety; or

(b) public order; or

(c) the protection of the rights and freedoms of other persons.

(3) In subsection (2)(c), a reference to the rights of persons includes a reference to—

(a) the rights of members of the public to enjoy the natural environment; and

(b) the rights of persons to carry on business.

¹⁰³ Section 2 of the *Peaceful Assembly Act 1992* (Qld).

¹⁰⁴ See above, 2.1 and 3.3.4.

4.4 Setting out the scope of legal immunity

The scope of the legal immunity provided to participants of authorised public assemblies in Queensland is clearly set out in section 6 of the *Peaceful Assembly Act 1992* (Qld), which relevantly states that a person who participates in an authorised public assembly that is peaceful and is held substantially in accordance with its particulars ‘... does not, merely because of the participation, incur any civil or criminal liability because of the obstruction of a public place’.

A public place is defined in section 4 of the *Peaceful Assembly Act 1992* (Qld) to include a road, a place that is open to or used by the public as of right, and a place that is for the time being open to or used by the public. The Queensland immunity is notable for applying solely to the obstruction of a public place, as well as for including an immunity against both civil and criminal liability.¹⁰⁵

4.5 Setting out factors courts must consider in determining applications

As previously discussed (at 3.3.4), the NSW public assembly provisions do not provide the courts with any statutory criteria for determining applications relating to public assemblies. That is, there are no legislative criteria set by parliament on the circumstances in which courts should grant or withhold the limited immunity offered under the public assembly provisions.

Academic commentary has suggested that the lack of statutory criteria in NSW has led to values-based regulation, where courts have exercised their discretion on the basis of an assessment of the value of the cause that the proposed assembly is either supporting or opposing. For instance:

The statutory scheme, as judges have often repeated, is silent on the criteria for authorising or prohibiting a proposed public assembly. 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 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 and traffic-obstruction offences for acts or omissions done only for the purpose of participating in the assembly? ...¹⁰⁶

In contrast, [section 16\(2\)\(a\)](#) of the *Peaceful Assembly Act 1992* (Qld) requires courts to have regard to the objects of the Act, as set out in [section 2](#). Consequently, courts must seek to ensure, so far as it is appropriate to do so, that persons may exercise the right to participate in public assemblies, and that the exercise of this right is subject only to such

¹⁰⁵ This is also the approach in South Australia: section 6(1)(b) of the [Public Assemblies Act 1972](#) (SA).

¹⁰⁶ J Gordon, [Protest before and during a pandemic](#), *Federal Law Review*, 2022, Vol 50(4), pp 421-448 at 445.

restrictions as are necessary and reasonable in a democratic society in the interests of public safety, public order or the protection of the rights and freedoms of other persons.

Courts must also determine applications as quickly as possible and with as little formality as possible.¹⁰⁷ This is also a requirement for NSW courts, which must determine applications relating to public assemblies as quickly as possible.¹⁰⁸

4.6 Avoiding the term ‘prohibition’

The Queensland provisions refer to ‘authorised’ and ‘non-authorised’ public assemblies, rather than to prohibited public assemblies. This helps avoid the risk identified by Justice Hunt in *Commissioner of Police v Allen*, who noted that the term ‘prohibition order’ was potentially misleading because it could falsely imply that the right to assembly can be prohibited by the court.¹⁰⁹

4.7 Conditions

The Queensland provisions allow conditions to be imposed on a public assembly by the relevant authority (police or local council) or the courts at certain points in the authorisation process. The notice of permission issued by the police or local council may specify conditions, such as in relation to public safety and the ‘recognition of any inherent environmental or cultural sensitivity’ at the location.¹¹⁰

The court may, in response to an application to refuse authorisation of a public assembly, specify conditions that are to apply to the assembly.¹¹¹ If an application is made less than 5 business days before the proposed public assembly, the organiser may seek an order from the court authorising the public assembly and the court may authorise the holding of the public assembly subject to conditions.¹¹²

The NSW legislation does not have equivalent provisions. Justice Simpson observed in *Rintoul* that ‘the Act gives me no power to do other than grant or refuse the orders sought. I am not empowered to impose conditions upon the conduct of any assembly that goes ahead...’¹¹³

The particulars of the notice required under section 23 of the *Summary Offences Act 1988* relate to matters such as date, time, duration and route. The form of the notice prescribed under the [Summary Offences Regulation 2020](#) refers to ‘special characteristics’ such as

¹⁰⁷ [Section 16\(2\)\(b\) and \(d\)](#) of the *Peaceful Assembly Act 1992* (Qld).

¹⁰⁸ [Section 27\(1\)](#) of the *Summary Offences Act 1988*.

¹⁰⁹ (1984) 14 A Crim R 244 at 245.

¹¹⁰ [Section 11](#) of the *Peaceful Assembly Act 1992* (Qld).

¹¹¹ [Section 12\(3\)\(b\)](#) of the *Peaceful Assembly Act 1992* (Qld).

¹¹² [Section 14\(3\)](#) of the *Peaceful Assembly Act 1992* (Qld).

¹¹³ *Commissioner of Police v Rintoul* [2003] NSWSC 662 at [24].

people addressing the assembly, musicians or animals.¹¹⁴ There is no reference to conditions relating to public safety or environmental concerns. However, the capacity under section 24 for the particulars to be negotiated by agreement between the Commissioner of Police and the organiser could effectively amount to conditions imposed on an assembly.¹¹⁵ These are not conditions imposed by the courts.

¹¹⁴ Notice of intention to hold public assembly, Schedule 1, [Summary Offences Regulation 2020](#).

¹¹⁵ For example, in [Antaw v R; Kitson v R; Lee v R](#) [2021] NSWDC 820 the organiser of a public assembly submitted a notice of intention to conduct a 'School Strike 4 Climate' in 2019. The police gave 'consent' subject to a list of conditions being agreed to and met: [10]. However, the organiser declined to sign the 'conditions letter': [12].

5. NSW offences and police powers

The right to protest is exercised in the context of a legal system that seeks to maintain public safety and order. Criminal law offences and police powers operate to deter and penalise actions that are not characteristic of peaceful assemblies. However, where the right of persons to participate in peaceful assemblies is impeded by police, legal avenues of redress exist.

5.1 Offences

Protesters are in general not protected from committing the type of offences discussed in this chapter. As discussed earlier (Chapter 3), such offences may apply even where an assembly has been authorised under Part 4 of the *Summary Offences Act 1988*. This is because the protection offered by Part 4 is limited. It applies to the offence of obstruction, provided the authorised assembly is held substantially in accordance with the particulars provided to police. It is unclear how it applies to the offence of unlawful assembly, and it does not apply to any of the other offences discussed in this chapter. In particular, the case law confirms that the protection does not apply to violence or property damage.¹¹⁶

The protection also does not apply to protesters who have not used Part 4 of the *Summary Offences Act 1988* before commencing their protest.

In NSW the offences that can be committed by protesters are located in a range of statutes, regulations and instruments, including the:

- [Crimes Act 1900](#)
- [Summary Offences Act 1988](#)
- [Roads Act 1993](#)
- [Roads Regulation 2018](#) and [Road Rules 2014](#)
- [Inclosed Lands Protection Act 1901](#)
- [Forestry Act 2012](#)
- [Mining Act 1992](#).

Table 2 provides a selection of the type of offences that can apply to protests. The table focusses on offences that, when introduced in parliament, were said to be responding to disruptive protests, such as the offences created in 2022 discussed in Chapter 6.

Table 2 is far from exhaustive. It does not include many other offences that protestors can potentially be charged with, such as damaging property, hindering or resisting police, or

¹¹⁶ [Commissioner of Police v Rintoul](#) [2003] NSWSC 662 at [24].

failing to comply with police directions.¹¹⁷ Such conduct occurs in a variety of situations that often do not involve protests.

The table also does not include violence offences such as assault during a large-scale public disorder, incitement of violence on grounds of race and religion, violent disorder, riot and affray.¹¹⁸ Such offences often are charged in the context of public unrest that does not relate to a protest, such as the Cronulla riots. However, if protest activity becomes violent or incites hatred, further offences relating to public disorder might apply, particularly if the use of the police's special powers are activated (discussed at 5.2.2).

Also omitted from Table 2 are some statutes and instruments relating to specific sites (including the Sydney Opera House,¹¹⁹ Royal Botanic Gardens,¹²⁰ Sydney Harbour Bridge and Anzac Bridge¹²¹) and statutes relating to local council notices in public places.¹²²

Table 2: Selected offences relevant to protests in NSW

Offence	Provision	Maximum penalty
Damage or disrupt major facility: enter, climb, otherwise trespass or block entry to a railway station, private port, infrastructure facility or other facility prescribed by regulation	Crimes Act 1900 , section 214A	2 years imprisonment or a fine of 200 penalty units (\$22,000) or both
Unlawful assembly: 5 or more persons whose common object is, by means of intimidation or injury, to	Crimes Act 1900 , section 545C	6 months imprisonment or a fine of 5 penalty units (\$550) or both If armed: 12 months imprisonment or 10 penalty units (\$1100) or both

¹¹⁷ For example, destroying or damaging property (section 195) and hindering or resisting police (section 60(1AA)) are offences against the [Crimes Act 1900](#); while failing to comply with a police direction without reasonable excuse (section 199) is an offence under the [Law Enforcement \(Powers and Responsibilities\) Act 2002](#). In [Antaw v R; Kitson v R; Lee v R](#) [2021] NSWDC 820, 3 protesters challenged their convictions under section 199 and the penalties imposed by the Local Court (a fine of \$150 each). The District Court dismissed the appeal, affirming that '[t]his was not a momentary failure, but a clear and persistent refusal' to comply with the directions of police: [41].

¹¹⁸ Assault during a large-scale public disorder (section 59A), riot (section 93B), affray (section 93C), and publicly threaten or incite violence on grounds including race and religion (section 93Z) are offences under the [Crimes Act 1900](#). Violent disorder by 3 or more persons is an offence under section 11A of the [Summary Offences Act 1988](#).

¹¹⁹ For example, entering or remaining as a trespasser (section 28A) or trespassing with intent to cause damage or seriously disrupt operations (section 28B) are offences under the [Sydney Opera House Trust Act 1961](#).

¹²⁰ Activities prohibited by the [Royal Botanic Gardens and Domain Trust Regulation 2020](#) include organising or participating in a public meeting or demonstration without written permission (clause 18) and addressing such a gathering (clause 30).

¹²¹ Clause 48 of the [Roads Regulation 2018](#), which provides for regulation of commercial activities on the Sydney Harbour Bridge and Anzac Bridge, includes an offence of conducting or participating in any public assembly or public procession otherwise than in accordance with a permit issued by Transport for NSW.

¹²² Failing to comply with a council notice that prohibits activities in a public place is an offence under section 632 of the [Local Government Act 1993](#).

Offence	Provision	Maximum penalty
compel a person to do or not do something ¹²³		
Damage, disrupt or obstruct major bridges, tunnels and roads: enter, remain on, climb, jump from or otherwise trespass on Sydney Harbour Bridge or any other major bridge, tunnel or road, causing damage or seriously disrupting or obstructing vehicles or pedestrians	Roads Act 1993 , section 144G	2 years imprisonment or 200 penalty units (\$22,000) or both
Climb on structure: risk safety of any other person by climbing on, abseiling or jumping from a building or other structure without reasonable excuse	Summary Offences Act 1988 , section 8A	3 months imprisonment or 10 penalty units (\$1100) or both
Climb on bridge: climb on any part of bridge, or remain on moving span while it is closed to traffic	Roads Regulation 2018 , clause 42	30 penalty units (\$3300)
Obstruct traffic: pedestrian causing traffic hazard by moving into path of a driver, or unreasonably obstructing path of a driver or another pedestrian (rule 236); or driver unreasonably obstructing path of another driver or pedestrian (rule 125)	Road Rules 2014 , rules 125 and 236	20 penalty units (\$2200)
Obstruct traffic: wilfully prevent free passage of a person, vehicle or vessel in a public place without reasonable excuse	Summary Offences Act 1988 , section 6	4 penalty units (\$440)
Obstruct railway: intentionally cause locomotive or rolling stock to be obstructed without reasonable excuse	Crimes Act 1900 , section 213	2 years imprisonment
Trespass (unlawful entry): enter public or private inclosed land without lawful excuse or permission, or remain on such land after being requested to leave ¹²⁴	Inclosed Lands Protection Act 1901 , section 4	Entry on prescribed premises (school, child care service, hospital or nursing home): 10 penalty units (\$1100)

¹²³ As discussed at 3.3.1.2, it is uncertain whether obtaining authorisation for a public assembly under Part 4 of the [Summary Offences Act 1988](#) protects participants from being charged with an offence under section 545C.

¹²⁴ This offence does not prevent entering or remaining on land for the purpose of industrial action or union activities: section 7A, which was inserted in the [Inclosed Lands Protection Act 1901](#) by the [Right to Farm Act 2019](#).

Offence	Provision	Maximum penalty
		Any other case: 5 penalty units (\$550)
Aggravated trespass: unlawful entry on inclosed lands on which a business or undertaking is conducted (section 4B); or inciting such conduct (section 4C)	Inclosed Lands Protection Act 1901 , sections 4B and 4C	Not agricultural land: 50 penalty units (\$5500) Agricultural land: ¹²⁵ 12 months imprisonment or 120 penalty units (\$13,200) or both Agricultural land and in company of 2 or more persons, or cause serious risk to safety: 3 years imprisonment or 200 penalty units (\$22,000) or both Incite aggravated trespass: 12 months imprisonment or 100 penalty units (\$11,000) or both
Interfere with mine: intentionally or recklessly destroy, damage or render useless any equipment, structure, road or bridge associated with a mine	Crimes Act 1900 , section 201	7 years imprisonment
Obstruction at mine: without reasonable excuse obstruct, hinder or restrict a person who is doing anything in accordance with a permit (section 257), or is exercising a function (section 378A) or is the holder of an authorisation (section 378B)	Mining Act 1992 , sections 257, 378A, 378B	Section 257: 100 penalty units (\$11,000) Section 378A: 2000 penalty units (\$220,000) Section 378B: 100 penalty units (\$11,000)
Obstruct forestry officer: obstruct, delay or hinder an authorised officer (including employees and police).	Forestry Act 2012 , section 83(1) ¹²⁶	20 penalty units (\$2200)

¹²⁵ Agricultural land is defined by section 3 to include keeping of livestock and poultry for commercial purposes, abattoirs, forestry, timber mills, and aquaculture. The concept of applying higher penalties to offences on agricultural land was introduced by the [Right to Farm Act 2019](#). The Minister for Agriculture quoted figures from the NSW Bureau of Crime Statistics and Research showing a 27% increase in the number of recorded incidents of trespass on farms and rural properties since 2014. He stated: 'The tactics of animal rights groups who trespass on farms are becoming more organised and more aggressive, including illegally installing recording devices, conducting mass on-farm protests, illegally removing stock, and collecting and publishing farm locations and data. These actions are often associated with online denigration, bullying, harassment and intimidation of farmers through social media.': Right to Farm Bill, [Second Reading Speech](#), Legislative Assembly, 17 September 2019.

¹²⁶ A private member's bill introduced in August 2023 proposed introducing new offences into the [Forestry Act 2012](#) and more than doubling the maximum penalties under section 83. The [Forestry Amendment \(Timber Harvesting Safety Zones\) Bill 2023](#) was introduced in the Legislative Council by Mark Banasiak MLC (Shooters, Fishers and Farmers Party) on 2 August 2023 and adjourned: [bill page](#). The bill proposes to insert Part 5C into the

Offence	Provision	Maximum penalty
Assault forestry officer: assault, threaten or intimidate an authorised officer	Forestry Act 2012 , section 83(2)	6 months imprisonment or 50 penalty units (\$5500) or both

It is not possible to set out data on the sentences imposed on protesters because there is no available set of statistics that solely relates to offences involving protests. When considering the sentences imposed for offences involving protests, an important factor is that the majority of the offences in Table 2 can be dealt with summarily in the Local Court, rather than on indictment in the District Court.¹²⁷ While the Local Court can impose sentences of imprisonment, it is more likely that an offence involving a protest would receive a non-custodial sentence in the Local Court. This outcome can be viewed as contrasting with the maximum penalties of imprisonment that apply to some of the offences involving protests.

The case of Deanna ‘Violet’ Coco (Box 1) illustrates the sentencing of offences charged in relation to a protest. Typically, the matter was dealt with summarily in the Local Court. Although a custodial sentence was initially imposed, this was later overturned on appeal.

[Forestry Act 2012](#), including to make it an offence for a person to enter or remain in a timber harvesting safety zone (proposed section 69ZD) or obstruct or interfere with timber harvesting (proposed 69ZE). The bill also proposes to increase the maximum penalty for the existing offence of obstructing a forestry officer (section 83(1)) from 20 penalty units to 120 penalty units, and for assaulting a forestry worker (section 83(2)) from 50 penalty units or imprisonment for 6 months to 120 penalty units or imprisonment for 12 months.

¹²⁷ Offences which can be dealt with summarily include: offences under the [Summary Offences Act 1988](#); offences in an Act which states that they may or must be dealt with summarily (e.g. [Inclosed Lands Protection Act 1901](#), section 8); and offences for which the maximum penalty of imprisonment is not more than 2 years ([Criminal Procedure Act 1986](#), section 6).

Box 1: The case of Deanna 'Violet' Coco

Deanna 'Violet' Coco was sentenced in December 2022 for her role in a protest on the Sydney Harbour Bridge. In April 2022 she drove a vehicle that blocked a lane of traffic on the bridge during peak hour as part of a climate activist group, Fireproof Australia.¹²⁸

In the Local Court she pleaded guilty to 5 charges including disrupting vehicles on the Sydney Harbour Bridge (section 144G of the *Roads Act 1993*), resisting or hindering a police officer (section 546C of the *Crimes Act 1900*), and failing to comply with a direction (section 199(1) of the *Law Enforcement (Powers and Responsibilities) Act 2002*). She was initially sentenced to an aggregate term of 15 months imprisonment, with a non-parole period of 8 months.

The sentence was overturned on appeal in March 2023 in the District Court where the judge substituted a 12 month conditional release order on the principal offence of disrupting vehicles on the Sydney Harbour Bridge.¹²⁹ The other charges received lesser sentences.¹³⁰ The judge found that the disruption caused by the incident was not to the extent claimed by the prosecution, and there was no evidence of Ms Coco's actions constituting a danger to the community.¹³¹

Like NSW, other Australian states and territories also have diverse offences which can apply to protest activities. Those offences are found in criminal laws, road laws and industry-specific legislation, particularly for mining and forestry. Between the jurisdictions, there are similarities among many of the provisions. For instance, trespassing and obstructing offences are expressed in broadly similar terms. However, some offences are unique to particular jurisdictions; an example is the NSW offence of disrupting a major facility, which was not detected in the same terms in other jurisdictions.

Appendix 1 sets out the key offences that can apply to protest activities in states and territories other than NSW. These provisions confirm that several states have expanded their offences and/or increased penalties in recent years.

¹²⁸ J McKinnell, [Jail sentence overturned for climate change activist who blocked Sydney Harbour Bridge](#), ABC News online, 15 March 2023.

¹²⁹ A conditional release order is a community-based sentencing option. Under section 9 of the [Crimes \(Sentencing Procedure\) Act 1999](#), the offender is convicted and undertakes to abide by the conditions imposed for the duration specified, in this case 12 months.

¹³⁰ See [Glover v R; Coco v R](#) [2023] NSWDC 322 at [31].

¹³¹ [Glover v R; Coco v R](#) [2023] NSWDC 322 at [8], [29].

5.2 Police powers

Police have a pivotal role when it comes to public assemblies in NSW. Firstly, they receive applications under Part 4 of the *Summary Offences Act 1988*. Secondly, they are responsible for ensuring that public assemblies are conducted in a manner that does not endanger the safety of the public or the participants in an assembly. With respect to the second role, police have a broad range of general powers that they can use. They also have special powers that can be used in emergency situations.

5.2.1 General powers

Police have broad powers to arrest persons without a warrant.¹³² Of particular relevance to protests, police may arrest a person without a warrant where:

- A police officer suspects on reasonable grounds that the person is committing (or has committed) an offence
- The police officer is satisfied that the arrest is reasonably necessary to:
 - Stop the person committing the offence
 - Stop the person fleeing
 - Obtain property in the possession of the person that is connected with the offence
 - Protect the safety or welfare of any person (including the person arrested).¹³³

Additionally, police officers retain their common law powers to deal with breaches of the peace.¹³⁴ Breach of the peace is a long-standing common law concept that can cover 'a wide range of actions and threatened actions that interfere with the ordinary operation of civil society'.¹³⁵ For instance:

A breach of the peace has been found to occur whenever harm is actually done (or is likely to be done) to a person or (while they are present) to their property; or a person is in fear of being harmed through an assault, affray, riot, unlawful assembly or other disturbance. Of particular significance to environmental protests that involve protesters blocking access ways or chaining themselves to machinery, a breach of the peace has also been found to occur 'whenever a person who is lawfully carrying out his work is unlawfully and physically obstructed by another from doing it'.¹³⁶

¹³² [Section 99\(1\)](#) of the *Law Enforcement (Powers and Responsibilities) Act 2022*.

¹³³ [Section 99\(1\)](#) of the *Law Enforcement (Powers and Responsibilities) Act 2022*.

¹³⁴ [Section 4\(2\)](#) of the *Law Enforcement (Powers and Responsibilities) Act 2022*.

¹³⁵ [State of NSW v Bouffler](#) [2017] NSWCA 185 at [164].

¹³⁶ T Gotsis, *Protests and the law in NSW*, 2015, p 22, citing R Douglas, *Dealing with Demonstrations: The Law of Public Protest and its Enforcement*, 2004, The Federation Press, Sydney, pp 52–53, and *R v Chief Constable of Devon and Cornwall* [1982] QB 458 at 417 per Lord Denning.

The common law powers retained by police to deal with breaches of the peace developed over time to protect and restore the 'King's Peace'. Those common law powers include dispersal of crowds, confiscation of property and arrest.¹³⁷

Where a criminal offence has occurred, police officers may, instead of exercising their powers of arrest, issue a penalty notice or court attendance notice. A penalty notice cannot be used to criminalise the act of public assembly; section 339 of the [Criminal Procedure Act 1986](#) states that a police officer is not authorised to issue a penalty notice in relation to 'an apparently genuine demonstration or protest', a 'procession' or an 'organised assembly'.

Search and seizure without warrant powers (under Part 4 Division 7 of the [Law Enforcement \(Powers and Responsibilities\) Act 2002](#)) include the power to seize 'anything that is intended to be used to lock-on or secure a person to any plant, equipment or structure for the purpose of interfering with the conduct of a business or undertaking' and that is likely to give rise to a serious safety risk.¹³⁸ However, it is not specifically an offence to possess such a device in NSW.¹³⁹

5.2.2 Special powers

Police ordinarily rely on their general powers to oversee protests and respond to any breaches of the law. There are, however, additional or special powers available to police to deal with protests when serious violence is anticipated or has arisen. In October 2023, there were reports that the special powers were going to be used in response to protests about the military conflict in the Middle East.¹⁴⁰ While that development did not eventuate, it is useful to provide an overview of the special powers; as they can still be used where there are concerns that a protest may or has become violent.

Part 6A Division 3 of the *Law Enforcement (Powers and Responsibilities) Act 2002* confers on police special powers to respond to public disorders, which are defined to mean 'a riot or other civil disturbance that gives rise to a serious risk to public safety'.¹⁴¹ The special powers were introduced in December 2005, when the NSW Parliament was recalled in response to the Cronulla riots. The use of the special powers was intended to be limited to

¹³⁷ T Gotsis, [Protests and the law in NSW](#), 2015, p 22 (footnotes omitted).

¹³⁸ This wording is from section 45A, which outlines the scope of things to which the power applies, while section 45B outlines the police's power to stop, search and detain without warrant, and to seize an item found as a result of the search. The provisions of Part 4 Division 7 of the *Law Enforcement (Powers and Responsibilities) Act 2002* were inserted by the [Inclosed Lands, Crimes and Law Enforcement Legislation Amendment \(Interference\) Act 2016](#).

¹³⁹ For comparison, see Appendix 1 for details of the Queensland offence of using a dangerous attachment device.

¹⁴⁰ See, for instance: T Rose and C McLeod, [Sydney police plan to use 'extraordinary' powers to search pro-Palestinian protesters and demand ID](#), *The Guardian*, 13 October 2023; and L Jackson, [Police weigh special powers ahead of pro-Palestinian protest](#), *Reuters*, 13 October 2023.

¹⁴¹ Section 87A of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

public disorders, and not to apply to peaceful assemblies or peaceful protests. This intent was noted by Premier Morris Iemma MP, who stated that Part 6A:

... create[s] a range of new powers to prevent or defuse large-scale public disorder. These powers are not intended for use in respect of peaceful protests, union demonstrations and the like. ...¹⁴²

A 2-year sunset clause originally applied to Part 6A but was deleted, meaning that the provisions of Part 6A remain.¹⁴³

In 2007 the NSW Ombudsman recommended that the NSW Parliament consider whether additional safeguards were required in Part 6A to provide an 'assurance of the right to peaceful assembly', similar to that which is provided by section 200 of the *Law Enforcement (Powers and Responsibilities) Act 2002* to police directions made under Part 14 of that Act.¹⁴⁴

5.2.2.1 Authorisation required

The use of the Part 6A special powers must be authorised by the Police Commissioner or a Deputy or Assistant Commissioner.¹⁴⁵ The authorisation may be given where there are reasonable grounds for believing that there is a large-scale public disorder occurring (or a threat of a large-scale public disorder in the near future) and that the exercise of those powers is reasonably necessary to prevent or control the public disorder.¹⁴⁶ The special powers may be authorised to prevent or control a public disorder in a particular area, or to prevent persons travelling by a specified road to create or participate in a public disorder. The particular area or road to which an authorisation applies is referred to as the 'target' of the authorisation.¹⁴⁷

The period that an authorisation has effect must be reasonably necessary for the purpose for which it is given but must not exceed 48 hours.¹⁴⁸ The period of the authorisation can be extended beyond 48 hours only following a successful application to the Supreme Court.¹⁴⁹

¹⁴² M Iemma, Law Enforcement Legislation Amendment (Public Safety) Bill 2005, [Second Reading Speech](#), NSW Hansard, Legislative Assembly, 15 December 2005, p 20,620.

¹⁴³ [Section 87P](#) of the *Law Enforcement (Powers and Responsibilities) Act 2002*, which was omitted by [Schedule 1\[6\]](#) of the *Law Enforcement and Other Legislation Amendment Act 2007*.

¹⁴⁴ NSW Ombudsman, [Review of Emergency Powers to Prevent or Control Disorder](#), 2007, Sydney, Recommendation 2, p vi and 12. The Attorney General at the time stated in relation to Recommendation 2: 'The Government is ... of the view that no legislative requirement is required to guarantee the right of peaceful assembly': [Second Reading Speech](#), Law Enforcement and Other Legislation Amendment Bill 2007, NSW Hansard, Legislative Council, 28 November 2007.

¹⁴⁵ [Section 87F](#) of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

¹⁴⁶ [Section 87D](#) of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

¹⁴⁷ [Section 87E](#) of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

¹⁴⁸ [Section 87G](#) of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

¹⁴⁹ [Section 87G\(3\)\(b\)](#) of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

5.2.2.2 Scope

The special powers allow police officers to:

- Establish a cordon or roadblock¹⁵⁰
- Stop and search vehicles without a warrant¹⁵¹
- Stop and search persons without a warrant.¹⁵²

If a police officer reasonably suspects that a person who is in the target area (or in a vehicle in the target area) has been involved in a public disorder (or is likely to be involved) the police officer may require the person to disclose their identity, including by providing proof of their identity.¹⁵³ Failure to disclose identity is an offence with a maximum penalty of 50 penalty units (\$5,500) and/or 12 months imprisonment.¹⁵⁴ It is also an offence, carrying the same maximum penalty, for a person to provide a false name or address.¹⁵⁵

A police officer may also seize and detain (for not more than 7 days) a vehicle, mobile phone or other thing if the seizure will assist in preventing or controlling a public disorder.¹⁵⁶ Police officers may also seize and detain all or part of a thing (including a vehicle) if the officer suspects on reasonable grounds that the seizure may provide evidence of the commission of a serious indictable offence.¹⁵⁷

A police officer may also verbally direct a group of persons within the target area to disperse immediately, provided the officer also informs the group that the direction is given for the purpose of preventing or controlling a public disorder.¹⁵⁸ It is an offence for a person to refuse or fail to comply with such a direction, without reasonable excuse. A maximum penalty of 50 penalty units (\$5,500) applies to the offence.¹⁵⁹

5.2.2.3 Scrutiny

The Law Enforcement Conduct Commission is required to scrutinise the exercise of the special powers provided to police under Part 6A and, for that purpose, may require the Police Commissioner or any public authority to provide information about the exercise of those powers.¹⁶⁰ The Police Commissioner is to ensure that, within 3 months, the Law

¹⁵⁰ [Section 87I](#) of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

¹⁵¹ [Section 87J](#). In certain limited circumstances, vehicles can be subject to the special powers even when the vehicle is outside the target area: [section 87MB](#). See further, [section 87N](#).

¹⁵² [Section 87K](#) of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

¹⁵³ [Section 87L\(1\) and \(4\)](#) of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

¹⁵⁴ [Section 87L\(2\)](#). [Section 17](#) of the *Crimes (Sentencing Procedure) Act 1999* provides that 1 penalty unit equals \$110.

¹⁵⁵ [Section 87L\(3\)](#) of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

¹⁵⁶ [Section 87M\(1\)\(a\)](#). The police can, under [section 87M\(2\)](#), apply to the Local Court for an extension of the period of detention.

¹⁵⁷ [Section 87M\(1\)\(b\)](#) of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

¹⁵⁸ [Section 87MA\(1\) and \(2\)](#) of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

¹⁵⁹ [Section 87MA\(4\)](#) of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

¹⁶⁰ [Section 87O\(1\) and \(2\)](#) of the *Law Enforcement (Powers and Responsibilities) Act 2002*

Enforcement Conduct Commission is provided with a report on any use of the special powers.¹⁶¹ The Law Enforcement Conduct Commission is to include in its annual report its work relating to the Part 6A police powers.¹⁶²

5.2.2.4 Use of the special powers

The NSW Police Force invoked the Part 6A special powers on 13 July 2008 in relation to an environmental protest in Newcastle.¹⁶³ Police were concerned that ‘splinter groups’ of activists threatened to turn ‘an otherwise peaceful camp and protest march’ into a ‘large scale public order incident...’.¹⁶⁴ The NSW Ombudsman was providing oversight at the time. It reported that the Part 6A powers were not misused, that police had ‘genuine and well-documented grounds for concern’ and that the formal authorisation to use the special powers occurred ‘only after police were alerted to an apparent attempt to derail a coal train.’¹⁶⁵

On 3 March 2011, the use of the special powers was authorised for a period of 48 hours to respond to a public disorder in a small community on the south coast of NSW, but this did not involve a protest.¹⁶⁶ The NSW Police Force has not used the Part 6A special powers since that occasion.¹⁶⁷

On 9 October 2023 there was a pro-Palestinian protest that moved from Sydney’s Town Hall to the Opera House. Video footage from the forecourt of the Opera House appeared to show some of the protesters burning the Israeli flag and chanting anti-Semitic slogans.¹⁶⁸ When pro-Palestinian protesters announced they were planning to hold another protest, the NSW Police Force announced that it was considering authorising the use of the special powers.¹⁶⁹ A second ‘largely peaceful’ protest took place in Hyde Park the following week, and it was reported that ‘NSW police did not follow through with their plan to enact extraordinary powers that would have permitted them to search protesters without reason and arrest and charge people who refused to identify themselves.’¹⁷⁰ On 21 November it was reported that the NSW Police Force was considering using the special powers to stop

¹⁶¹ [Section 870\(3\) and \(4\)](#) of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

¹⁶² [Section 870\(5\)](#) of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

¹⁶³ NSW Ombudsman, *Annual Report 2008-2009*, 2009, p 74 and 154.

¹⁶⁴ NSW Ombudsman, *Annual Report 2008-2009*, 2009, p 154

¹⁶⁵ NSW Ombudsman, *Annual Report 2008-2009*, 2009, p 155.

¹⁶⁶ NSW Ombudsman, *Annual Report 2010-11*, 2011, pp 158, 160.

¹⁶⁷ Law Enforcement Conduct Commission, *Annual Report 2022-23*, 23 October 2023, p 82.

¹⁶⁸ D Wu, [Flares set off at Sydney Opera House lit up in blue and white as pro-Palestine protesters appear to burn Israel flag](#), *Sky News*, 10 October 2023, accessed 17 October 2023.

¹⁶⁹ M Maddison, A Smith and M McGowan, [Minns backs use of extraordinary police powers for pro-Palestine rally](#), *Sydney Morning Herald*, 12 October 2023, accessed 17 October 2023.

¹⁷⁰ C McLeod, [Thousands attend pro-Palestine protests in Sydney and Melbourne ahead of Gaza invasion](#), *The Guardian*, 15 October 2023, accessed 17 October 2023. See also: [Thousands turn out for pro-Palestinian rallies in Melbourne, Sydney and Adelaide, while Israel supporters gather in Brisbane](#), *ABC News*, 15 October 2023, accessed 17 October 2023.

car convoys that were being organised in support of Palestine.¹⁷¹ There have since been regular peaceful protests on this issue and the special powers have not been used.

5.2.3 Damages arising from the use of police powers in protests

As discussed in this chapter, police have a broad range of general and special powers that they can use at protests. However, they also have legal obligations with which they must comply. In particular, section 6 of the [Police Force Act 1900](#) states that the NSW Police Force is responsible for protecting people from injury or death, 'whether arising from criminal activity or in any other way.' That responsibility extends to members of the public who are attending a protest, whether as participants or spectators.¹⁷² As illustrated in 2 recent cases, where the responsibility of police to protesters is not upheld the NSW Police Force can be subject to civil legal proceedings and the payment of damages.

The first case involved Professor Simon Rice, of the University of Sydney. Professor Rice sued the NSW Police Force in the NSW District Court for false imprisonment and assault and battery. In 2020 Professor Rice was observing university students protesting against tertiary education policy. He approached police officers to ask why they took a megaphone away from a protester. Shortly afterwards, he was arrested. Video of the incident posted online showed him being forced to the ground by 3 police officers. Judgment was entered in Professor Rice's favour in September 2023, with the consent of the parties and confidential terms of settlement.¹⁷³

The second case was *Cullen v State of NSW*.¹⁷⁴ In January 2017 Ms Laura Cullen attended an Invasion Day rally. At one point during the protest, a protester doused an Australian flag with accelerant in preparation for burning it, while a crowd of protesters and spectators gathered around him. Police rushed through the crowd to prevent the burning of the flag and tackled a person who assaulted a police officer. In the process, Ms Cullen was knocked over, struck her head on the ground and suffered significant injury. Acting Justice Elkaim found that the officers owed Ms Cullen a duty of care, that the duty was breached and that the breach caused injury to her. Negligence was found both in how the police rushed into the crowd and in how they attempted to effect an arrest by tackling a protester in the midst of an agitated crowd.¹⁷⁵ Ms Cullen was awarded damages in the sum of \$800,000.¹⁷⁶

¹⁷¹ I Roe, [Palestinian supporters protest at NSW premier's office as police to use special powers to stop car convoys](#), ABC News, 21 November 2023.

¹⁷² *Cullen v State of NSW* [2023] NSWSC 653 at [129].

¹⁷³ M Whitbourn, [University of Sydney law professor wins court fight against NSW Police](#), *Sydney Morning Herald*, 2 October 2023.

¹⁷⁴ *Cullen v State of NSW* [2023] NSWSC 653.

¹⁷⁵ *Cullen v State of NSW* [2023] NSWSC 653 at [150] and [162].

¹⁷⁶ *Cullen v State of NSW* [2023] NSWSC 653 at [178].

6. The 2022 Act

This part of the paper discusses the [Roads and Crimes Legislation Amendment Act 2022](#), which was introduced in response to disruptive protest activity. The 2022 Act was controversial because of the speed with which it was enacted and its potential impact on public assemblies. As explained in Chapter 7, the 2022 Act was challenged in court on a constitutional ground. The following discussion of the 2022 Act examines the main features of the legislation and the various stakeholder perspectives.

6.1 The amendments

The [Roads and Crimes Legislation Amendment Act 2022](#) amended the *Roads Act 1993* and the *Crimes Act 1900* to prohibit unauthorised conduct that disrupts roads and major facilities.

In each house of Parliament, the Roads and Crimes Legislation Amendment Bill 2022 was considered after being declared an urgent bill.¹⁷⁷ In the Legislative Assembly, the then Attorney General, Mark Speakman MP, stated that the Bill responded to recent instances of ‘illegal protestors’ causing major disruptions to infrastructure and the transport network, particularly at Port Botany and the Spit Bridge.¹⁷⁸ He noted that the protests were not authorised and, as well as ‘the major inconvenience that incidents like these cause to the community, there are also severe financial impacts ... through direct economic loss and lost productivity.’¹⁷⁹

The Attorney General stated there was a need for the amendments to address a gap in the law:

The problem with the current laws is that, unless there is a malevolent intention to endanger lives or vandalise property and there is only an intention to disrupt and cause economic chaos, the penalty will only be several hundred dollars. It is as if someone pays a small licence fee of a few hundred dollars to unleash enormous economic carnage on ordinary

¹⁷⁷ The legislation was enacted within 3 days: [bill page](#) of the Roads and Crimes Legislation Amendment Bill 2022. On the same day that it passed (1 April 2022), it received assent and commenced: section 2 of the [Roads and Crimes Legislation Amendment Act 2022](#); and [Government Gazette No.158](#). The Legislation Review Committee (LRC) which examined the Bill noted that it had already passed before their report was tabled and ‘the Houses were therefore unable to take into account the comments made in this Bill report during their consideration of the Bill’: [Legislation Review Digest](#), No. 42/57, 10 May 2022, p 23. The LRC discussed the human rights implications of the Bill and found that it may impact on freedom of movement and assembly: p 24.

¹⁷⁸ Mark Speakman, Attorney General, *Roads and Crimes Legislation Amendment Bill 2022*, [Second reading speech](#), *NSW Hansard*, Legislative Assembly, 30 March 2022, p 8938. The second reading debates identified a climate change activist group, Blockade Australia, which had further plans ‘to participate in mass, disruptive action’: *Roads and Crimes Legislation Amendment Bill 2022*, [Second Reading Debate](#), *NSW Hansard*, Legislative Assembly, 30 March 2022, p 8942 (Michael Daley), p 8943 (Yasmin Catley), p 8964 (Mark Speakman).

¹⁷⁹ *Roads and Crimes Legislation Amendment Bill 2022*, [Second reading speech](#), *NSW Hansard*, Legislative Assembly, 30 March 2022.

citizens. That is unacceptable. It is clear that there is insufficient deterrence for that sort of behaviour.¹⁸⁰

6.1.1 Existing offence of section 144G extended

The existing offence of causing damage, serious disruption or obstruction of the Sydney Harbour Bridge and other major bridges and tunnels under section 144G of the [Roads Act 1993](#) was extended to apply to 'major roads'. The maximum penalty for this offence remained at 200 penalty units (\$22,000) or imprisonment for 2 years or both.

The definition of a 'major road' is prescribed by clause 48A of the [Roads Regulation 2018](#) in broad terms to include: a main road, highway, freeway or tollway; a bridge or tunnel that joins a main road, highway, freeway or tollway; and any bridge or tunnel in the Greater Sydney Region, City of Newcastle and City of Wollongong. According to the Attorney General, defining aspects of the offence in the regulation, rather than in the Act, 'ensures that government can remain flexible and responsive to prevent and respond to hotspots as they arise.'¹⁸¹

This offence records a relatively low number of proven convictions. The most recent sentencing statistics from the Judicial Commission of NSW show that, over the 4 year period of July 2019 to June 2023, there were 13 cases in the Local Court where a conviction was recorded for an offence against section 144G.¹⁸² All offences under the *Roads Act* are dealt with summarily in the Local Court and therefore there are no cases in the sentencing statistics for the District and Supreme Courts.¹⁸³

This offence also receives mostly non-custodial sentences. In the 13 Local Court cases where a conviction was recorded for an offence against section 144G, the penalties imposed were 3 fines (23.1%), 8 Community Correction Orders (61.5%), 1 Intensive Correction Order (7.7%) and 1 prison sentence (7.7%) which was overturned on appeal (as discussed in Box 1).¹⁸⁴

¹⁸⁰ Mark Speakman, Attorney General (in reply), Roads and Crimes Legislation Amendment Bill 2022, [Second Reading Debate](#), *NSW Hansard*, Legislative Assembly, 30 March 2022, pp 8951-8952.

¹⁸¹ Roads and Crimes Legislation Amendment Bill 2022, [Second reading speech](#), *NSW Hansard*, Legislative Assembly, 30 March 2022.

¹⁸² Judicial Commission of NSW, Judicial Information Research System (JIRS), Sentencing Statistics, Local Court, as at December 2023, sentences from July 2019 to June 2023, accessed 31 January 2024. The Judicial Commission sentencing statistics only include cases where section 144G was the principal (or most serious) offence.

¹⁸³ Section 242 of the [Roads Act 1993](#).

¹⁸⁴ The penalty options are available under the [Crimes \(Sentencing Procedure\) Act 1999](#). The Judicial Commission data shows the 3 fines imposed were for the amounts of \$400, \$750 and \$5,000, although a note to the data states that these figures have been rounded upwards (e.g., a fine of \$60 would be shown as \$100).

6.1.2 New offence of section 214A created

A new offence of damage or disruption to a 'major facility' was created under section 214A of the [Crimes Act 1900](#). The offence provides that:

(1) A person must not enter, remain on or near, climb, jump from or otherwise trespass on or block entry to any part of a major facility if that conduct –

(a) causes damage to the major facility, or

(b) seriously disrupts or obstructs persons attempting to use the major facility, or

(c) causes the major facility, or part of [it]... to be closed, or

(d) causes persons attempting to use the major facility to be redirected.

The maximum penalty for this offence is the same as the offence under section 144G, namely, a fine of \$22,000 or imprisonment for 2 years or both.¹⁸⁵

A 'major facility' is defined by section 214A(7) as being a railway station or public transport facility, private port or another port, or an infrastructure facility (including water, sewerage, energy or other public service), as prescribed by regulation.¹⁸⁶

The most recent sentencing statistics from the Judicial Commission do not show any recorded convictions for an offence against section 214A of the *Crimes Act 1900*.¹⁸⁷ However, a recent example of this charge being used was in November 2023, when pro-Palestinian activists gathered at Port Botany to protest against the unloading of an Israeli-owned shipping company vessel. The protesters blocked major roads and police charged 23 people with damage or disruption to a major facility, as well as failing to comply with a move on direction.¹⁸⁸ Any convictions recorded for those charges will, in due course, appear in future sentencing statistics.¹⁸⁹

¹⁸⁵ Offences for which the maximum penalty of imprisonment is not more than 2 years are to be dealt with summarily in the Local Court: section 6 of the *Criminal Procedure Act 1986*.

¹⁸⁶ Schedule 1 of the [Crimes Regulation 2020](#) lists the major facilities.

¹⁸⁷ Judicial Commission of NSW, Judicial Information Research System (JIRS), Sentencing Statistics, Local Court, as at December 2023, sentences from July 2019 to June 2023, accessed 31 January 2024. The Judicial Commission's sentencing statistics only include cases where section 214A was the principal (or most serious) offence.

¹⁸⁸ [NSW Police charge 23 pro-Palestinian activists over protest against Israeli shipping line ZIM at Sydney's Port Botany](#), ABC News online, 22 November 2023.

¹⁸⁹ Provided the charges were the principal offence in the case, as the sentencing statistics are based solely on principal offences.

6.1.3 Defences and exemptions

It is a defence to either offence if the person charged proves that they had a reasonable excuse for their conduct.¹⁹⁰ Section 144G(5) states that a person has a reasonable excuse if the conduct arises from a mechanical fault or breakdown of a motor vehicle.

Both offences stipulate that a person does not commit an offence if the conduct forms part of an industrial action, industrial dispute or industrial campaign.¹⁹¹ This exemption was the subject of input from the Labor Party before the introduction of the Bill. Michael Daley MP, the then Shadow Attorney General, confirmed that 'a carve-out...for industrial activity...was a non-negotiable for us.'¹⁹²

Other exemptions for both offences include conduct occurring with the consent of the police or another public authority, conduct occurring at a person's workplace or a workplace owned by their employer, and conduct occurring at Parliament House or at an office of a member of parliament.¹⁹³

6.2 Stakeholder perspectives

The second reading debates on the [Roads and Crimes Legislation Amendment Bill 2022](#) in late March 2022 referred to the reactions and perspectives of various organisations and sections of the community relating to the Bill and protest activities.

A letter criticising the Bill was signed by 39 legal, human rights and community organisations, including the Australian Council of Social Service, Amnesty International, Asylum Seekers Centre, Human Rights Law Centre, Aboriginal Legal Service, Redfern Legal Centre, Community Legal Centres NSW, Greenpeace Australia Pacific, the Australian Youth Climate Coalition, the Australian Centre for International Justice, and Friends of the Earth Australia. The letter described the laws as 'incompatible with the democratic right to protest and our fundamental civil liberties.' The organisations called on the NSW Government to 'cease the introduction of draconian penalties for protests.'¹⁹⁴

¹⁹⁰ [Crimes Act 1900](#), section 214A(2); and [Roads Act 1993](#), section 144G(5).

¹⁹¹ [Crimes Act 1900](#), section 214A(3); and [Roads Act 1993](#), section 144G(5A).

¹⁹² Roads and Crimes Legislation Amendment Bill 2022, [Second Reading Debate](#), *NSW Hansard*, Legislative Assembly, 30 March 2022, p 8941. Mr Daley referred to past protests by unions and a protest which the Nurses and Midwives' Association was preparing to hold in the week that the Bill was introduced. He observed that the Nurses and Midwives' Association 'has permission to protest' and while 'it will be disruptive...the citizens of New South Wales will look on and say, "That is disruptive, but that is a cost we are happy to accept": p 8,942.

¹⁹³ Further provisions with regard to reasonable excuses and exemptions were proposed to exclude climate action, or peaceful non-violent action at animal facilities, or action supporting the rights of First Nations people, but these were negated: [Consideration in Detail](#), Legislative Assembly, 30 March 2022, pp 8951, 8960; [In Committee](#), Legislative Council, 1 April 2022, pp 7279, 7280, 7289.

¹⁹⁴ [Threats of 2 years jail for road disruption and visa cancellations an unconscionable attack on protest rights](#), Open letter, March 2022, accessed from Redfern Legal Centre, [Concern raised around new protest laws passed in NSW](#), media release, 23 June 2022.

Some activist groups that opposed the Bill were referred to in the debates, including the 'Knitting Nannas', which launched a court challenge to the laws (discussed in Chapter 7.)¹⁹⁵

The union movement also opposed the Bill.¹⁹⁶ The Maritime Union of Australia considered that the Bill contained 'repressive laws', which indicated the 'State of NSW is once again imprisoning people for legitimate forms of protest.'¹⁹⁷ Unions NSW launched a 'proud to protest' petition.¹⁹⁸

Some environmental and human rights organisations asserted that the [Roads and Crimes Legislation Amendment Act 2022](#) was symptomatic of a national trend of 'anti-protest legislation' in recent years.¹⁹⁹ Examples of interstate statutes that have expanded existing offences or created new offences in the last 5 years are:

- [Summary Offences and Other Legislation Amendment Act 2019](#) (Qld)
- [Police Offences Amendment \(Workplace Protection\) Act 2022](#) (Tas)
- [Sustainable Forests Timber Amendment \(Timber Harvesting Safety Zones\) Act 2022](#) (Vic)
- [Summary Offences \(Obstruction of Public Places\) Amendment Act 2023](#) (SA)

This interstate legislation is examined further in Appendix 1.

Contrasting perspectives were also acknowledged in the debates. For example, the Minister for Regional Transport and Roads, Sam Farraway MLC, in supporting the Bill, referred to the 'unseen impacts that protests are having on our regional communities, our farmers, our primary producers, our businesses and, in particular, our freight operators across the State.'²⁰⁰

Daniel Mookhey MLC, the Shadow Treasurer at the time (now Treasurer), highlighted the 'cascading consequences' for workers of disruption at a container port such as Port Botany. Truck drivers who were delayed in accessing the port can experience a reduction of income earned and time worked, jeopardising their ability to comply with fatigue laws. Owner-

¹⁹⁵ Roads and Crimes Legislation Amendment Bill 2022, [Second Reading Debate](#), *NSW Hansard*, Legislative Assembly, 30 March 2022, p 8945.

¹⁹⁶ J McIlroy, [NSW unions campaign against anti-strike and anti-protest laws](#), *Green Left*, Issue 1363, 4 October 2022.

¹⁹⁷ [MUA joins fight for the right to protest and strike](#), *Maritime Workers Journal*, Autumn 2023, p 12, quoting MUA Sydney Branch Secretary, Paul Keating.

¹⁹⁸ Action Network website, Petitions, [Proud to protest](#), accessed 6 October 2023.

¹⁹⁹ For instance, Environmental Justice Australia, [Laws criminalising peaceful protests](#), webpage, accessed 12 October 2023; J Grix, [South Australia's rushed anti-protest laws the latest affront to democracy](#), Environmental Defenders Office, 19 May 2023; Josh Pallas, the President of the NSW Council of Civil Liberties, quoted in L Cass and E Lawry, ['A patchwork quilt of repression': The disappearing right to protest in NSW](#), *Honi Soit*, 17 October 2023; E Howie, Human Rights Law Centre, [Anti-protest legislation and the chilling of free speech](#), 136, *Precedent*, Australian Lawyers Alliance, 2016.

²⁰⁰ Roads and Crimes Legislation Amendment Bill 2022, [Second Reading Debate](#), Legislative Council, 31 March 2022, p 7312.

drivers were especially disadvantaged as they cannot recover the costs of delay from their clients (retailers).²⁰¹

Spokespersons from the mining, agriculture and forestry industries expressed concerns that protest activity in recent years has led to the harassment of their staff; placed the safety of workers and protesters at risk, particularly where protesters are accessing dangerous worksites, such as mines; and risked damaging expensive plant and equipment.²⁰²

6.3 Review of provisions

There is a requirement for a statutory review of section 214A and section 144G to be conducted 2 years after the commencement (on 1 April 2022) of the [Roads and Crimes Legislation Amendment Act 2022](#). Within a further 6 months, a report on the outcome of the review must be tabled in each House of Parliament (by late 2024).²⁰³

²⁰¹ Roads and Crimes Legislation Amendment Bill 2022, [Second Reading Debate](#), Legislative Council, 31 March 2022, p 7331.

²⁰² Allegations of harassing conduct towards forestry workers were made in NSW Parliament in August 2023: L Costin, [Protections urged for threatened forestry workers](#), *Canberra Times*, 4 August 2023. The Chief Executive of Australian Pork Limited, Margo Andrae, gave evidence to an Australian Parliament Senate Estimates hearing about protesters 'frightening staff': National Farmers Federation, [Activists ought to be called out on harassment tactics](#), Media release, 26 May 2023. In 2016 in the context of coal seam gas protests, the NSW Minerals Council chief executive, Stephen Galilee, spoke on behalf of member companies 'about their serious concerns for the safety of their mining workers as well as for those protesters who are illegally accessing mine sites': A Raper, [NSW Government proposing new police powers to stop 'lock-on' mining protests](#), ABC News online, 7 March 2016. Australian Petroleum Production and Exploration Association chief executive, Dr Malcolm Roberts, also voiced concern in 2016 over equipment damage and risks to personal safety at natural gas worksites near Narrabri: H Black, [NSW beefs up anti-protest laws](#), *Energy News Bulletin*, 8 March 2016.

²⁰³ The review requirement is outlined under section 214B of the [Crimes Act 1900](#) and section 144H of the [Roads Act 1993](#).

7. The 2023 Supreme Court case of Kvelde v NSW

7.1 Background

Ms Helen Kvelde and Ms Dominique Jacobs are 2 members of the Knitting Nannas, whose ‘Nannafesto’ states that members of the group engage in protests to raise awareness of environmental issues.²⁰⁴ Both Ms Kvelde and Ms Jacobs demonstrated to the court that they had a long-held interest in environmental issues and participated in many environmental protests.²⁰⁵

Following the introduction of the [Roads and Crimes Legislation Amendment Act 2022](#), Ms Kvelde and Ms Jacobs restricted their participation in protests, particularly protests in highly visible parts of the Sydney central business district, due to concerns about the scope and impact of the Act. Seeking to resume their protest activity due to ongoing concerns about environmental issues, they sought declarations in the Supreme Court that:

1. Section 214A of the [Crimes Act 1900](#) was invalid because it infringed the implied freedom of political communication in the Australian Constitution
2. Clause 48A(1) of the [Roads Regulation 2018](#) was invalid because it was beyond the scope of the regulation-making power contained in the [Roads Act 1993](#).

(Section 214A and clause 48A are discussed at 6.1.1 and 6.1.2 of this paper.)

The State of NSW argued that Ms Kvelde and Ms Jacobs had no standing to seek the declarations because they had no ‘special interest’ in the matter, and that a person merely having strong ideological beliefs about an issue is insufficient to establish standing.²⁰⁶ The court found, however, that Ms Kvelde’s and Ms Jacobs’ long-held interest in environmental issues and history of participating in environmental protests meant that they had a real and special interest in the validity of the provisions, ‘which have affected and will continue to affect, their ability to communicate their political beliefs through protest actions that they consider to be effective ...’²⁰⁷ Accordingly, Ms Kvelde and Ms Jacobs had standing to bring the proceedings in the Supreme Court.

²⁰⁴ [Kvelde v State of New South Wales](#) [2023] NSWSC 1560 at [68].

²⁰⁵ [Kvelde v State of New South Wales](#) [2023] NSWSC 1560 at [131], [132].

²⁰⁶ The ‘special interest’ test was established in [Australian Conservation Foundation Inc v Commonwealth](#) (1980) 146 CLR 493, as discussed in [Kvelde v State of New South Wales](#) [2023] NSWSC 1560 at [111]-[113].

²⁰⁷ [Kvelde v State of New South Wales](#) [2023] NSWSC 1560 at [133].

7.2 The implied freedom of political communication

The Australian Constitution provides an implied freedom of political communication that protects the 'free expression of political opinion, including peaceful protest, which is indispensable to the exercise of political sovereignty by the people of the Commonwealth.'²⁰⁸ A statutory provision which is found to contravene the implied freedom of political communication is invalid.

The following 3-part test has been developed by the High Court to establish whether a law contravenes the implied freedom of political communication:

1. Does the law effectively burden the implied freedom in its terms, operation or effect?
2. If 'yes' to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
3. If 'yes' to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?²⁰⁹

7.3 Applying the 3-part test to section 214A

This section of the paper provides an overview of the way the 3-part test was used to examine whether section 214A was invalid under the implied freedom of political communication.

7.3.1 Answer to Question 1

Question 1 was answered 'yes'. Section 214A burdened the implied freedom of political communication in so far as it prohibited persons from engaging in conduct which causes the partial closure of the major facility and/or the redirection of persons who are attempting to use the major facility.²¹⁰ In particular, section 214A(1)(d) prohibited the 'prototypical peaceful protest activity' of an assembly of people near a major facility causing people attempting to use the facility to be redirected, even where the redirection was slight. Similarly, section 214A(1)(c) prohibited conduct which causes part of a major facility to be closed even where the operation of the facility is not otherwise affected (for instance, people not being able to use one of several easily accessible entries to a railway station

²⁰⁸ [Brown v Tasmania](#) (2017) 261 CLR 328 at [88].

²⁰⁹ [Kvelde v State of New South Wales](#) [2023] NSWSC 1560 at [8], citing [McCloy v NSW](#) (2015) 257 CLR 178 at [1]-[3], [Brown v Tasmania](#) (2017) 261 CLR 328 at [104], [156], [277] and [481], and [Clubb v Edwards](#) (2019) 267 CLR 171 at [5].

²¹⁰ [Kvelde v State of New South Wales](#) [2023] NSWSC 1560 at [415].

due to a public assembly).²¹¹ The court noted that such conduct ‘...may cause inconvenience, but is not otherwise unlawful.’ In those instances, the burden on the implied freedom of political communication was ‘direct and substantial.’²¹²

7.3.2 Answer to Question 2

Question 2 was answered ‘yes’. Section 214A had a legitimate purpose. That legitimate purpose was to increase deterrents to unlawful conduct causing damage, serious disruption or obstruction to major facilities and, more generally, to the broader community. The legitimate purpose of section 214A, however, did not extend to the criminalisation of otherwise lawful conduct that ‘merely’ caused inconvenience. In particular, it did not extend to people near a major facility being incidentally redirected or to the partial closure of a facility that does not affect its operation.²¹³

7.3.3 Answer to Question 3

The court answered question 3 ‘no’. A ‘structured proportionality analysis’ was used to determine whether the restriction which section 214A imposed on the implied freedom of political communication was justified.²¹⁴ The structured proportionality analysis adopted by the court involved answering the following 3 questions, which effectively become questions 3(a)-(c):

(a) Is the law suitable to achievement of [its] purpose, in the sense of having a rational connection to that purpose?

(b) Is the burden on the freedom necessary, in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom?

(c) Is the law adequate in its balance, that is to say, not unduly burdensome on the freedom taking account of the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom?²¹⁵

Question 3(a) was answered ‘yes’. The prohibitions under section 214A(1)(a)-(d) were suitable for achieving the provision’s legitimate purpose.²¹⁶

Question 3(b) was answered ‘no’. Section 214A(1)(c) (insofar as it relates to partial closure) and section 214A(1)(d), impose a significantly greater burden on the implied freedom than

²¹¹ [Kvelde v State of New South Wales](#) [2023] NSWSC 1560 at [259] and [363].

²¹² [Kvelde v State of New South Wales](#) [2023] NSWSC 1560 at [363].

²¹³ [Kvelde v State of New South Wales](#) [2023] NSWSC 1560 at [434] and [436].

²¹⁴ [Kvelde v State of New South Wales](#) [2023] NSWSC 1560 at [438].

²¹⁵ [Kvelde v State of New South Wales](#) [2023] NSWSC 1560 at [440], quoted from [Burton v Director of Public Prosecutions \(NSW\)](#) [2022] NSWCA 22 at [16]. In [Burton](#) at [15] it was noted that an ongoing majority of the High Court have continued to adopt a structured proportionality test.

²¹⁶ [Kvelde v State of New South Wales](#) [2023] NSWSC 1560 at [463].

is necessary to achieve the legitimate purpose of the law. The court considered that they have a 'chilling effect' on political communication that is conducted via protests and public assemblies.²¹⁷ It was possible for alternative laws to have imposed a significantly lesser burden on the implied freedom and still have achieved Parliament's legitimate purpose.²¹⁸ For example, the court said that one of the alternative laws proposed by Ms Kvelde and Ms Jacobs (that is, creating an offence of engaging in unlawful conduct that causes damage or serious disruption to major facilities) had 'substance' and 'may be reasonably expected to have imposed a significantly lesser burden upon the implied freedom and still achieved Parliament's purpose to the same or a similar effect.'²¹⁹ Accordingly, section 214A(1)(c) (with respect to partial closure) and 214(1)(d) failed this stage of the structured proportionality analysis.²²⁰

Although Question 3(c) was not required to be answered (due to Question 3(b) having been answered 'no'), Question 3(c) was also answered 'no'. Section 214A was not adequate in its balance because:

... the adverse effect of s 214A on the implied freedom in terms of deterring otherwise lawful protests significantly outweighs the benefit sought to be achieved by more effectively deterring any conduct that may disrupt major facilities themselves. It does represent overreach from the legislative purpose.²²¹

Notably, the law was likely to deter protests of all kinds at locations that have long been used for political communication. People who were intending to conduct a peaceful protest at Sydney Town Hall, for instance, would be deterred by the law from remaining near Town Hall Station.²²²

7.3.4 Outcome of the 3-part test: section 214A(1) partially invalid

Section 214A(1)(c), as it relates to the partial closure of major facilities, and section 214A(1)(d) impermissibly burdened the implied freedom of political communication, contrary to the Australian Constitution.²²³ That conclusion rendered those parts of section 214A(1) invalid. The rest of the section remained valid. The valid and invalid parts of section 214A(1) are shown in Box 2.

²¹⁷ [Kvelde v State of New South Wales](#) [2023] NSWSC 1560 at [486] and [498].

²¹⁸ [Kvelde v State of New South Wales](#) [2023] NSWSC 1560 at [498].

²¹⁹ [Kvelde v State of New South Wales](#) [2023] NSWSC 1560 at [469], [477], [498].

²²⁰ [Kvelde v State of New South Wales](#) [2023] NSWSC 1560 at [499].

²²¹ [Kvelde v State of New South Wales](#) [2023] NSWSC 1560 at [517]-[518].

²²² [Kvelde v State of New South Wales](#) [2023] NSWSC 1560 at [516].

²²³ [Kvelde v State of New South Wales](#) [2023] NSWSC 1560 at [519], [564]-[565] and [578]

Box 2: Section 214A(1) of the *Crimes Act 1900*, with invalid text in bold

(1) A person must not enter, remain on or near, climb, jump from or otherwise trespass on or block entry to any part of a major facility if that conduct—

(a) causes damage to the major facility, or

(b) seriously disrupts or obstructs persons attempting to use the major facility, or

(c) causes the major facility, **or part of the major facility**, to be closed, or

(d) causes persons attempting to use the major facility to be redirected.

Maximum penalty: 200 penalty units [\$22,000] or imprisonment for 2 years, or both.²²⁴

7.4 Regulation-making and validity of clause 48A

Regulations are a type of delegated legislation. They are created by executive power rather than being passed by the legislature. Consequently:

... while delegated legislation is subject to oversight by parliamentary committees, it does not require democratic endorsement. Delegated legislation might impact on matters as significant as rights and freedoms, without the direct imprimatur of Parliament.²²⁵

This observation is pertinent to clause 48A of the [Roads Regulation 2018](#), which was introduced and amended twice in less than a fortnight in 2022.²²⁶

Clause 48A identifies what constitutes a 'major bridge, tunnel or road', for the purposes of section 144G of the [Roads Act 1993](#). Section 144G prohibits conduct causing damage,

²²⁴ Section 17 of the [Crimes \(Sentencing Procedure\) Act 1999](#) provides that 1 penalty unit equals \$110.

²²⁵ B Chen, 'Delegated legislation and rights-based interpretation' in J Boughey and L Burton Crawford (eds), *Interpreting Executive Power*, 2020, The Federation Press, p 91.

²²⁶ Clause 48A was inserted into the regulation by the [Roads Amendment \(Major Bridges and Tunnels\) Regulation 2022](#), which commenced on 24 March 2022 and defined a 'major bridge or tunnel' as any bridge or tunnel within the Greater Sydney Region. It was then expanded by the [Roads Amendment \(Major Bridges and Tunnels\) Regulation \(No 2\) 2022](#) (commenced on 1 April 2022), adding to the definition of 'major bridge or tunnel' any bridge or tunnel in the cities of Newcastle and Wollongong, and also bridges or tunnels that join a main road, highway or freeway. The [Roads Amendment \(Major Roads\) Regulation 2022](#) (commenced on 5 April 2022) changed the definition to 'major bridge, tunnel or road' and adopted the current wording reproduced here.

serious disruption or obstruction to the use of the Sydney Harbour Bridge or any other major bridge, tunnel or road prescribed by the regulations.

The definition of a 'major bridge, tunnel or road' under clause 48A(1) is:

- (a) a main road
- (b) a highway
- (c) a freeway
- (d) a tollway
- (e) a bridge or tunnel that joins a road referred to in paragraphs (a)–(d)
- (f) a bridge or tunnel in—
 - (i) the Greater Sydney Region, or
 - (ii) the City of Newcastle, or
 - (iii) the City of Wollongong.

Ms Kvelde and Ms Jacobs challenged the validity of clause 48A of the [Roads Regulation 2018](#) on 2 grounds: that it lacked reasonableness and it delegated power to the executive to prescribe what is a 'major road'.

7.4.1 Unreasonableness

On the first ground, Ms Kvelde and Ms Jacobs argued it was not reasonable to prescribe every bridge or tunnel within the large areas of Sydney, Newcastle and Wollongong with the classification of 'major' and that the blanket, non-discriminating approach of clause 48A(1)(f) impermissibly expanded the scope of section 144G of the [Roads Act 1993](#).

There is a high threshold for invalidating a regulation on the basis of unreasonableness, and the court found that the present case did not cross it.²²⁷ As legal experts have noted, courts are cautious about overturning delegated legislation on the ground of unreasonableness.²²⁸

The court also rejected the argument that clause 48A(1)(a) conflated the 2 categories of 'main roads' and 'major roads' by prescribing all 'main roads' to be 'major roads'. There was nothing to substantiate that parliament intended the expression 'major bridge, tunnel or road' to create a different category of roads that was narrower than 'main roads'.²²⁹

²²⁷ [Kvelde v State of New South Wales](#) [2023] NSWSC 1560 at [537], [548]. Reference is made to [Attorney-General \(SA\) v Corporation of the City of Adelaide](#) (2013) 249 CLR 1, which at [52] gives an example of a regulation found to be unreasonable and invalid.

²²⁸ D Pearce and S Argument, *Delegated Legislation in Australia*, 2023, 6th edition, Lexis Nexis, p 453. The authors explain (at p 451) that delegated legislation reflects policies, so the 'formulation of policy will often require the making of choices and, in normal circumstances, the court should not second guess the choice made.'

²²⁹ [Kvelde v State of New South Wales](#) [2023] NSWSC 1560 at [545], [547].

7.4.2 Delegation of power

As to the power to prescribe ‘major roads’, the governor has the power to make regulations according to section 264 of the *Roads Act 1993*. The exercise of the power conferred by the Act is completed by the governor. Clause 48A does not delegate the prescription of major bridges, tunnels or roads to another person. The court found that no impermissible delegation to the executive of this power has occurred.²³⁰

7.5 Initial government reaction to *Kvelde*

On the day following the decision in *Kvelde* it was reported that the NSW Government was:

... carefully considering the judgment [and] ... seeking advice on appeal options or options for legislative reform to ensure that protest activity is appropriately regulated and balances the rights and freedoms of the people of NSW.²³¹

No further public response from the government has been located at the time of writing.

²³⁰ [Kvelde v State of New South Wales](#) [2023] NSWSC 1560 at [554], [555].

²³¹ J O’Doherty and L Leeming, [Chris Minns responds to Supreme Court’s anti-protest laws ruling](#), *The Daily Telegraph*, 14 December 2023.

8. Conclusion

It is widely accepted that protests are an important feature of political discourse in democratic nations. Despite this acceptance, the concept of the 'right to protest' is at times misunderstood. In NSW there is some confusion about whether the right to protest exists only where it has been authorised under Part 4 of the *Summary Offences Act 1988*, and whether the right to protest justifies actions that are in fact illegal.

As this paper shows, the right to protest can be exercised outside the operation of Part 4. The practical consequences of protesters not using Part 4 is that they forgo the opportunity of co-operating with police and will not be protected against being charged with the offence of obstruction.

Whether based in statute law, human rights or common law (as is the case in NSW), peaceful public assembly remains the lawful form of the right to protest. But notable differences do exist between jurisdictions. For instance, in NSW there is no express statement of the right to public assembly and how that right is to be exercised. This lack of transparency has been commented on by the courts and legal scholars. Differences also exist in relation to the scope of the protection provided to 'authorised' assemblies and the basis on which courts can determine applications relating to proposed public assemblies.

One point of commonality is that all jurisdictions have a broad range of offences that can apply to protests which are not characteristic of peaceful public assemblies. Several jurisdictions have recently introduced new offences and/or increased penalties in response to protest actions that disrupt roads or other facilities, such as ports, or industries. Comparing the various features of the laws in different jurisdictions can inform an assessment of the strengths and weaknesses of NSW laws and inform future reforms.

Protest offences introduced in NSW in 2022 were challenged in the Supreme Court in *Kvelde v State of New South Wales*. The primary basis of the challenge was the implied freedom of political communication in the Australian Constitution, which protects peaceful assemblies because they are an essential form of political communication. The court in *Kvelde* found that most elements of the 2022 offences were constitutionally valid, but some elements were found to be invalid because they inhibited political communication. A key message from *Kvelde* is that public assemblies are a form of political communication that is protected under the Australian Constitution. Offences that the courts determine unreasonably limit peaceful public assemblies are likely to be constitutionally invalid.

The government's response to the *Kvelde* decision, along with the statutory review of the 2 offences examined in that case (section 214A of the *Crimes Act* and section 144G of the *Roads Act*) may prompt further political and public debate of laws affecting protests. Future protests may also generate challenges and developments in this active area of the law.

Appendix 1: Applications for public assemblies and relevant offences in other states and territories

This appendix provides an overview of protest laws in each state and territory other than NSW.

The application process for authorising a public assembly differs between jurisdictions. Applications are made to the police in Queensland, South Australia, Tasmania and Western Australia, to local councils in Victoria and the Northern Territory, and to the relevant government authority in the ACT.

The application provisions for public assemblies in Queensland and South Australia, like those of NSW, do not contain offences. Tasmania has a permit system for activities on public streets and failing to obtain a permit is an offence. Western Australia also has a permit system and the provisions contain an offence of obstructing emergency vehicles. In Victoria, depending on the council, failing to comply with the local law can constitute an offence.

Aside from contraventions of the application process, a wide range of offences can be committed by protesters in all jurisdictions. Offences are spread across numerous statutes and instruments. Most jurisdictions have offences which specifically protect primary producers from trespassers, and this may be framed within an agricultural or business context.²³² Some offences are more distinctive, such as disrupting a major facility in NSW, which was introduced in 2022²³³ and was not detected in the same terms in other jurisdictions.

Several jurisdictions have provisions relating to devices that may be collectively referred to as 'lock-on devices'. Queensland created an offence of using a dangerous attachment device.²³⁴ Victoria has an offence of interfering with timber harvesting operations by using

²³² For example: aggravated trespass under section 4B of the [Inclosed Lands Protection Act 1901](#) (NSW), where the circumstances of aggravation include interfering with a business and higher maximum penalties apply to offences that occur on agricultural land; unlawfully entering farming land under section 13 of the [Summary Offences Act 2005](#) (Qld); disturbing farm animals under section 17C of the [Summary Offences Act 1953](#) (SA); trespassing on land, with higher penalties for substantially impeding a person carrying out lawful work under section 14B(2AA) of the [Police Offences Act 1935](#) (Tas); trespassing on land used for primary production under section 50A of the [Summary Offences Act 1966](#) (Vic); and aggravated trespassing on an 'animal source food production place' with a higher maximum penalty under section 70A(2A) of the [Criminal Code 1913](#) (WA).

²³³ Section 214A of the [Crimes Act 1900](#) was introduced by the [Roads and Crimes Legislation Amendment Act 2022](#), which commenced on assent on 1 April 2022.

²³⁴ Section 14C of the [Summary Offences Act 2005](#) (Qld).

a prohibited thing, which includes various devices.²³⁵ In NSW, police have the power to seize 'anything that is intended to be used to lock-on or secure a person' for the purpose of interfering with a business or undertaking, where it is likely to give rise to a serious safety risk. However, it is not an offence to possess such a device.²³⁶

Not all offences pertaining to individual industries or locations are covered here due to the large number of laws involved.

Queensland

Application process for authorised assembly

The [Peaceful Assembly Act 1992](#) (Qld) marked a significant shift for the status of protests in Queensland. Prior to its introduction, obtaining a permit from the police was required under the *Traffic Act 1949* (Qld).²³⁷

The right to assemble peacefully with others in a public place is recognised by section 5 of the [Peaceful Assembly Act 1992](#) (Qld). An assembly can be authorised or unauthorised. Obtaining authorisation gives participants protection from criminal liability for obstruction in a public place, provided the assembly is held in accordance with the particulars. The public assembly may be authorised by a notice being submitted to the Police Commissioner, and also to a local authority if it is proposed that the assembly will be held in, or pass through, a park, reserve, pedestrian mall or other public place: section 8.

The Police Commissioner or local authority can respond by issuing a notice of permission, stating that they do not oppose the assembly: section 10(2). The notice may specify conditions, such as in relation to public safety or recognition of an environmental or cultural sensitivity at the location: section 11. The Commissioner or local authority can only apply to a magistrate for an order refusing to authorise the assembly if certain conditions are satisfied including that a mediation session has been held: section 13. The court may, in response to an application to refuse to authorise the holding of the assembly, specify conditions that are to apply to the assembly: section 12(3)(b).

In [Attorney-General for the State of Queensland v Sri & Ors](#) [2020] QSC 246 the Supreme Court of Queensland granted an injunction to stop a protest which the Refugee Action Collective planned to hold on the Story Bridge in Brisbane. The organisers did not obtain authorisation under the *Peaceful Assembly Act 1992* (Qld). While this did not render the gathering unlawful, it did mean the police could not make an application to oppose the

²³⁵ Section 94A of the [Sustainable Forests \(Timber\) Act 2004](#) (Vic) contains the offence, while 'prohibited thing' is defined in section 3 to include such devices as a shackle or joining clip, a metal or PVC pipe, and a metal or timber frame.

²³⁶ Part 4 Division 7 of the [Law Enforcement \(Powers and Responsibilities\) Act 2002](#).

²³⁷ Peaceful Assembly Bill, [Second Reading Speech](#), *Qld Hansard*, Legislative Assembly, 21 May 1992, p 5546. See also [Attorney-General for the State of Queensland v Sri & Ors](#) [2020] QSC 246 at [23].

protest.²³⁸ The judge noted that, unlike a procession, the planned sit-down protest was intended to block the bridge and could impede emergency vehicles and hospital users.²³⁹ The judge concluded that the protest would impose a 'significant burden' on the rights of the public, and that burden had not been moderated by an attempt to engage in the processes in the *Peaceful Assembly Act 1992* (Qld).²⁴⁰

Offences relevant to protests

The *Peaceful Assembly Act 1992* (Qld) does not contain offences. Numerous offence provisions that could apply to protest activity are located under the *Summary Offences Act 2005* (Qld) including:

- Public nuisance, which involves behaving in a disorderly, offensive, threatening or violent way in a public place (section 6)
- Unlawful assembly, where the conduct of 3 or more persons with a common purpose would cause another person to reasonably fear violence or other risks outlined (section 10A)
- Trespass (section 11)
- Two or more persons unlawfully gathering in or on a building or structure (section 12)²⁴¹
- Unlawfully entering or remaining on particular land, such as land used for agricultural activity and animal husbandry (section 13)
- Use of dangerous attachment devices (section 14C).²⁴²

The dangerous attachment device offences were introduced in 2019.²⁴³ Two offences are created by section 14C and apply unless there is a reasonable excuse. A person is prohibited from using a dangerous attachment device to interfere with the ordinary operation of transport infrastructure: section 14C(1). The maximum penalty is 50 penalty units or 2 years imprisonment. It is also an offence to use such a device to stop a person from entering or leaving a place of business, or to cause a halt to the ordinary operation of

²³⁸ This point was recognised by the Queensland Human Rights Commission in [submissions](#) it made in the case, 8 August 2020, paragraph 7.

²³⁹ *Attorney-General for the State of Queensland v Sri & Ors [2020] QSC 246* at [33].

²⁴⁰ *Attorney-General for the State of Queensland v Sri & Ors [2020] QSC 246* at [36]. In addition to the injunction to stop the protest, the court also ordered the organisers to post messages on their website and Facebook pages indicating that the protest had been cancelled.

²⁴¹ The [Explanatory Note](#) to the Summary Offences Bill 2004 confirms (at p 6) that this offence was 'designed to apply to demonstrations or sit-ins. It offers protection when a business or government property is unlawfully occupied.'

²⁴² Dangerous attachment devices are defined under section 14B and include devices constructed or modified to cause injury if the device is interfered with. An example is a 'sleeping dragon', which incorporates an anchor point for a protester's arm to be attached to (such as a bolt encased in a pipe) so that it cannot be self-released.

²⁴³ *Summary Offences and Other Legislation Amendment Act 2019* (Qld).

plant or equipment due to concerns about the safety of any person: section 14C(2). The maximum penalty is 20 penalty units or 1 year imprisonment.

Related amendments to the [Police Powers and Responsibilities Act 2000](#) (Qld) enable the police to search without a warrant a person reasonably suspected of possessing a dangerous attachment device to disrupt relevant lawful activity: section 30(1)(k).

The Minister for Police and Corrective Services stated that these amendments would not take away the rights ‘enshrined’ in the [Peaceful Assembly Act 1992](#) (Qld) and the [Human Rights Act 2019](#) (Qld); rather, they were intended to address ‘bespoke devices’ used by ‘a small cohort of people [who] have decided to engage in deliberately unlawful behaviour with potentially dangerous outcomes.’²⁴⁴

Further possible criminal offences are found under the [Criminal Code Act 1899](#) (Qld), including breaches of the peace such as riot (section 61) and affray (section 72). A little-used offence of disturbing the legislature (section 56), which carries a maximum penalty of 3 years imprisonment, was charged in relation to a protest in the Queensland Legislative Assembly on 30 November 2022. Extinction Rebellion activists hung a banner from the public gallery and chanted ‘stop coal, stop gas’, interrupting proceedings in the chamber.²⁴⁵ One of the protesters challenged the validity of the charge of disturbing the legislature.²⁴⁶ The magistrate found the charge was ‘good at law’ and set a trial date for April 2024.²⁴⁷

Other relevant laws for Queensland protesters include road rules against obstructing traffic.²⁴⁸ Provisions relating to particular industries include obstruction of mining, petroleum and forestry activities.²⁴⁹

South Australia

Application process for approved assembly

The [Public Assemblies Act 1972](#) (SA) provides for a person engaged in organising an assembly that would proceed in any public place to give notice of the assembly to the Police Commissioner, chief secretary, or local council for the area in which the assembly is

²⁴⁴ Summary Offences and Other Legislation Amendment Bill, [Second Reading Speech](#), *Qld Hansard*, 19 September 2019, p 3024.

²⁴⁵ M Dennien, [Nine charged after protest props smuggled into Qld parliament](#), *Brisbane Times*, 7 December 2022.

²⁴⁶ R Martinich, [Climate protesters wait on challenge to parliament law](#), *Sydney Morning Herald*, 13 November 2023.

²⁴⁷ P Billings, [Wife of gov integrity report author to stand trial for parliament protest](#), *Courier Mail*, 8 February 2024. The article states that the magistrate ‘did not read his decision but gave copies of it to the parties.’ No published decision was located online at that date.

²⁴⁸ For example, offences relating to pedestrians causing a traffic hazard or obstruction appear under clause 236 of the [Transport Operations \(Road Use Management—Road Rules\) Regulation 2009](#) (Qld).

²⁴⁹ For example, see offences under section 397B of the [Mineral Resources Act 1989](#) (Qld), section 805 of the [Petroleum and Gas \(Production and Safety\) Act 2004](#) (Qld) and section 86 of the [Forestry Act 1959](#) (Qld).

to be held.²⁵⁰ Objections must set forth how it is alleged that the proposal would ‘unduly prejudice the public interest’: section 4(7).

If an objection is made to a proposal, any person who desires to participate in the proposed assembly may apply to a judge for a determination.²⁵¹ Proposals which are not objected to, or which a judge has approved, are ‘approved proposals’ and are exempt from obstruction laws if the conduct of the assembly conforms to the proposal.

Some commentators argue that ‘NSW, like SA, lacks a clear human rights framework to guide these decisions, and as a result often leaves citizens unsure of how and when their individual rights will be upheld in the face of competing public interests.’²⁵²

Offences relevant to protests

No offences appear in the [Public Assemblies Act 1972](#) (SA). Various potentially relevant offences in the [Summary Offences Act 1953](#) (SA) include:

- Violent disorder by 3 or more persons (section 6A)
- Being on premises for an unlawful purpose or without lawful excuse (section 17), with a specific category for primary production premises²⁵³
- Trespassing on premises, land and structures (section 17A), with higher fines applying for trespassing on primary production premises
- Disturbance of farm animals (section 17C)
- Obstruction of public places (section 58).

Primary production activities are defined to include forestry (section 4).

The summary offence of obstruction of public places (section 58) was recently amended by the [Summary Offences \(Obstruction of Public Places\) Amendment Act 2023](#) (SA), which increased the maximum penalty from a fine of \$750 to 3 months imprisonment or a \$50,000 fine. The Premier, Peter Malinauskas MP, indicated in the second reading speech that the Bill was in response to the recent actions of protesters that went ‘beyond a standard demonstration that would seek to project a message into the community, to the

²⁵⁰ Section 4(4). In practice these matters are dealt with by the Police Commissioner: C Charles and S Moulds, The right to protest for racial equality during a state of emergency: Fundamental freedom or sacrificial lamb?, [The Bulletin](#) (Law Society of SA Journal), Vol 42(10), November 2020, p 9.

²⁵¹ Section 5. A judge is defined by section 3 as a ‘Judge of the Local and District Criminal Court’. In practice there are Magistrates Courts and District Courts in South Australia.

²⁵² C Charles and S Moulds, The right to protest for racial equality during a state of emergency: Fundamental freedom or sacrificial lamb?, [The Bulletin](#) (Law Society of SA Journal), Vol 42 (10), November 2020, p 10.

²⁵³ This was added by the [Summary Offences \(Trespass on Primary Production Premises\) Amendment Act 2020](#) (SA), inserting section 17(a1) and (a2). Aggravated circumstances apply where the person attempts to interfere with primary production activities or is accompanied by 2 or more other persons.

extent that it dramatically disrupted traffic in an unexpected way and put people at risk, including emergency services personnel.²⁵⁴

Some organisations voiced concern that the ‘haste with which this legislation has been drawn up is deeply troubling’ and that ‘anti-protest legislation has been introduced over the past five years along the entire east coast of Australia.’²⁵⁵

Other public disorder and trespass offences are provided under the [Criminal Code](#) (SA), including serious criminal trespass (sections 168-170) and riot and affray (sections 83B and 83C). Offences specific to industries include obstructing a person authorised to mine: section 70HD of the [Mining Act 1971](#) (SA).

Tasmania

Public street permit

Activities on public streets which require a permit under the [Police Offences Act 1935](#) (Tas) include a march, rally or other political demonstration, and also a procession of a religious or cultural character.²⁵⁶

Section 49AB(4) gives some guidance on matters which may be considered by police in determining whether or not to grant a permit, including ‘the safety and convenience of the public.’ The provision also allows the permit to be subject to conditions considered necessary by the police.

It is an offence for a person to organise or conduct a demonstration or procession, if it is to be held wholly or partly on a public street, without a permit: section 49AB(1). The maximum penalty is a fine of 10 penalty units (currently \$1950).²⁵⁷

Other offences relevant to protests

The [Police Offences Act 1935](#) (Tas) also provides various public order and trespass offences that could arise in the circumstances of protest activity, including public

²⁵⁴ Summary Offences (Obstruction of Public Places) Amendment Bill, *SA Hansard*, Legislative Assembly, [Second Reading Speech](#), 18 May 2023.

²⁵⁵ J Grix, [South Australia's rushed anti-protest laws the latest affront to democracy](#), Environmental Defenders Office, 19 May 2023.

²⁵⁶ Part 6, Division IIIAA on activities on public streets was inserted by the [Traffic Control \(Miscellaneous Amendments\) Act 2001](#). The second reading speech to the Bill confirmed that the police would continue to administer the permit system (which was previously in the *Traffic Act 1925*) with the rationale that ‘permits allow for flexibility in the use of public space, while ensuring that these activities will not adversely affect road safety’: Traffic Control (Miscellaneous Amendments) Bill, *Tas Hansard*, Second Reading Speech, House of Assembly, 21 November 2001.

²⁵⁷ The value of a penalty unit is \$195 for the period from 1 July 2023 to 30 June 2024: Tasmanian Government, Department of Justice, [Penalty units indexed amounts](#), webpage, accessed 26 October 2023.

annoyance by engaging in disorderly conduct or disturbing the public peace (section 13) and unlawful entry onto land or structures (section 14B).

The [Police Offences Amendment \(Workplace Protection\) Act 2022](#) (Tas) extended the forms of aggravated trespass to include where the court is satisfied that the trespass substantially impedes a person carrying out 'lawful work'. Such a case carries a maximum penalty of 50 penalty units (currently \$9750) or imprisonment for 12 months: section 14B(2AA).

When it was introduced, the Bill also proposed to amend section 13 to increase the penalty for public annoyance and to clarify that the offence applied to prohibit conduct which 'unreasonably obstruct[s] the passage of vehicles or pedestrians on a street'.²⁵⁸ However this provision was negated in the Legislative Council.²⁵⁹

The Second Reading Speech to the Bill maintained that 'Tasmania needed to take action to further protect the rights of people going about their lawful business' and referred to laws introduced in NSW and Queensland.²⁶⁰

Further criminal offences are found under the [Criminal Code Act 1924](#) (Tas) including breaches of the peace in Chapter VIII. Road offences in Tasmania that may affect protesters include obstructing traffic.²⁶¹ Site-specific offences include those under the [Forest Management Act 2013](#) (Tas)²⁶² and the [Mineral Resources Development Act 1995](#) (Tas).²⁶³

Victoria

Permits from local councils

Victoria does not have a set of provisions equivalent to Part 4 of the *Summary Offences Act 1988* (NSW) to encourage organisers of public assemblies to directly submit a notice to the police for authorisation of a public assembly.

²⁵⁸ Police Offences Amendment (Workplace Protection) Bill ([as introduced](#)), House of Assembly, 3 May 2022. The penalty would have been increased from a maximum fine of 3 penalty units to 10 penalty units although there was no change to the maximum period of imprisonment (3 months).

²⁵⁹ [Tas Hansard](#), Legislative Council, 24 August 2022, p 38.

²⁶⁰ The laws referred to were the *Roads and Crimes Legislation Amendment Act 2022* in NSW and the *Summary Offences and Other Legislation Amendment Act 2019* in Queensland with regard to the use of dangerous attachment devices: [Tas Hansard](#), House of Assembly, Minister for Resources, Guy Barnett, Police Offences Amendment (Workplace Protection) Bill, [Second Reading Speech](#), 5 May 2022.

²⁶¹ For example, a pedestrian causing a traffic hazard or obstruction under rule 236 of the [Road Rules 2019](#).

²⁶² For example, contravening the directions on signage (section 21) or failing to comply with a request to leave a permanent timber production zone (section 22).

²⁶³ For example, hindering or obstructing a licensee from carrying out activity under an exploration licence (section 23(3)), a retention licence (section 58(3)), a production licence (section 67N(3)) or a mining lease (section 84(2)).

Rather, local councils in Victoria have the power under the [Local Government Act 2020](#) (Vic) to make 'local laws'.²⁶⁴ These laws may require organisers of activities in public places to obtain a permit from the council and a failure to do so may attract a penalty.

There is some variation in the wording of local laws. For example, Melbourne City Council provides that a person must not, without a permit, unreasonably obstruct pedestrian or vehicular traffic in a public place or encourage the congregation of persons to do the same.²⁶⁵ Bayside City Council provides that a person must not, without a permit, hold a procession on a road, or hold a rally, procession or demonstration on a municipal reserve.²⁶⁶ Both local laws provide that a person who fails to comply with the law commits an offence, and a maximum fine of 20 penalty units applies in a court, or 5 penalty units if an infringement notice is issued.²⁶⁷

It should be noted that section 72 of the [Local Government Act 2020](#) (Vic) stipulates that local council laws must not be inconsistent with other Acts, including the [Charter of Human Rights and Responsibilities Act 2006](#) (Vic). As previously stated, the Charter legislates a right of peaceful assembly and freedom of association, with limitations.²⁶⁸

Also relevant is the obligation created in the [Summary Offences Act 1966](#) (Vic) for local councils to consult with Victoria Police before granting a permit for a public protest that involves a road closure or using council land.²⁶⁹

Other offences relevant to protests

Offences that could relate to protests are found in several statutes such as:²⁷⁰

- Taking part in an unlawful assembly including 'demonstrating' in the terms outlined by section 10 of the [Unlawful Assemblies and Processions Act 1958](#) (Vic)²⁷¹

²⁶⁴ Local laws are authorised by section 71 of the [Local Government Act 2020](#) (Vic).

²⁶⁵ Clause 5.9 of the [Activities Local Law 2019](#). A permit is also required for various types of road interference such as occupying or fencing off part of a road: clause 6.1.

²⁶⁶ Clauses 39 and 67(4) of the [Neighbourhood Amenity Local Law 2021](#).

²⁶⁷ Melbourne City Council, [Activities Local Law 2019](#), clause 14.6(a) and Schedule 1; Bayside City Council, [Neighbourhood Amenity Local Law 2021](#), clause 91 and Schedule 1.

²⁶⁸ Section 16 of the [Charter of Human Rights and Responsibilities Act 2006](#) (Vic). Section 7 explains how human rights may be limited.

²⁶⁹ Section 6A of the [Summary Offences Act 1966](#) (Vic) was inserted by the [Crimes Legislation Amendment \(Public Order\) Act 2017](#). The amendment was influenced by several protests which 'turned ugly' and raised concerns about policing: J Gordon, [Councils forced to consult with police before agreeing to protests](#), *The Age*, 28 June 2016. Under the provision, the Police Minister can issue guidelines about consultation or when a council is not required to consult with police.

²⁷⁰ See also Fitzroy Legal Service, *The Law Handbook* (online), Community activism, [Common charges associated with protests](#), accessed on 31 October 2023.

²⁷¹ Section 12 states that such persons assembled who refuse to disperse are subject to a maximum penalty of 1 month (or 3 months for a subsequent conviction). There is also a common law offence of unlawful assembly,

- Offences under the [Summary Offences Act 1966](#) (Vic) including obstruct footpath or road (section 4(e)), trespass (section 9(1)(d)) and trespass on land used for primary production (section 50A)
- Offences under the [Crimes Act 1958](#) (Vic) such as affray (section 195H)
- Obstructing a road under section 62 of the [Road Management Act 2004](#) (Vic).

The [Sustainable Forests \(Timber\) Act 2004](#) (Vic) sets out various offences relating to hindering, obstructing or interfering with timber harvesting. The definition of ‘timber harvesting safety zone’ in section 77B applies to specific areas of state forest. The [Sustainable Forests Timber Amendment \(Timber Harvesting Safety Zones\) Act 2022](#) (Vic) increased penalties for numerous existing offences. For example, obstructing an authorised officer (section 86), threatening or abusing an authorised officer (section 87) and intentionally hindering, obstructing or interfering with timber harvesting operations by using a prohibited thing (section 94A) now carry a maximum penalty of 12 months imprisonment or a fine of 120 penalty units.²⁷²

The definition of a ‘prohibited thing’ (under section 3) already prohibited bolt cutters, cement or mortar mix, constructed metal or timber frames, heavy chains and shackles in timber harvesting safety zones. The definition was expanded to include metal or PVC pipe and prescribed items. New powers to search and seize prohibited things in timber harvesting safety zones were introduced by section 88A. The new powers also authorise banning persons from a timber harvesting safety zone for up to 28 days if an authorised officer suspects on reasonable grounds that the person has committed or is committing a specified offence: section 94CA.²⁷³

The government’s statement of compatibility for these new powers maintained that notices to ban protesters were ‘reasonable and justified’ limitations on the right to movement, while the powers for search and seizure of prohibited items ‘go no further than necessary to adequately manage the safety risks these items create for protesters.’²⁷⁴

which prohibits 3 or more people meeting with an intent to commit a crime by open force, or with an intent to carry out any common purpose, whether lawful or not, in such a manner as to give people in the vicinity reasonable grounds to fear a breach of the peace. Section 320 of the [Crimes Act 1958](#) (Vic) provides the penalty for the common law offence of unlawful assembly, which is a maximum of 5 years imprisonment.

²⁷² The value of a penalty unit from 1 July 2023 to 30 June 2024 is \$192.31. The increases in the latest amendment Act represented a doubling or tripling of the penalty depending on the offence. For example, for refusing or failing to comply with a direction to leave a timber harvesting safety zone, the fine increased from \$3634 to \$10 900 according to figures quoted in the second reading debates: Sustainable Forests Timber Amendment (Timber Harvesting Safety Zones) Bill 2022, [Vic Hansard](#), Legislative Council, 4 August 2022, pp 2592, 2595.

²⁷³ The maximum penalty for contravening a banning notice is a fine of 60 penalty units: section 94CD.

²⁷⁴ Sustainable Forests Timber Amendment (Timber Harvesting Safety Zones) Bill 2022, [Statement of compatibility](#), [Vic Hansard](#), Legislative Assembly, 25 May 2022.

New offences were introduced in 2022 to regulate entry to premises that relate to livestock, after some incidents occurred involving animal activists. The offences are framed in terms of contravening a biosecurity measure.²⁷⁵ The amendments responded to a parliamentary committee report that found that the 'penalties handed out in certain incidents of trespass had not met the expectations of many stakeholders in the Inquiry.'²⁷⁶

Western Australia

Permits for public meetings and processions

Holding public meetings and processions is regulated by the [Public Order in Streets Act 1984](#) (WA). Public meetings and processions are defined at section 4, including that they comprise 3 or more persons.

A notice of a proposed public meeting or procession is to be submitted to the police who shall not refuse to grant a permit unless there is reasonable ground for apprehending that the meeting or procession may:

- Occasion serious public disorder, or damage to public or private property
- Create a public nuisance
- Give rise in any street to an obstruction that is too great or too prolonged in the circumstances or
- Place the safety of any person in jeopardy: section 7(2).

There is some scope under section 8 for a person who is refused a permit or aggrieved by a condition or limit specified in a permit to seek review by the State Administrative Tribunal.

A permit requires participants in the public meeting or procession not to obstruct the free passage of any ambulance, fire brigade or police vehicle: section 4(2). Contravening this condition is punishable by a fine of \$200: section 9(1).

A permit is also required to enter and use any land within state forests and timber reserves. An offence applies to contravening this requirement: section 97A(4) of the [Conservation and Land Management Act 1984](#) (WA).

²⁷⁵ The [Livestock Management Amendment \(Animal Activism\) Act 2022](#) (Vic) inserted Part 3A into the [Livestock Management Act 2010](#) (Vic) including offences at section 50A.

²⁷⁶ Livestock Management Amendment (Animal Activism) Bill 2021, [Second reading speech](#), Vic Hansard, Legislative Assembly, 2 December 2021. The maximum penalty for the new offence of contravening a biosecurity measure (section 50A) is 60 penalty units when committed by an individual, compared to the penalty for trespass under section 9 of the [Summary Offences Act 1966](#) (Vic) of 25 penalty units or 6 months imprisonment.

Other relevant offences

Offences in relation to unlawful assemblies are located under Chapter IX of the [Criminal Code 1913](#) (WA). Unlawful assembly and riot are defined by section 62.²⁷⁷ A person who takes part in an unlawful assembly is liable to a maximum penalty of imprisonment for 12 months and a fine of \$12,000: section 63.

Other offences in Chapter IX include:

- Trespassing a place (section 70A(2))
- Trespassing an 'animal source food production place' in circumstances of aggravation including interfering with production or harassing a person (section 70A(2A))
- Organising an out-of-control gathering (section 75B), which is defined as a gathering of 12 or more persons, some of whom engage in the conduct listed, including trespassing (section 75A).

Offences relating to obstructing roads and particular sites include pedestrians causing obstruction²⁷⁸ and obstructing or insulting a person authorised to mine.²⁷⁹

In 2015 the WA Government attempted to introduce laws against 'locking devices', as they were described in the second reading speech to the Bill.²⁸⁰ The offences proposed by the Bill included possessing 'a thing' for the purpose of preventing a lawful activity.²⁸¹ The proposed legislation was criticised by the Law Society of WA as being too broad and effectively reversing the onus of proof.²⁸² The Bill lapsed before the 2017 state election.²⁸³

²⁷⁷ An unlawful assembly occurs when 3 or more persons, with intent to carry out some common purpose, cause persons nearby to fear, on reasonable grounds, that the assembled persons will tumultuously disturb the peace. When an unlawful assembly has begun to act in so tumultuous a manner as to disturb the peace, the assembly is called a riot, and the persons assembled are said to be riotously assembled.

²⁷⁸ Regulation 201 of the [Road Traffic Code 2000](#) (WA).

²⁷⁹ Section 157 of the [Mining Act 1978](#) (WA).

²⁸⁰ Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015, [Second Reading Speech](#), WA Hansard, Legislative Council, 25 February 2015.

²⁸¹ [Criminal Code Amendment \(Prevention of Lawful Activity\) Bill 2015](#) (as introduced), proposed section 68AB. The Parliament of WA [bill page](#) includes the explanatory memorandum and other resources, accessed 31 October 2023.

²⁸² A MacNiven, [Law Society concerned by Criminal Code Amendment \(Prevention of Lawful Activity\) Bill](#), media release, no date, accessed 31 October 2023.

²⁸³ J Kagi, [WA protest laws on backburner until after state election](#), ABC News online, 7 September 2016; H Roman, [WA to weigh in on High Court anti-protest challenge in Tasmania](#), ABC News online, 10 March 2017.

Australian Capital Territory

Approval from relevant authority

Although there is not an equivalent set of provisions in the ACT to Part 4 of the *Summary Offences Act 1988* in NSW, consultation with the appropriate authorities is encouraged and obtaining approval is required in some situations. The relevant authority depends on whether the land in question is 'national land' or ACT land.

National land, which includes the parliamentary zone, diplomatic areas and Lake Burley Griffin is managed by the National Capital Authority. Approval is required for erecting a structure as part of a protest on national land.²⁸⁴

Aside from national land, most public land within the ACT is managed by the ACT Government. Under Part 3 of the *Public Unleased Land Act 2013* (ACT), a permit is required to use public land for an activity that may have an impact on other members of the public. Permits are available through the City Services branch of the ACT Government.²⁸⁵

Offences relevant to protests

Potential offences under the *Crimes Act 1900* (ACT) include: affray (section 35A); acting with intent to cause public alarm (section 140A); hindering mines (section 141); obstructing railways (section 145); and trespassing or obstructing access to government premises (section 154). Some further offences under the *Criminal Code 2002* (ACT) are obstructing a public official (section 361) and damaging property (section 403).

Offences under the *Public Order (Protection of Persons and Property) Act 1971* (Cth) also apply to the ACT.²⁸⁶ Such offences include trespass on premises (section 11). Offences under the Act which apply to taking part in an assembly include:

- Committing physical violence or giving rise to a reasonable apprehension of physical violence to persons or damage to property (section 6)
- Causing actual bodily harm to a person or damage to property (section 7)
- Engaging in 'unreasonable obstruction' (section 9)
- Conduct involving a weapon, missile, destructive object or noxious substance (section 10).

²⁸⁴ Section 12(1)(b) of the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth). For further guidance see: National Capital Authority, *The Right to Protest: Guidelines*, 2020.

²⁸⁵ ACT Government, City Services website, Public land use, *Frequently asked questions*, accessed 23 November 2023. See also V Sporne et al, *Practical Guide to Law and Protests in the Australian Capital Territory*, 2021, ANU Law Reform and Social Justice, p 9.

²⁸⁶ Definition of Territory under section 4.

Northern Territory

Permits from local councils

The [Local Government Act 2019](#) (NT) gives local councils the power to make by-laws and these may require a permit for a public assembly.²⁸⁷ For example, in Alice Springs a person must not organise or lead a demonstration of protest in a public place without a permit; to do so is an offence.²⁸⁸

The [Traffic Regulations 1999](#) (NT) also require a permit to be obtained for a parade or procession (except a funeral) that may disrupt traffic on a road.²⁸⁹

Offences relevant to protests

Unlawful assembly offences are found under Part III, Division 4 of the [Criminal Code Act 1983](#) (NT). An offence of unlawful assembly is committed when 3 or more persons, with intent to carry out a common purpose, act in a manner to cause nearby persons to reasonably fear disturbance of the peace: section 63(1). The maximum penalty is imprisonment for one year. A person in this situation who proceeds to act in 'so tumultuous a manner as to disturb the peace' commits the more serious offence of taking part in a riot: section 63(4). The maximum penalty is imprisonment for 3 years: section 65.²⁹⁰

There are also offences relating to public disorder under the [Summary Offences Act 1923](#) (NT) including:

- Riotous or disorderly behaviour or disturbing the public peace (section 47)
- Violent disorder, where 2 or more people engage in conduct that involves a violent act, including conduct capable of causing or threatening injury to a person or damage to property (section 47AA).

Industry-specific offences include obstructing an official under section 64 of the [Mining Management Act 2001](#) (NT).

²⁸⁷ Chapter 13, Part 13.1 of the [Local Government Act 2019](#) (NT). Note that the guiding principles for by-laws include that they 'must not infringe personal rights in an unreasonable way or to an unreasonable extent': section 276(1)(d).

²⁸⁸ By-law 33 of the [Alice Springs \(Management of Public Places\) By-laws 2009](#).

²⁸⁹ A person who applies for a permit from the authority responsible for the road must also obtain the written consent of the Police Commissioner: regulation 38; with terminology defined in section 3 of the [Traffic Act 1987](#) (NT).

²⁹⁰ A higher maximum penalty of 14 years imprisonment applies where a person takes part in a riot involving 12 or more people and one of the situations outlined occurs, including that the person fails to comply with an instruction from a police officer to disperse: section 66.

Protest law in New South Wales

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This image comes from 'Our Colours of Country', which was created for the Parliament of NSW by Wallula Bethell (Munro) a Gumbaynggirr/Gamilaroi artist born and raised in Tamworth who has spent time living on Dughutti Country and is currently living in Western Sydney on Darug Country with her husband and son.

