



# briefing paper



## NSW Parliamentary Research Service

### **Protests and the law in NSW**

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by Tom Gotsis

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# Protests and the law in NSW

by

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## SUMMARY

In democratic systems of government protests are both important means of political discourse and contentious manifestations of social discord. In NSW in recent times, the mining of coal and coal seam gas has been a particular focus of protest activity. The Baird Government has indicated it is considering introducing legislation aimed at deterring protest activity that interferes with the operation of industry. [1], [2]

This paper examines the laws that apply to protests in NSW. It shows, perhaps somewhat unusually in these modern statute-based times, that it is the common law right to assembly that provides the legal basis of what is commonly called the right to protest. The origins of the common law right to assembly have been traced back 800 years to the signing of the Magna Carta. [3.2]

**The common law and constitutional law:** The common law right to assembly has been expressly recognised by Australian courts, including the High Court of Australia and the Supreme Court of NSW. It is further protected by the Australian Constitution under the implied freedom of political communication. [3.2].

The scope of the protection afforded to the common law right to assembly by the implied freedom of political communication is considered in light of recent High Court authority, as well as the Occupy Sydney case of *O'Flaherty v City of Sydney Council* and the APEC case of *Gibson v Commissioner of Police*. [3.3]–[3.5]

**The Summary Offences Act 1988 (NSW):** In NSW Part 4 of the *Summary Offences Act 1988* facilitates the exercise of the common law right to assembly. Part 4 is silent as to the existence of that right. This is in contrast to s 5 of the *Peaceful Assemblies Act 1992* (Qld), which expressly provides for a statutory right to assembly. As academic commentators have argued, the silence of Part 4 as to the existence of a right to assembly fails to promote the important role that peaceful protests have in a democracy. However, while Part 4 does not expressly provide for a statutory right to assembly, neither does it prohibit protests in any way. [4]

Instead of granting or taking away rights, the aim of Part 4 is to encourage co-operation between protesters and police, in return for providing protesters with protection against the offences of unlawful assembly and obstruction. [4.2]

If agreement is not reached, protesters can still choose to proceed with their protest and police can enforce the law in the usual manner. [4.2], [4.4]

The protection provided to protesters under Part 4 is limited. It applies only where the assembly is conducted substantially in accordance with the details supplied to Commissioner of Police in a Notice of Intention to Hold a Public Assembly; and then only in respect of the two offences of unlawful assembly and obstruction. It does not apply to the offences of unlawful assembly or obstruction where the assembly is not conducted in accordance with the details supplied in the Notice of Intention. Nor does it extend to the many other

offences that can apply to protests; or to any civil law action that can be taken against protesters. [4.3]

The cases in which Part 4 has been applied identify the principles and factors that inform the discretion to be exercised by the Commissioner of Police and the courts under Part 4. Those factors include the purpose of the intended assembly, its size, its proposed location and route, the potential for breaches of the peace, the likely inconvenience to persons and traffic, and whether other special events will be taking place in the nearby area. [4.7]

**Offences and police powers:** The powers that can apply to protests are extensive and the offences are both myriad and broad. [5] The offences include:

- breaches of the peace, under the common law;
- obstruction, under s 6 of the *Summary Offences Act 1988*;
- obstruction and causing a traffic hazard, under cl 236 of the *Road Rules 2014*;
- offensive conduct and offensive language, under ss 4 and 4A of the *Summary Offences Act 1988*;
- affray, under s 93C(1) of the *Crimes Act 1900*;
- assault during public disorder, under s 59A(1) of the *Crimes Act 1900*;
- assault and other actions against police officers under s 60 of the *Crimes Act 1900*;
- violent disorder under s 11A(1) of the *Summary Offences Act 1988*;
- riot, under s 93B(1) of the *Crimes Act 1900*;
- unlawful entry and offensive conduct on inclosed lands under ss 4 and 4A of the *Inclosed Lands Protection Act 1901*;
- destroying or damaging property under s 195(1) of the *Crimes Act 1900*;
- intimidation or annoyance by violence or otherwise (including hindering), under s 545B(1)(a)(iii) of the *Crimes Act 1900*;
- interfering with a mine, under s 201 of the *Crimes Act 1900*;
- obstructing and hindering, under ss 257, 378A and 378B of the *Mining Act 1992*;
- obstructing and hindering, under s 83(1) of the *Forestry Act 2012*;
- assaulting, threatening and intimidating, under s 83(2)(a) of the *Forestry Act 2012*; and
- breaching regulations made under s 632(2) of the *Local Government Act 1993*.

Following conviction, in addition to imposing the appropriate sentence for the offence, courts can also direct that offenders pay any “aggrieved person” compensation for any loss sustained through, or by reason of, the offence. “Person” in this context includes an individual or corporation.



**Civil law and victim compensation:** The civil law and applications for victim compensation can be used by corporations to deter protest activity. Collectively referred to as Strategic Lawsuits Against Public Participation (SLAPPS), such actions rely on the torts of trespass, nuisance, interference with contractual relations and injury to trade or business, and the provisions of the *Victims Rights and Support Act 2013*. [6]

**Statutory rights charters:** Victoria and the ACT expressly provide for a right to assembly in their human rights legislation: the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT). The charters seek to promote and protect human rights by requiring laws to be made and interpreted, and public authorities to act, in accordance with the human rights they identify in their provisions. Those human rights, however, are not absolute. They are subject to such reasonable limits as can be demonstrably justified in a free and democratic society. [7.1]

**The Queensland model:** Section 5 of the *Peaceful Assembly Act 1992* (Qld) expressly provides for a statutory right to assembly. This right is limited 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. The reference to the rights of other persons specifically includes the right of persons to carry on business. [7.2]

**Protections for business:** Tasmania has taken the approach of enacting specific legislation designed to deter protests of an obstructionist nature. On 24 December 2014 the *Workplaces (Protection from Protesters) Act (Tas)* commenced. The object of that Act is to ensure that protesters do not damage business premises or business-related objects, or impede or obstruct the carrying out of business activities. It provides for offences of invading or hindering businesses, causing damage or risk to safety, preventing removal of obstructions and not complying with the direction of a police officer to leave a business premises or access area. [8.1]

In Western Australia the *Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015* was introduced into Parliament on 25 February 2015 with the object of deterring environmental protesters from locking on to equipment, trees or other objects at mining or logging sites. The Bill proposes to amend the *Criminal Code* (WA) by providing for two broad offences: physically preventing lawfully activity; and preparing to physically prevent a lawful activity or to trespass. The Bill has been broadly criticised, particularly by farmers concerned about its effect on their ability to oppose coal seam gas mining on or near the their farms. [8.2]

Ultimately, what this paper demonstrates is that, in line with its long-standing common law heritage and the democratic system of government in this State, protests remain an important means of political expression. The importance of protests is implicitly (but not explicitly) recognised by Part 4 of the *Summary Offences Act 1988*, which aims to facilitate negotiation between protesters and police. However, the right to protest has always been, and remains, limited to the right to peaceful assembly. In NSW a suite of offences sharply delineate between lawful and unlawful protest activity.



## 1. INTRODUCTION

The right to protest peacefully is a defining feature of liberal democracy, a system of government characterised by the tolerance of dissenting minority opinion. Protests can be on issues as diverse as the environmental impact of mining<sup>1</sup> or the influence of Chinese investors on Sydney property prices.<sup>2</sup>

The laws relating to protests have received parliamentary attention in NSW in recent times. In May 2013 the Legislative Council passed a motion that NSW political representatives should not support illegal protest activities because “the New South Wales public expects its political representatives to reject illegal activities and participate in debate in a lawful manner”.<sup>3</sup> A year later the Labor Opposition and The Greens NSW alleged that heavy-handed policing of anti-mining protests was undermining the right to peaceful protest.<sup>4</sup> The Government, while affirming its support for people participating in legal protests,<sup>5</sup> has indicated that it is considering new legislation to counteract illegal protest activity.<sup>6</sup> In May 2015, Duncan Gay MLC said that the foreshadowed legislation will “ensure that people are protected from machinery, particularly in the supply chain”<sup>7</sup>, act as a “reinforcement of common sense” and “protect people from themselves”.<sup>8</sup>

Business interests have also entered the debate about the most appropriate response to protests. The Chief Executive of Metgasco, Peter Henderson, has said in relation to coal seam gas protests that if the NSW Government “continue[s] with the policy of appeasement, they will lose. ... The other side will

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<sup>1</sup> For example: J Buckingham, [Gloucester Community Protest](#), NSW Parliament, Legislative Council, Hansard, 4 November 2014, p 1,948; J Buckingham, [Maules Creek Coal Mine](#), NSW Parliament, Legislative Council, 18 September 2014, p 816; D Shoebridge, [Bentley Blockade](#), NSW Parliament, Legislative Council, 15 May 2014, p 28,889.

<sup>2</sup> D Munoz, [Race Hate Flyers Distributed in Sydney Spark Rally Outside Chinese Consulate](#), Getty Images, 31 May 2015; S Anderson, [“Redneck” anti-foreign flyers distributed ahead of Sydney protest](#), 29 May 2015, SBS World News.

<sup>3</sup> [Unlawful Environmental Activism](#), NSW Parliament, Legislative Council, Hansard, 2 May 2013, p 19,873; [Unlawful Environmental Activism](#), NSW Parliament, Legislative Council, 30 May 2013, p 21,282.

<sup>4</sup> M Daley, [Police Resources Allocation](#), NSW Parliament, Legislative Assembly, 8 May 2014, p 28,482; D Shoebridge, [Business of the House](#), NSW Parliament, Legislative Council, Hansard, 15 May 2014, p 28,887.

<sup>5</sup> S Ayres, [Police Resources Allocation](#), NSW Parliament, Legislative Assembly, 8 May 2014, p 28,482.

<sup>6</sup> D Gay, [Illegal Protest Legislation](#), NSW Parliament, Legislative Council, Hansard, 14 May 2015, p 33. [Protest Legislation](#), NSW Parliament, Legislative Council, 12 August 2014, p 30,290.

<sup>7</sup> D Gay, [Illegal Protest Legislation](#), NSW Parliament, Legislative Council, Hansard, 14 May 2015, p 33.

<sup>8</sup> D Gay, [Illegal Protest Legislation](#), NSW Parliament, Legislative Council, Hansard, 14 May 2015, p 33. For a possible model of such legislation see: *Workplaces (Protection from Protestors) Act 2014 Tas.*

get stronger”.<sup>9</sup>

Fundamentally, there is consensus that people should have the right to protest. At issue is where the line between lawful and unlawful protest activity should be drawn. To inform the consideration of this issue, this paper examines the legal basis of protests in NSW. It highlights how in NSW the right of assembly — the legal basis of what is commonly referred to as the “right to protest” — is the product of a complex interaction of common law, constitutional law, statute law and even local council by-laws. The paper also considers the extent to which the right to protest is circumscribed by policing policy and the criminal law. It illustrates the practical operation of the law relating to protests by examining relevant court proceedings.

This paper further contrasts the NSW position with the Queensland position, where a statutory right to assembly has been expressly created;<sup>10</sup> with Victoria and the ACT, where human rights legislation expressly protects and promotes the right to assembly;<sup>11</sup> and with the position at international law, where a right to assembly exists under Article 21 of the International Covenant on Civil and Political Rights.<sup>12</sup> New and proposed offences in Tasmania and Western Australia, respectively, are also considered.

## 2. KEY FEATURES OF PROTESTS

A protest is, quintessentially, an expression of opposition, disapproval or discontent. A physical manifestation of social discord, protests are inherently polarising. They can be viewed, depending on the social standpoint of the observer, as an integral part of a democratic process; a threat to social order; a nuisance to be tolerated; or an impediment to business and economic growth.<sup>13</sup>

The word “protest” typically evokes images of large street marches.<sup>14</sup> In Australia in recent times street marches have been held against: the war in Iraq;<sup>15</sup> the APEC and G20 meetings in Sydney and Brisbane<sup>16</sup>; the closure of

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<sup>9</sup> W Glasgow, [Metgasco slams NSW “appeasement”](#), 1 June 2015, Australian Financial Review.

<sup>10</sup> [Peaceful Assemblies Act 1992](#) (QLD), s 5.

<sup>11</sup> [Charter of Human Rights and Responsibilities Act 2006](#) (Vic), s 16; [Human Rights Act \(2004\)](#) (ACT), s 15

<sup>12</sup> [International Covenant on Civil and Political Rights, Article 19](#); Australian Government, Attorney-General’s Department, [Right to Freedom of Assembly and Association](#).

<sup>13</sup> For an overview of policy considerations, see: R Douglas, *Dealing with Demonstrations: The Law of Public Protest and its Enforcement*, 2004, The Federation Press, Sydney, Ch 1.

<sup>14</sup> Other important forms of protest also exist — such as industrial action, individual protest (including acts of self-harm), media campaigns, protest songs, protest art and cyber protests (hacking and Denial of Service attacks) — but this paper focuses on protests that inherently involve static or mobile public assemblies, whether urban-based or at sensitive environmental sites, such as forests and mines.

<sup>15</sup> [Protests across Australia against war in Iraq](#), ABC News, 14 April 2003.

<sup>16</sup> For example, see: [G20 Brisbane: Police praise protesters despite arrests, exclusions from security zone](#), ABC News, 15 November 2014.

remote Western Australian Aboriginal communities;<sup>17</sup> Sharia law;<sup>18</sup> and the Abbott Government's policies and 2014–2015 Budget.<sup>19</sup> However, street marches are not the whole story. Protests are conducted at sensitive environmental sites,<sup>20</sup> where they can take on a more obstructionist nature.<sup>21</sup> Protests can also take the form of occupations, such as the Aboriginal Tent Embassy<sup>22</sup> in Canberra or the Occupy Sydney protest in Martin Place.<sup>23</sup>

Although protests take these different forms, their defining feature is the assembly of members of the public. As Professor Frank Brennan stated, the decision to join an assembly is often a person's "most powerful means of expression that he [or she] believes in or is committed to a particular cause."<sup>24</sup> While protests are often viewed as acts of "free speech,"<sup>25</sup> the act of assembly itself constitutes a powerful expression of protest and precedes any subsequent vocalisation of discontent.<sup>26</sup> The fundamental importance of the right to

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<sup>17</sup> [Aboriginal community closures: protests in pictures](#), ABC News, 19 March 2015.

<sup>18</sup> [Anti-Islamic protests around the country spark ugly stand-offs](#), 8 April 2015, Sydney Morning Herald.

<sup>19</sup> [Thousands drawn to Australia-wide protests against government policies](#), ABC News, 17 March 2014; [Thousands attend rallies across Australia to protest the federal budget](#), ABC NEWS, 7 July 2014.

<sup>20</sup> In Australia, most notably at the Franklin dam in Tasmania, where about 1400 people were arrested: [Franklin dam still controversial 30 years on](#), ABC News, 15 December 2012.

<sup>21</sup> For a more recent example of this type of protest, see: [Former Wallabies captain David Pocock avoids conviction over Mauls Creek coal mine protest](#), ABC News, 5 February 2015.

<sup>22</sup> National Museum of Australia, [Collaborating for Indigenous Rights: Aboriginal Embassy 1972](#).

<sup>23</sup> [O'Flaherty v City of Sydney Council](#) [2014] FCAFC 56.

<sup>24</sup> F Brennan, [Too Much Order with Too Little Law](#), 1983, University of Queensland Press, Queensland, p 262. That powerful means of expression was recently demonstrated in a highly innovative way in Madrid, Spain. Protesting against the *Citizens Security Law* (which, amongst other anti-protest measures, makes it an offence to protest outside government buildings without prior approval) protesters organised the world's first holographic protest, which received international media coverage: see J Blitzer, [Protest by Hologram](#), 20/4/2015, The New Yorker.

<sup>25</sup> Of relevance in this regard is the Constitutional implied freedom of communication on political matters and the common law right to free speech. The importance of the common law right to freedom of speech was recently adverted to in *Monis v The Queen* (2013) 249 CLR 92 per French CJ at [60] and *Attorney-General (South Australia) v Corporation of the City of Adelaide* (2013) 249 CLR 1 per French CJ at [151]. It was this common law right to free speech that was referred to in the environmental protest case of *Wenny Theresia v DPP* [2007] NSWDC 237 at [2] by Nicholson SC DCJ, when his Honour said: "There is a right of free speech. The exercise of that right may take many lawful forms, such as the march across the Sydney Harbour Bridge for the Stolen Generation..." Similarly, Hamilton J in *Commissioner of Police v David Gabriel* [2004] NSWSC 31 at [1] said that protests are a "due exercise of the democratic right of free speech". Simpson J in *Commissioner of Police v Rintoul* [2003] NSWSC 662 at [5] highlighted the interrelated nature of the rights by referring to the freedom of speech and the freedom of assembly.

<sup>26</sup> Professor FJ Stimson argues that: "The important political right of assembly and petition is rather the original than a derivation from freedom of speech": FJ Stimson, *The Law of the Federal and State Constitutions of the United States* (1908), Boston Book Company, Boston, p 43, cited by J Jarret and V Mund, *The Right of Assembly* (1931) 9(1) New York University Law Quarterly Review 1 at 3. See also: B Gaze and M Jones, *Law, Liberty and Australian Democracy*, 1990, Lawbook Co, Sydney, p 115, cited by D McGlone, *The Right to Protest*

assembly is recognised by the common law,<sup>27</sup> State legislation,<sup>28</sup> domestic human rights charters<sup>29</sup> and by international law.<sup>30</sup>

The media often speak of “violent protests” and “violent protestors”.<sup>31</sup> However, as Lee J said in *Commissioner of Police v Vranjkovic*,<sup>32</sup> the right to protest does not extend to violence. At law, a violent protest constitutes a breach of the peace,<sup>33</sup> unlawful assembly,<sup>34</sup> riot<sup>35</sup> or affray;<sup>36</sup> as well as the multitude of criminal law offences that relate to violence. Nor does the right to protest extend to environmental activism involving such actions as blockages, entering mining sites without permission and chaining oneself to mining equipment. Such action constitutes a range of offences, such as breach of the peace,<sup>37</sup> being on “inclosed lands”,<sup>38</sup> obstruction<sup>39</sup> and hindering the operation of mining equipment.<sup>40</sup>

### 3 RIGHT OF ASSEMBLY

#### 3.1 International law

The right to peaceful assembly is recognised by international law. Article 21 of the *International Covenant of the Civil and Political Rights* (ICCPR) states:<sup>41</sup>

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(2005) 30 ALTLJ 274 at 274.

<sup>27</sup> For example, *South Australia v Totani* [2010] HCA 39 at [30]–[31] per French CJ.

<sup>28</sup> [Peaceful Assemblies Act 1992](#) (QLD), s 5.

<sup>29</sup> [Charter of Human Rights and Responsibilities Act 2006](#) (Vic), s 16; [Human Rights Act 2004](#) (ACT), s 15.

<sup>30</sup> [International Covenant on Civil and Political Rights](#), Article 21.

<sup>31</sup> For instance: A Taylor, [Images of violent protests in Baltimore](#), The Atlantic, 28/4/2015; J Desmond-Harris, [An all out war between kids and police: violent protests in Baltimore after Freddie Gray's funeral](#), 27/4/2015, Vox Media; D Ford, [Baltimore protests turn violent; police officers injured in clashes](#), 28/4/2015, CNN. In contrast, see A Noble, [Baltimore riots: State of emergency declared. National Guard activated](#), The Washington Times, 27/4/2015; [Riots erupt across West Baltimore, downtown](#), 27/4/2015, the Baltimore Sun; [Rioting in Baltimore: state of emergency declared as police injured in clashes](#), 28/4/2015, The Guardian.

<sup>32</sup> Unreported, NSWSC, 28/11/80, Lee J at 7; discussed in R Douglas, *Dealing with Demonstrations: The Law of Public Protest and its Enforcement*, 2004, The Federation Press, Sydney, p 46.

<sup>33</sup> R Douglas, *Dealing with Demonstrations: The Law of Public Protest and its Enforcement*, 2004, The Federation Press, Sydney, p 52–53 citing *R v Howell* [1982] QB 416 (Eng CA) at 427 per the court.

<sup>34</sup> *Crimes Act 1900*, s 545C.

<sup>35</sup> *Crimes Act 1900*, s 93B.

<sup>36</sup> *Crimes Act 1900*, s 93C.

<sup>37</sup> R Douglas, *Dealing with Demonstrations: The Law of Public Protest and its Enforcement*, 2004, The Federation Press, Sydney, p 52–53 citing *R v Howell* [1982] QB 416 (Eng CA) at 427 per the court.

<sup>38</sup> *Inclosed Lands Protection Act 1901*, s 4.

<sup>39</sup> For offences of obstruction in respect of mines: ss 257, 378A and 378B of the *Mining Act 1992*.

<sup>40</sup> *Crimes Act 1900*, s 201.

<sup>41</sup> Entered in to force on 23 March 1976: Article 49. Signed by Australia in 1972 and ratified in



The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and 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.

The Commonwealth Government has not legislated to incorporate the provisions of the ICCPR into Australian law. Consequently, the ICCPR has no domestic application and affords no protection to protests in Australia.<sup>42</sup>

The power of State Parliaments to legislate contrary to rights created at international law where the Commonwealth has not legislated to incorporate the provisions of a treaty into domestic law was specifically affirmed by Keane J in *Tajjour v New South Wales*.<sup>43</sup> As his Honour said:<sup>44</sup>

The Commonwealth's ratification of the ICCPR did not affect the ability of the States to enact legislation contrary to that Convention. The validity of State legislation is not dependent on its conformity with international agreements made by the Commonwealth where the international agreement has not been given effect by Commonwealth legislation whereby s 109 of the Constitution might be engaged.

Ultimately, in the absence of Commonwealth legislation incorporating Article 21 into domestic law, while the right to protest at international law may have important symbolic significance, its practical effect is limited.<sup>45</sup>

### 3.2 Common law

Legal scholars have traced the right to assembly back to 1215, to the signing of the Magna Carta.<sup>46</sup> Its long history is evidenced by the enactment in 1412 of 13

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1980: [United Nations, Status of Ratification Interactive Dashboard](#).

<sup>42</sup> *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* [1995] HCA 20, (1995) 183 CLR 273 at [25]; *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1 per Keane J at [490]; *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168 per Mason J at 225. Commonwealth Legislation incorporating treaty provisions into domestic law would be made pursuant to the external affairs power of the Australian Constitution (s 51(xxix) and, pursuant to s 109, would invalidate any inconsistent State laws (to the extent of any inconsistency): *The Commonwealth of Australia v Tasmania (the Tasmanian Dam case)* (1983) 158 CLR 1. For general commentary, see also: Australian Government Attorney-General's Department, [Right to freedom of assembly and association](#).

<sup>43</sup> [2014] HCA 35.

<sup>44</sup> [2014] HCA 35 at [249].

<sup>45</sup> Nevertheless, the symbolic significance of human rights at international law should not be understated. Rights at international law can provide "great symbolic force for oppressed groups within society, offering a significant vocabulary to formulate political and social grievances": H Charlesworth, *The Australian Reluctance about Rights* in P Alston (ed) *Towards an Australian Bill of Rights*, 1994, Centre for International and Public Law, Canberra, p 94, cited by S Bronitt and G Williams, *Political Freedom as an Outlaw: Republican Theory and Political Protest* (1996) 18 Adel L Rev 289 at 329.

<sup>46</sup> See the review of authorities in J Jarret and V Mund, *The Right of Assembly* (1931) 9(1) New York University Law Quarterly Review 1 at 2-10; and G Smith, *The Development of the Right*

*Henry IV*,<sup>47</sup> the first English statute dealing with public assemblies; and by the publication in 1619 of the first systematic English legal commentary on the right to assembly, *Eirenarcha* by William Lambard.<sup>48</sup>

The scope of this common law right has been cast in broad terms:<sup>49</sup>

A meeting may assemble by the spontaneous act of any portion of the people. ... [A]ll that the law requires is that the meeting assemble peaceably... and that it be conducted without any violence, leading to a breach of the peace.

The common law right to assembly has been expressly recognised by Australian Courts, including the High Court of Australia and the NSW Supreme Court, in terms which illustrate an “acceptance of the role of protests as part of democratic systems of government.”<sup>50</sup> As these courts have said:

- freedom of assembly and speech are “important democratic rights”,<sup>51</sup> “precious democratic rights”<sup>52</sup> and “common law freedoms”,<sup>53</sup>
- people have a “right innocently and unaggressively to use the King’s highway in company on occasions that frequently represent great and important national, political, social, religious or industrial movements or opinions”,<sup>54</sup>
- peaceful assemblies are “perfectly reasonable and entirely acceptable modes of behaviour in a democracy”,<sup>55</sup> and
- peaceful assemblies are “integral to a democratic system of government and way of life.”<sup>56</sup>

Common law rights are subject to the doctrine of parliamentary supremacy, “a doctrine as deeply rooted as any in the common law”.<sup>57</sup> The effect of the doctrine of parliamentary supremacy is that Parliament can modify or abolish

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*to Assembly: A Current Socio-Legal Investigation* (1967) 9(2) William & Mary Law Review 351 at 361–362 and note 12.

<sup>47</sup> J Jarret and V Mund, *The Right of Assembly* (1931) 9(1) New York University Law Quarterly Review 1 at 7 and note 13.

<sup>48</sup> J Jarret and V Mund, *The Right of Assembly* (1931) 9(1) New York University Law Quarterly Review 1 at 5–6.

<sup>49</sup> D Rowlands, *A Manual of the English Constitution*, 1859, p 528, cited by J Jarret and V Mund, *The Right of Assembly* (1931) 9(1) New York University Law Quarterly Review 1 at 4 and 9. For an illustration of the operation of the right to assembly in England today see: J Elgot, [Police powerless to stop neo-Nazi rally in Jewish area of London](#), 21/5/2015, The Guardian.

<sup>50</sup> D McGlone, *The Right to Protest* (2005) 30 ALTLJ 274 at 274 at 275.

<sup>51</sup> *Commissioner of Police v Jackson* [2015] NSWSC 96 per Schmidt J at [90].

<sup>52</sup> *Commissioner of Police v Allen* (1984) 14 A Crim R 244 at 245.

<sup>53</sup> *South Australia v Totani* [2010] HCA 39 at [30] per French CJ.

<sup>54</sup> *Melbourne Corporation v Barry* (1922) 31 CLR 174 at 197, see also 206.

<sup>55</sup> *NSW Commissioner of Police v Bainbridge* [2007] NSWSC 1015 at [3]–[4] per Adams J.

<sup>56</sup> *Commissioner of Police v Rintoul* [2003] NSWSC 662 per Simpson J at [5].

<sup>57</sup> *Kable v The Director of Public Prosecutions for NSW* (1996) 189 CLR 151 at 76 per Dawson J. Dawson J discusses the development of the doctrine of parliamentary supremacy at 71–76.



common law rights.<sup>58</sup>

As French CJ said in *South Australia v Totani*, courts will, where possible, interpret Acts in a manner that minimises their impact upon common law rights, so as to give effect to the presumed intention of Parliament not to interfere with common law rights except by unequivocal language, “for which the Parliament may be accountable to the electorate”.<sup>59</sup> However, as his Honour continued:<sup>60</sup>

... it is self-evidently beyond the power of the courts to maintain unimpaired common law freedoms which the Commonwealth Parliament or a State Parliament, acting within its constitutional powers, has, by clear statutory language, abrogated, restricted or qualified.

### 3.3 Constitutional law

The Australian Constitution does not provide a right to assembly.<sup>61</sup> It does, however, augment the common law right to assembly in two important respects. Firstly, the Australian Constitution has been interpreted by the High Court as requiring Australian citizens to be able to assemble before the Federal Parliament.<sup>62</sup> Secondly, and more relevantly, the High Court has interpreted the Australian Constitution as providing an implied freedom of political communication.<sup>63</sup>

The importance of the implied freedom of political communication is highlighted by Professor Douglas, who says:<sup>64</sup>

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<sup>58</sup> *Lee v NSW Crime Commission* (2013) 251 CLR 196 at [3] per French CJ.

<sup>59</sup> *South Australia v Totani* (2010) 242 CLR 1 at 31.

<sup>60</sup> *South Australia v Totani* (2010) 242 CLR 1 at 31.

<sup>61</sup> This is in contrast to the Constitution of the United States and its Bill of Rights, Article I of which provides that: “Congress shall make no law ... abridging ... the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”

<sup>62</sup> *R v Smithers* [1912] HCA 96; (1912) 16 CLR 99, applying *Crandall v State of Nevada* [1867] USSC 15. See also *Theophanous v The Herald and Weekly Times* (1994) 182 CLR 104 per Dean J at 166, 169–170; J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, Angus & Robertson, Sydney, p 958. As Professors Bronitt and Williams suggest, *Smithers* “weakens the Commonwealth’s power to restrict or proscribe public protests at ... Parliament House in Canberra”. Further, while *Smithers* does not expressly apply to State Parliaments, it remains open for the High Court to revive *Smithers* and extend its application to State Parliaments for the purposes of upholding the system of government established under a State Constitution: S Bronitt and G Williams, *Political Freedom as an Outlaw: Republican Theory and Political Protest* (1996) 18 Adel L Rev 289 at 302. See generally: Australian Government, National Capital Authority, [The Right to Protest Guidelines](#).

<sup>63</sup> See: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Cunliffe v The Commonwealth* (1994) 182 CLR 272; *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *McGinty v Western Australia* (1996) 186 CLR 140; *Lange v ABC* (1997) 189 CLR 520 and *Levy v Victoria* (1997) 189 CLR 579; *Coleman v Power* [2004] HCA 39; *Monis v The Queen*, *Droudīs v The Queen* [2013] HCA 4.

<sup>64</sup> R Douglas, *Dealing with Demonstrations: The Law of Public Protest and its Enforcement*, 2004, The Federation Press, Sydney, p 36.

Before the High Court's creation of an implied freedom of political communication, the constitutionality of anti-demonstration laws was non-problematic. If the Commonwealth or the States wanted to ban demonstrations within their respective jurisdictions they were free to do so, and this was so obvious that no attempt was made to challenge the Queensland ban on street marches<sup>[65]</sup> on constitutional grounds. The logic of the implied freedom cases, however, was that there would be circumstances in which laws restricting demonstrations would be unconstitutional.

### 3.3.1 No personal rights conferred

The implied freedom of political communication does not confer a personal right to protest.<sup>66</sup> It is a “freedom from laws”, not a “freedom to communicate.”<sup>67</sup> Statements by the High Court on this point are emphatic. For instance, in *Unions NSW v NSW*<sup>68</sup> French CJ, Hayne, Crennan, Keifel and Bell JJ said:<sup>69</sup>

... it is important to bear in mind that what the Constitution protects is not a personal right ... The freedom is to be understood as addressed to legislative power, not rights, and as effecting a restriction on that power.

Rather than bestowing personal rights, the implied freedom invalidates laws that restrict political communication. It does so, however, only to the extent necessary to protect the effective operation of the system of representative and responsible government provided for by the Constitution.<sup>70</sup> Where that line will be drawn in any particular case will be determined by applying the two-step test that the High Court unanimously propounded in *Lange v Australian Broadcasting Corporation*:<sup>71</sup>

First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second,

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<sup>65</sup>The Bjelke-Peterson government effectively banned political protests between September 1977 and August 1979, which led to an “immediate recourse to civil disobedience by many protests [that] resulted in social disorder”: F Brennan, *Too Much Order with Too Little Law*, 1983, University of Queensland Press, Queensland, pp 1,6 and 139 ff.

<sup>66</sup> *Lange v ABC* (1997) 189 CLR 520 at 567.

<sup>67</sup> *O’Flaherty v City of Sydney Council and State of NSW* [2014] FCAFC 56 at 10, citing *Levy v Victoria* (1997) 189 CLR 579 at 622 per McHugh J.

<sup>68</sup> [2013] HCA 58.

<sup>69</sup> *Unions NSW v NSW* [2013] HCA 58 at [36]. See also *Coleman v Power* [2004] HCA 39 at [88]–[89] per McHugh J; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 326 per Brennan J.

<sup>70</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561; *Coleman v Power* [2004] HCA 39 at [89] per McHugh J.

<sup>71</sup> (1997) 189 CLR 520 at 567–568. In *Coleman v Power* [2004] HCA 39 at [96] McHugh J said that, under the second limb of the *Lange* test: “a law that burdens communications on political or governmental matters will be invalid unless it seeks to achieve an end in a manner that is consistent with the system of representative government enshrined in the Constitution”. As Hayne J said in *Attorney General (SA) v Corporation of the City of Adelaide* (2013) ALR 197 at 235 [131]: “The accepted doctrine of the Court is to be found in the unanimous joint judgment in *Lange v Australian Broadcasting Corporation* as modified by ... *Coleman v Power*”.

if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government ... If the first question is answered "yes" and the second is answered "no", the law is invalid.

A modification to the second part of the test was made by the High Court in *Coleman v Power*, with the court replacing the words "the fulfilment of which" with the words "in a manner which".<sup>72</sup>

The test was recently considered by the High Court in *Monis v The Queen*.<sup>73</sup> With respect to the application of the second limb of the *Lange* test, Hayne J said:<sup>74</sup>

... it is necessary to consider the legal and practical effect of the impugned law. It is necessary to identify how the law curtails or burdens political communication on the one hand and how it relates to what has been identified as the law's legitimate end on the other. In undertaking that comparison it is essential to recognise that the legitimacy of the object or end of the impugned law is identified by considering the compatibility of that object or end with the system of representative and responsible government and the freedom of political communication which is its indispensable incident.

### 3.3.2 Scope

The scope of the implied freedom of communication is not limited to the federal sphere. It applies to a law of a State or federal Parliament<sup>75</sup> and to matters of communication beyond narrowly confined federal concerns.<sup>76</sup> Moreover, the implied freedom of political communication is not limited to verbal communication. It extends to protests and other forms of non-verbal collective communication.<sup>77</sup> As Brennan CJ said in *Levy v The State of Victoria*:<sup>78</sup>

Speech is the chief vehicle by which ideas about government and politics are communicated. Hence it is natural to regard the freedom of communication about government and politics implied in the Constitution as a freedom of speech. But actions as well as words can communicate ideas.

<sup>72</sup> *Coleman v Power* (2004) 220 CLR 1; discussed in L Roth, [The High Court's decision in the electoral funding law case](#), 2014, NSW Parliamentary Research Service e-brief 2/2014, p 3.

<sup>73</sup> [2013] HCA 4; (2013) 249 CLR 92.

<sup>74</sup> [2013] HCA 4 at [145] per Hayne J, see also [279]–[283] per Crennan, Kiefel and Bell JJ.

<sup>75</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567. See also *Unions NSW v NSW* [2013] HCA 58; L Roth, [The High Court's decision in the electoral funding law case](#), 2014, NSW Parliamentary Research Service e-brief 2/2014.

<sup>76</sup> *Coleman v Power* [2004] HCA 39 at [228] per Kirby J; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 571–572. See also *Unions NSW v NSW* [2013] HCA 58; L Roth, [The High Court's decision in the electoral funding law case](#), 2014, NSW Parliamentary Research Service e-brief 2/2014.

<sup>77</sup> R Douglas, *Dealing with Demonstrations: The Law of Public Protest and its Enforcement*, 2004, The Federation Press, Sydney, pp 38–42 and cases discussed therein.

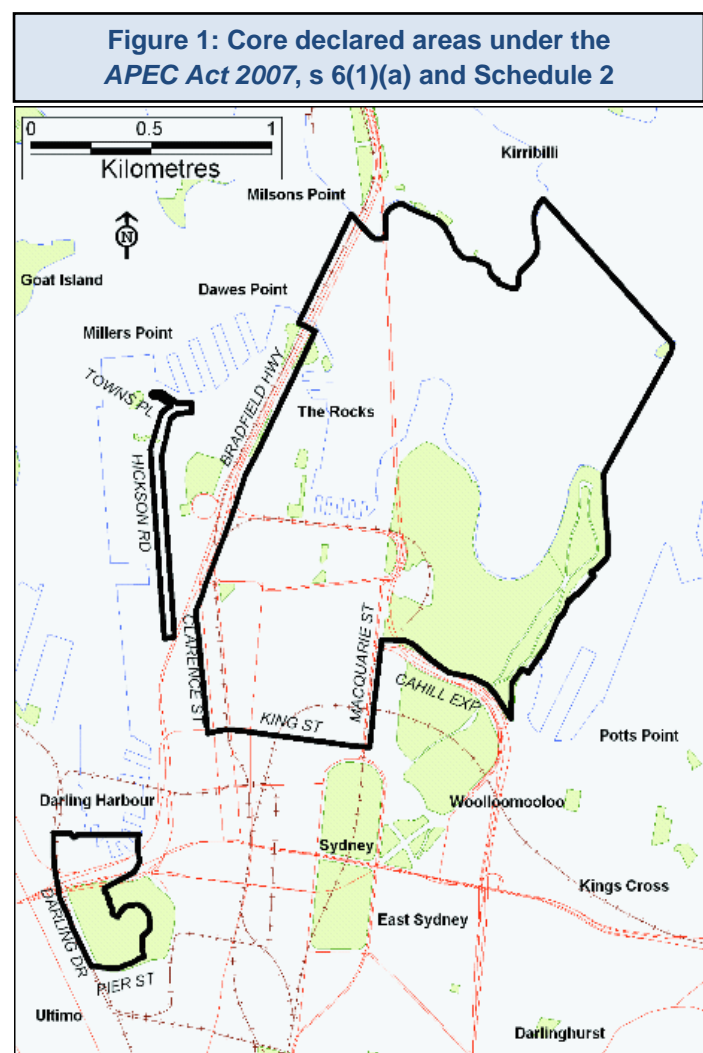
<sup>78</sup> (1997) 189 CLR 579 at 594.

In considering the limit to the protection of protests afforded by the implied freedom of political communication, Brennan CJ said that a law which simply denied people an opportunity to protest “would be as offensive to the constitutionally implied freedom as a law which banned political speech-making.”<sup>79</sup> However, a law which prohibited non-verbal conduct for a legitimate purpose other than suppressing its political message would be unaffected by the implied freedom if the prohibition was appropriate and adapted to fulfilling that purpose.<sup>80</sup> In *Levy*, the impugned law, which restricted persons other than holders of valid game licences (specifically, protesters against duck hunting) from entering specified hunting areas, was not invalidated by the implied freedom of political communication because it was reasonably appropriate and adapted to protecting public safety.<sup>81</sup>

### 3.3.3 APEC Act 2007

A case which illustrates the limits of the implied freedom of political communication is *Gibson v Commissioner of Police*.<sup>82</sup> Mr Gibson, a protester, challenged the validity of the *APEC Act 2007* on constitutional grounds. The object of the Act was to provide police officers with special powers for the security of the meetings of the Asia-Pacific Economic Cooperation (APEC) nations. The Act commenced on assent on 4 July 2007 and, in accordance with its “sunset” provision (s 41), it was repealed on 13 September 2007. The special powers granted to police under Parts 3 and 4 were available during the “APEC period” of 30 August 2007 to 12 September 2007.<sup>83</sup>

The *APEC Act 2007* operated in respect of two types of security areas:<sup>84</sup> the first being core and additional declared areas,<sup>85</sup> and the second being restricted areas.<sup>86</sup> Three core declared areas were in effect during the APEC period, covering a large part of Sydney’s Central Business District.



<sup>79</sup> (1997) 189 CLR 579 at 595 per Brennan CJ.

<sup>80</sup> (1997) 189 CLR 579 at 595 per Brennan CJ.

<sup>81</sup> (1997) 189 CLR 579.

<sup>82</sup> *Gibson v Commissioner of Police* [2007] NSWCA 251.

<sup>83</sup> *APEC Meeting (Police Powers) Act 2007*, ss 9 and 20.

<sup>84</sup> *APEC Meeting (Police Powers) Act 2007*, s 5.

<sup>85</sup> *APEC Meeting (Police Powers) Act 2007*, s 6 and Schedule 2.

<sup>86</sup> *APEC Meeting (Police Powers) Act 2007*, s 7.

Within these security areas the Act granted police the power to establish check points, cordons or road blocks;<sup>87</sup> stop and search vehicles or vessels;<sup>88</sup> search persons;<sup>89</sup> confiscate prohibited items (including poles more than one meter long, which are often used in protests to raise signs and banners);<sup>90</sup> give reasonable directions;<sup>91</sup> and close roads.<sup>92</sup>

Police were also provided with broad powers to exclude and remove persons from the security areas.<sup>93</sup> For instance, police were empowered to exclude any person who failed to: comply with a requirement to submit to a search;<sup>94</sup> surrender a prohibited item;<sup>95</sup> or comply with a reasonable direction;<sup>96</sup> and any person on a closed road<sup>97</sup> or on the “excluded persons list” that the Commissioner of Police was authorised to compile under s 26(1).<sup>98</sup>

### 3.3.3.1 Validity of the *APEC Act 2007*

While the *APEC Act 2007* was intended to ensure that APEC meetings were conducted in safety, the Act clearly limited the right to peaceful assembly in the security areas it established.<sup>99</sup> Mr Gibson, a protester, filed a summons in the Supreme Court seeking a declaration that, due to the operation of the implied freedom of political communication, ss 24(1)(g) and 26 of the *APEC Act 2007* (the “excluded persons list” provisions) were invalid. The court dismissed the summons, finding that the impugned sections of the *APEC Act 2007* did not offend the Constitution’s implied freedom of political communication.<sup>100</sup>

While ss 24(1)(g) and 26 of the *APEC Act* did burden freedom of

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<sup>87</sup> *APEC Meeting (Police Powers) Act 2007*, s 10.

<sup>88</sup> *APEC Meeting (Police Powers) Act 2007*, s 11.

<sup>89</sup> *APEC Meeting (Police Powers) Act 2007*, s 12.

<sup>90</sup> *APEC Meeting (Police Powers) Act 2007*, ss 3 and 13.

<sup>91</sup> *APEC Meeting (Police Powers) Act 2007*, s 14.

<sup>92</sup> *APEC Meeting (Police Powers) Act 2007*, s 15.

<sup>93</sup> *APEC Meeting (Police Powers) Act 2007*, s 24.

<sup>94</sup> *APEC Meeting (Police Powers) Act 2007*, s 24(1)(a).

<sup>95</sup> *APEC Meeting (Police Powers) Act 2007*, s 24(1)(d).

<sup>96</sup> *APEC Meeting (Police Powers) Act 2007*, s 24(1)(e).

<sup>97</sup> *APEC Meeting (Police Powers) Act 2007*, s 24(1)(f).

<sup>98</sup> *APEC Meeting (Police Powers) Act 2007*, s 24(1)(g).

<sup>99</sup> For instance, a unilateral decision by the Commissioner of Police to use his powers under the *APEC Act 2007* to close off George Street, so that no demonstration could proceed in a northerly direction further than King Street, “changed substantially the character of the demonstration and increased the public safety risks involved”, which influenced the decision of Adams J to issue a prohibition order under s 25 of the *Summary Offences Act 1988: NSW Commissioner of Police v Bainbridge* [2007] NSWSC 1015 at [18] and [32]. For a discussion of concerns relating to the *APEC Act 2007* and its implementation by police, see: L Snell, *Protest, Protection, Policing: The expansion of police powers and the impact on human rights in NSW*, 2008, Combined Community Legal Centres Group (NSW) and Kingsford Legal Centre, Sydney.

<sup>100</sup> *Gibson v Commissioner of Police* [2007] NSWCA 251 at [12] and [16].



communication about government or political matters,<sup>101</sup> they were reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which was compatible with the maintenance of representative and responsible government.<sup>102</sup>

The precise reasons given by the Court for its decision illustrate some of the parameters within which laws such as the *APEC Act 2007* can operate:<sup>103</sup>

... the provisions under challenge here are appropriate to achieve the end of public safety and the safety of leaders of other countries and their accompanying parties who are present in Australia for the APEC meeting. It is relevant and significant that the legislation does not prohibit public protests by any person including persons on an "excluded persons list". Rather, it provides for the potential exclusion of persons on the "excluded persons list" for a limited period in designated areas.

The ability to engage in protests and any other form of political communication both before, during and after the APEC period in any other part of the city or indeed, any other part of the State of New South Wales, is unaffected.

### 3.3.4 Occupy Sydney

Another case which illustrates the application of the implied freedom of political communication to protests is *O'Flaherty v City of Sydney Council*.<sup>104</sup> The case concerned the decision of Sydney City Council to end the almost 18 month encampment in Martin Place Sydney, known as Occupy Sydney.<sup>105</sup> One of the protesters, Eamonn O'Flaherty, was charged with an offence contrary to s 632(2) of the *Local Government Act 1993*; namely, failing to comply with the terms of a notice given by the Council prohibiting camping or staying overnight in Martin Place.<sup>106</sup>

Mr O'Flaherty applied to the Federal Court,<sup>107</sup> contending that it was beyond the powers of the City of Sydney Council to issue the notice because it impermissibly burdened his freedom of political communication by deterring him and others by threat of criminal sanctions from staying overnight in the area.<sup>108</sup>

<sup>101</sup> *Gibson v Commissioner of Police* [2007] NSWCA 251 at [8].

<sup>102</sup> *Gibson v Commissioner of Police* [2007] NSWCA 251 at [9] and [12].

<sup>103</sup> *Gibson v Commissioner of Police* [2007] NSWCA 251 at [10]–[12].

<sup>104</sup> [2014] FCAFC 56.

<sup>105</sup> V Champion, [Sydney City Council approves police removal of Occupy Sydney protest in Martin Place](#), The Daily Telegraph, 25 June 2013.

<sup>106</sup> *O'Flaherty v City of Sydney Council* [2013] FCA 344 at [4]. He was also charged with an offence under s 199(1) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) for refusing to comply, without reasonable excuse, with a police direction, even though, by virtue of s 200, that particular offence does not apply to an "apparently genuine demonstration or protest" or "organised assembly".

<sup>107</sup> *O'Flaherty v City of Sydney Council* [2013] FCA 344 at [27], where Katzmann J said: "There is no dispute that Mr O'Flaherty has standing to bring this application. Nor is it disputed that this Court has jurisdiction to entertain it. The Federal Court has original jurisdiction in any matter arising under the Constitution or involving its interpretation: *Judiciary Act*, s 39B(1A)(b)"

<sup>108</sup> *O'Flaherty v City of Sydney Council* [2013] FCA 344 at [5]. He also raised an argument

He sought declarations to the effect that the issue or publication of the Council's notices was *ultra vires* (that is, beyond the powers conferred on an authorised officer under the *Local Government Act 1993*); or, in the alternative, that s 632(1) of the Act was invalid to the extent that it burdened the freedom of political communication.<sup>109</sup> His original application was dismissed.<sup>110</sup> He then appealed that decision, with the appeal heard by a full bench of the Federal Court. That appeal was also dismissed.<sup>111</sup>

The full Federal Court noted that it was common ground on appeal that the impugned law was an effective burden on the implied freedom of political communication.<sup>112</sup> Specifically, neither the City of Sydney Council nor the State of New South Wales challenged the primary judge's finding that by placing limits on the duration of the communication in the places covered by the notices, the prohibition effectively burdened the protesters' implied freedom of political communication.<sup>113</sup> However, the nature and extent of the burden imposed had to be determined because it was:<sup>114</sup>

only by identifying the purpose sought to be achieved by the prohibition and the nature and extent of the "burden" that content could be given to whether "the law was reasonably appropriate and adapted" to serve a legitimate end.

The full Federal Court found no error in the primary judge concluding that the prohibition served the legitimate end of "maintaining public health, safety amenity in a high use public area"; and that the effect of the law on freedom of political communication was "slight" and "incidental".<sup>115</sup> Importantly, the primary judge identified the factors which supported his conclusion.<sup>116</sup> They included that: s 632 and the notices in Martin Place were on their face neutral (that is, they did not refer to political communication); the occupation affected the capacity of the Council to clean and maintain the site; the prohibition applied only to a discrete area; and that the prohibition did not prevent people from assembling in Martin Place to express their views provided they then dispersed.<sup>117</sup>

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based on an implied right of political association but as Katzmann J said at [86]: "Mr O'Flaherty's contentions based on an implied freedom of political association add nothing to his claims based on the implied freedom of political communication". See also *O'Flaherty v City of Sydney Council* [2014] FCAFC 56 at [28]–[29].

<sup>109</sup> *O'Flaherty v City of Sydney Council* [2013] FCA 344 at [5].

<sup>110</sup> *O'Flaherty v City of Sydney Council* [2013] FCA 344 at [96].

<sup>111</sup> *O'Flaherty v City of Sydney Council* [2014] FCAFC 56 at [31].

<sup>112</sup> *O'Flaherty v City of Sydney Council* [2014] FCAFC 56 at [11].

<sup>113</sup> *O'Flaherty v City of Sydney Council* [2014] FCAFC 56 at [12].

<sup>114</sup> *O'Flaherty v City of Sydney Council* [2014] FCAFC 56 at [14].

<sup>115</sup> *O'Flaherty v City of Sydney Council* [2014] FCAFC 56 at [15]. The Court emphasised that "although laws which directly inhibit such communications will be much more difficult to justify than laws which do so indirectly, there is no support for the proposition that an indirect burden can never infringe the Constitutional requirement". See also *Wotton v Queensland* (2012) 246 CLR 1 at 16 [30].

<sup>116</sup> *O'Flaherty v City of Sydney Council* [2014] FCAFC 56 at [17].

<sup>117</sup> *O'Flaherty v City of Sydney Council* [2013] FCA 344 at [63]–[74].

In dismissing the appeal, the full Federal Court concluded that s 632 and the notices prohibiting camping at Martin Place were reasonably appropriate in circumstances where the protesters “retained the freedom to otherwise occupy that site or other public sites within the City of Sydney and thereby communicate their views.”<sup>118</sup>

#### 4. THE NSW STATUTORY SCHEME

NSW has a statutory scheme relating to public assemblies in Part 4 of the *Summary Offences Act 1988*.<sup>119</sup> Part 4 makes no mention of the right to assembly. This is in contrast to the *Peaceful Assembly Act 1992* (Qld), s 5 of which states that a “person has the right to assemble peacefully with others in a public place.”<sup>120</sup> The silence of the NSW scheme is doubly significant. While Part 4 does not expressly grant any statutory right, neither does it abolish the long-standing common law right to assembly.

##### 4.1 Objective of Part 4

As stated in the Second Reading Speech to the *Summary Offences Bill 1988*, an important objective of the NSW statutory scheme is to encourage and reward mutual co-operation between police and participants in public assemblies.<sup>121</sup>

Reflecting that objective, Hamilton J in *Commissioner of Police v Gabriel* emphasised the role of Part 4 in providing a mechanism for promoting and managing the conduct of public assemblies. As his Honour said, “the whole purport of [Part 4] is not to prohibit public assemblies but ... to facilitate them.”<sup>122</sup>

By taking this facilitative and co-operative approach, the Act aims to strike a balance between upholding the right of assembly and preventing other citizens being injured or having their own activities impeded, obstructed or curtailed by the exercise of that right.<sup>123</sup>

As Table 1 indicates, Part 4 of the *Summary Offences Act 1988* has been considered and applied by the courts on a number of occasions and in a number of different contexts.

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<sup>118</sup> *O’Flaherty v City of Sydney Council* [2014] FCAFC 56 at [26].

<sup>119</sup> J Dowd, *Second Reading Speech for the Summary Offences Bill*, Hansard, Legislative Assembly, 31 May 1988, p 807. The predecessor to Part 4 was the *Public Assemblies Act 1979*, until that Act was repealed and its provisions were incorporated into the *Summary Offences Act 1988*.

<sup>120</sup> That right is subject to such restrictions as are necessary and reasonable for public safety, public order and the protection of the rights and freedoms of other persons.

<sup>121</sup> J Dowd, *Second Reading Speech for the Summary Offences Bill*, Hansard, Legislative Assembly, 31 May 1988 p 807.

<sup>122</sup> [2004] NSWSC 31 at [1].

<sup>123</sup> *Commissioner of Police v Rintoul* [2003] NSWSC 662 at [5] per Simpson J; *NSW Commissioner of Police v Bainbridge* [2007] NSWSC 1015 at [16] per Adams J.



| Table 1: Cases applying Part 4 of the Summary Offences Act 1988  |                                  |
|--|----------------------------------|
| Protest  | Case                             |
| Protest on George Street alongside the official ANZAC day march by the Sydney Women Against Rape (WAR) collective  | <i>Allen</i> <sup>124</sup>      |
| Protest against police corruption to be held in the vicinity of the home of a police officer and his family. The police officer had previously arrested the protest organiser.   | <i>Gabriel</i> <sup>125</sup>    |
| Protest against President George Bush and the war in Iraq by the “Stop Bush Coalition” during the APEC meetings in Sydney, to be held along George Street and up Martin Place to Macquarie Street.   | <i>Bainbridge</i> <sup>126</sup> |
| Protest in the Sydney Central Business District to commemorate Al-Nakba on 15 May. Al-Nakba is a Palestinian commemoration of the day following the Israeli Declaration of Independence on 14 May 1948.  | <i>Langosch</i> <sup>127</sup>   |
| Protest by the Palestinian Action Group at the opening of an Israeli Film Festival at the Verona Cinema in Paddington.   | <i>Ridgewell</i> <sup>128</sup>  |
| Protest to commemorate the 11th anniversary of the death of TJ Hickey, the Aboriginal teenager who died while running from police.   | <i>Jackson</i> <sup>129</sup>    |
| Public assembly of about 1000 people outside Parliament House in Macquarie Street from 12.00–2.00pm to protest against wood chipping in southeast forests of NSW. It was proposed that a float would be parked on the footpath immediately outside the gates of Parliament House and would require one lane of Macquarie Street to be closed for the duration of the assembly. | <i>Plumb</i> <sup>130</sup>      |
| A protest against the Commonwealth Government’s refugee policy. It was proposed that the participants would meet at Pennant Hills railway station and proceed to a nearby street to protest outside the house of the then Minister for Immigration, Mr Philip Ruddock.   | <i>Rintoul</i> <sup>131</sup>    |
| Protest near a foreign consulate against overseas oppression of ethnic minority. Evidence of organisers being disorderly and violent at previous protests.   | <i>Vranjkovic</i> <sup>132</sup> |

## 4.2 Authorised assemblies

Under s 23 of the *Summary Offences Act 1988* protest organisers inform the Commissioner of Police of their intention to protest and such details as the proposed location and/or route of the protest, how many people will attend and

<sup>124</sup> *Commissioner of Police v Allen* (1984) 14 A Crim R 244.

<sup>125</sup> *Commissioner of Police v Gabriel* [2004] NSWSC 31 at [10]–[13].

<sup>126</sup> *NSW Commissioner of Police v Bainbridge* [2007] NSWSC 1015.

<sup>127</sup> *Commissioner of Police v Langosch* [2012] NSWSC 499. As Adamson J explained at [5], Al-Nakba, which falls on 15 May, is an annual Palestinian commemoration of the day following the Israeli Declaration of Independence on 14 May 1948.

<sup>128</sup> *Commissioner of Police v Ridgewell* [2014] NSWSC 1138 at [1].

<sup>129</sup> *Commissioner of Police v Jackson* [2015] NSWSC 96 at [1].

<sup>130</sup> Discussed in *Commissioner of Police v Langosch* [2012] NSWSC 499 at [23]–[25]. In *Plumb* the Court granted the Commissioner’s application for a s 25 order. One of the factors that Barr AJ took into account was the effect of the proposed assembly on public transport, including the interference which the float would cause to the passage of vehicles and pedestrians on Macquarie Street for a considerable time, bearing in mind the time of day and week proposed.

<sup>131</sup> *Commissioner of Police v Rintoul* [2003] NSWSC 662.

<sup>132</sup> *Commissioner of Police v Vranjkovic* (unrep, 28/11/1980, NSWSC); discussed in *Commissioner of Police v Gabriel* [2004] NSWSC 31 at [6].

the duration of the protest.<sup>133</sup> Where the intended protest is not opposed by police, it becomes an “authorised public assembly”.

Section 24 provides that people who participate in an authorised public assembly in accordance with the details furnished under s 23 are not guilty of participating in an unlawful assembly or obstruction:

If an authorised public assembly is held substantially in accordance with the particulars furnished with respect to it under section 23 (1) (c) or, if those particulars are amended by agreement between the Commissioner and the organiser, in accordance with those particulars as amended and in accordance with any prescribed requirements, a person is not, by reason of any thing done or omitted to be done by the person for the purpose only of participating in that public assembly, guilty of any offence relating to participating in an unlawful assembly or the obstruction of any person, vehicle or vessel in a public place.

The terms “authorised” and “unlawful assembly” do not imply that protests which have not been authorised under s 24 are illegal. To interpret those terms in such a way would be to engage in a false dichotomy, one that runs contrary to the underlying objectives of Part 4. An “authorised assembly” is simply an assembly that has been provided with the additional legal protection afforded by s 24, while an “unlawful assembly” is a specific offence under s 545C of the *Crimes Act* 1900 that can only be committed if a protest turns (or threatens to turn) violent.<sup>134</sup>

### 4.3 Scope of s 24 protection

The protection afforded by s 24 is specific in scope. It applies only as long as the protest is conducted “substantially in accordance” with the particulars furnished with respect to it under s 23. It also applies only to the offences of participating in an unlawful assembly and obstruction. Given that violence at a protest would almost certainly fail to be “substantially in accordance” with the particulars furnished under s 23, in practical terms the protection from prosecution provided by s 24 is likely to apply only to the offence of obstruction.<sup>135</sup>

Moreover, as Simpson J said in *Rintoul*,<sup>136</sup> s 24 does not protect against prosecution for other criminal offences relating to violence or offences relating to the damage or destruction of property. Ultimately, as Schmidt J said in

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<sup>133</sup> A form for this purpose is provided under the *Summary Offences Regulation 2010*, [Schedule 1: Notice of Intention to Hold A Public Assembly](#).

<sup>134</sup> Discussed below under “Offences”.

<sup>135</sup> R Handley, “*Serious affront*” and the *NSW Public Assemblies Legislation* (1986) 10 *Criminal Law Review* 288 at 292, discussing comments to that effect made by Hunt J in *Commissioner of Police v Allen* (1984) 14 A Crim R 244 at 246, in respect of the similarly-worded predecessor to s 24 of the *Summary Offences Act 1988*, s 5 of the *Public Assemblies Act 1979*.

<sup>136</sup> *Commissioner of Police v Rintoul* [2003] NSWSC 662 at [24].

*Commissioner of Police v Jackson*.<sup>137</sup>

... the actual conduct of public assemblies is a matter for those who conduct the assembly and the Commissioner of Police. It is a matter for the individuals who participate to determine how they will each conduct themselves and for the members of the police force to respond, in the event that any conduct disturbs the peace, endangers others, or involves the commission of any offence.

#### 4.4 Prohibition orders sought by Commissioner of Police

Bearing all this in mind, special mention must be made of s 25 of the Act, which applies where the Commissioner opposes the protest but the protest organiser, despite the Commissioner's opposition, proposes to continue with the protest.<sup>138</sup> At first reading s 25 appears "particularly curious"<sup>139</sup>, if not antithetical to the objectives of Part 4. This is because s 25 is entitled "Prohibition by a Court of a public assembly" and provides that, where notice has been given under s 23(1) 7 days or more before the date of an intended protest, the Commissioner of Police may (under s 25) apply to a Court for an order "prohibiting" the holding of the public assembly.<sup>140</sup> Reflecting Part 4's emphasis on negotiation and co-operation, the Commissioner of Police can only do so if he has first served on the organiser of the public assembly notice inviting the organiser to confer with a member of the Police Force about the assembly and then taken into consideration any matters raised by the organiser.<sup>141</sup>

As to the effect of a s 25 order, Hamilton J said in *Gabriel*:<sup>142</sup>

... the effect of a prohibition order under s 25 is not to prohibit the assembly in any way, but to impose upon the participants the possibility of the commission of additional criminal offences. Its description as a prohibition order is therefore something of a misnomer. All it does is to produce the effect that persons participating in the assembly do not have the benefit of the additional protection which could potentially be afforded to them under s 24 ...

Or, as Adams J succinctly put it in *New South Wales Commissioner of Police v Bainbridge*, an order made under s 25 "prohibits nothing".<sup>143</sup> Indeed, despite the

<sup>137</sup> [2015] NSWSC at [12].

<sup>138</sup> *NSW Commissioner of Police v Bainbridge* [2007] NSWSC 1015 at [13].

<sup>139</sup> *Commissioner of Police v Gabriel* [2004] NSWSC 31 at [1].

<sup>140</sup> *In Commissioner of Police v Supple* [2013] NSWSC 1311 at [7]–[8] the court held that the Commissioner of Police had no power to apply for a prohibition order under s 25 because the notice was not served on the Commissioner seven days or more before the date specified in the Notice for the assembly.

<sup>141</sup> *Summary Offences Act 1988*, s 25(2); *Commissioner of Police v Gabriel* [2004] NSWSC 31 at [2].

<sup>142</sup> *Commissioner of Police v Gabriel* [2004] NSWSC 31 at [3]. See also *Commissioner of Police v Jackson* [2015] NSWSC 96 at [13] per Schmidt J; *Commissioner of Police v Langosch* [2012] NSWSC 499 at [19].

<sup>143</sup> *NSW Commissioner of Police v Bainbridge* [2007] NSWSC 1015 at [15]. Adams J at [17] notes that while a "prohibition" order does not make it an offence for members of the public to participate in an assembly, it *might* — "the matter is not entirely clear" — make it unlawful for

prohibition order issued by Hunt J in *Commissioner of Police v Allen*, some 350 protesters attended the planned demonstration, which was entirely peaceful and entailed no arrests.<sup>144</sup> As Hunt J noted in that case, there is a real potential for the term “prohibition order” to mislead the public and media into thinking that the right to assembly can be prohibited by the court.<sup>145</sup>

#### 4.5 Authorisation orders sought by organisers of protest

Section 26 provides that, if the notice under s 23(1) was served on the Commissioner of Police *less than 7 days* before the date of the intended protest and the Commissioner has not notified the organiser of the public assembly that he or she does not oppose the holding of the assembly, the organiser may apply to a court for an order authorising the holding of the public assembly.<sup>146</sup>

#### 4.6 No right of appeal

Section 27(1) of the *Summary Offences Act 1988* provides that the decision of a court on an application under ss 25 and 26 of the Act is final and not subject to appeal.

#### 4.7 Criteria to be used by the Commissioner of Police and the courts

The Act is silent as to the criteria to be used by the Commissioner of Police and the courts when exercising their respective discretion under Part 4.<sup>147</sup> But the cases considering applications under s 25 do indicate what those criteria may be.

The prospect that a breach of the peace would likely be caused by the holding of an assembly would ordinarily be sufficient grounds upon which the Commissioner of Police can oppose an intended protest and apply to the court

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the organiser of the assembly (who is named as a party to the proceedings) to participate in the assembly. This consideration derives from comments made by Hunt J in *Commissioner of Police v Allen* (1984) 14 A Crim R 244 at 245, where his Honour said: “Those organisers, as parties to the proceedings in which the prohibiting order is made are, it seems to me, acting in contempt of that order if they participate in the assembly”. See also R Handley, “*Serious affront*” and the NSW Public Assemblies Legislation (1986) 10 Criminal Law Review 288 at 292. Handley notes that the protest organisers also risk having the costs of proceedings ordered against them, which acts as a disincentive to using the legislative scheme. (As previously mentioned, although Handley is referring to the predecessor to Part 4, the *Public Assemblies Act 1979*, that Act was repealed and its provisions were incorporated into the *Summary Offences Act 1988*)

<sup>144</sup> R Handley, “*Serious affront*” and the NSW Public Assemblies Legislation (1986) 10 Criminal Law Review 288 at 291.

<sup>145</sup> (1984) A Crim R 244 at 245. As His Honour said, television reports of a protest that were tendered before the court reveal that, regarding the protest in question, “such a description has certainly misled the media”.

<sup>146</sup> *Commissioner of Police v Supple* [2013] NSWSC 1311 at [5].

<sup>147</sup> Handley suggest that a “public interest test” should be adopted, as is used in s 4(6) of the *Public Assemblies Act 1972* (SA): R Handley, “*Serious affront*” and the NSW Public Assemblies Legislation (1986) 10 Criminal Law Review 288 at 295.

for a s 25 order, and for the granting of a s 25 order by the courts.<sup>148</sup> As Adamson J in *Langosch* said:<sup>149</sup>

Although it is not necessary to show that a breach of the peace would or would be likely to be caused by the holding of the public assembly, it is difficult to imagine a case where a s 25 order would be made where there was no real prospect of such a breach.

As illustrated in *Jackson*,<sup>150</sup> *Ridgewell*,<sup>151</sup> *Langosch*,<sup>152</sup> *Rintoul*<sup>153</sup> and *Gabriel*<sup>154</sup> the particular features of the intended protest are highly relevant to the exercise of the broad discretion afforded to the Commissioner of Police and the Court under Part 4. These features include:<sup>155</sup>

- the time of the assembly;
- the expected duration of the assembly;
- the location of the assembly and, if it is intended that the assembly will take the form of a procession, the intended route of the assembly;
- the purpose of the assembly;
- the number of people and (if applicable) vehicles involved;
- the likely vehicular and pedestrian traffic present;
- whether other special events will be occurring on the day;
- the likely disruption caused to public transport and other persons; and
- any other notified special characteristics of the proposed assembly.

In *Jackson*<sup>156</sup> Schmidt J granted the s 25 order sought by the Commissioner of Police. Her Honour noted several factors underpinning her decision that the

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<sup>148</sup> *Commissioner of Police v Jackson* [2015] NSWSC 96 at [18]; *Commissioner of Police v Allen* (1984) 14 A Crim R 244 at 250; *Commissioner of Police v Rintoul* [2003] NSWSC 662 at [7].

<sup>149</sup> *Commissioner of Police v Langosch* [2012] NSWSC 499 at [22].

<sup>150</sup> *Commissioner of Police v Jackson* [2015] NSWSC 96, which involved the protest to commemorate the 11th anniversary of the death of TJ Hickey.

<sup>151</sup> *Commissioner of Police v Ridgewell* [2014] NSWSC 1138, which involved the protest by the Palestinian Action Group at the opening of an Israeli Film Festival at the Verona Cinema in Paddington.

<sup>152</sup> *Commissioner of Police v Langosch* [2012] NSWSC 499, which involved a protest to commemorate Al-Nakba, which falls on 15 May, the day after the Israeli Declaration of Independence on 14 May 1948.

<sup>153</sup> *Commissioner of Police v Rintoul* [2003] NSWSC 662, which involved a protest outside the home of the then Minister for Immigration, Mr Philip Ruddock.

<sup>154</sup> *Commissioner of Police v Gabriel* (2004) 141 A Crim R 566, which involved a protest against police corruption outside the house of a police officer who had previously arrested the protest organiser.

<sup>155</sup> *Commissioner of Police v Jackson* [2012] NSWSC 96 at [14] and [67] ff; *Commissioner of Police v Langosch* [2012] NSWSC 499 at [21] ff.

<sup>156</sup> *Commissioner of Police v Jackson* [2015] NSWSC 96.

intended protest was a risk to public safety.<sup>157</sup> These included the confrontational nature of protest in the preceding year; the large numbers of intending protesters; the proposed path along George Street, and the anti-police sentiment exhibited by the intending protesters. Schmidt J noted that the likelihood of the intended protest becoming unruly and unsafe:<sup>158</sup>

had to be considered in circumstances where even those intending to march peacefully...felt that there was nothing wrong or offensive with chanting "fuck the police" during the march ...

In *Ridgewell*<sup>159</sup> a s 25 order was granted by the court in part because the protest was focused on the Verona Cinema in Paddington, which has a small foyer with a large glass frontage and is positioned on a narrow footpath adjoining busy Oxford Street. Despite discussing safety issues with the protest organisers, police remained concerned that, in such confined circumstances, they could not prevent violence erupting between the protesters and patrons attending the film festival; nor could they prevent serious injury to protesters or the public should the crowd become too big or surge.

In contrast, in *Langosch*<sup>160</sup> the order sought under s 25 by the Commissioner of Police to prohibit an intended protest in the city was not granted, despite Adamson J saying that the protest would certainly cause inconvenience and increase "the risk of danger" on busy city streets.<sup>161</sup> Objection to the intending protest was taken on the ground that it should be moved to a weekend, when it would be less busy in the city. This was raised with the protesters and in court to no effect. Adamson J said the protest was intended to mark a specific overseas political event, which "like ANZAC day, Christmas Day or Australia Day is referable to a particular date which is not moveable".<sup>162</sup> Weighing up the relevant factors in that case, his Honour concluded:<sup>163</sup>

Were I to have made the order ... I would be inhibiting, albeit in a small way, the right to freedom of expression and assembly. In refusing the order, I am, also in a small way, providing some sanction to a significant disruption to the routines of many commuters on a single evening and delaying their arrivals home by minutes if not hours.

In *Rintoul*<sup>164</sup> the court considered whether a s 25 order should be granted where a protest against Australia's refugee policies was to be held in front of the home of the then Commonwealth Minister for Immigration, Philip Ruddock. Simpson J first considered the effect of the protest on the surrounding residential area,

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<sup>157</sup> *Commissioner of Police v Jackson* [2015] NSWSC 96 at [86] and [96].

<sup>158</sup> *Commissioner of Police v Jackson* [2015] NSWSC 96 at [86].

<sup>159</sup> *Commissioner of Police v Ridgewell* [2014] NSWSC 1138 at [15]–[16].

<sup>160</sup> *Commissioner of Police v Langosch* [2012] NSWSC 499.

<sup>161</sup> *Commissioner of Police v Langosch* [2012] NSWSC 499 at [30]–[31], [35].

<sup>162</sup> *Commissioner of Police v Langosch* [2012] NSWSC 499 at [28].

<sup>163</sup> *Commissioner of Police v Langosch* [2012] NSWSC 499 at [34].

<sup>164</sup> *Commissioner of Police v Rintoul* [2003] NSWSC 662.

including a heavily used local park where many sporting fixtures were held. Her Honour said:<sup>165</sup>

... the regular use of a public facility such as the Pennant Hills Park does not entitle the regular user to the exclusive and continuous possession of that facility at the cost of others who also have a legitimate claim to its use. Public facilities are to be shared and occasionally even a regular user has to give way to the claims of others. It is in the very nature of the entitlement to peaceful protest that disruption will be caused to others. The fact that the proposed assembly is likely to cause significant inconvenience to residents of Pennant Hills and to individuals involved in the events at the park is far from determinative. If matters such as this were to be determinative, no assembly involving inconvenience to others would be permitted.

The most pertinent issue in this case, however, was whether it was proper for the court to sanction, by refusing to grant a prohibition order under s 25, a public assembly that will undoubtedly have privacy implications for the Immigration Minister and his family.<sup>166</sup> Weighing up the competing interests — the right to protest versus the invasion of the Minister's privacy — Simpson J concluded that, as long as the assembly was peaceful and in accordance with the notice provided to the Commissioner of Police, the protesters should not be deprived of the protection afforded by Part 4 of the Act.<sup>167</sup> In so concluding, Simpson J said that she was influenced by the "lack of significant consequences of making an order",<sup>168</sup> in that "the assembly may in any event go ahead",<sup>169</sup> and emphasised that "participants should be aware of the very limited nature of the protection that the Act affords them."<sup>170</sup>

*Rintoul*<sup>171</sup> can be contrasted with *Gabriel*,<sup>172</sup> where a s 25 order was issued in respect of a protest that was planned to be conducted outside the house of a police officer and his family because that protest "was motivated in large part not by principle but by vindictive personal spite."<sup>173</sup> As Hamilton J said:<sup>174</sup>

It is a central and vital principle in a democratic society that there be a Police Force which is not corrupt. Protests against alleged corruption by police officers (including particular police officers) and the manner in which they have been or have not been dealt with are very valid exercises of the free expression of views in our democratic society. However, in this case I find that there is also a very considerable element in the defendant's views and courses of conduct, past and proposed, of obsession about particular police officers and an absolute and

<sup>165</sup> *Commissioner of Police v Rintoul* [2003] NSWSC 662 at [20].

<sup>166</sup> *Commissioner of Police v Rintoul* [2003] NSWSC 662 at [21].

<sup>167</sup> *Commissioner of Police v Rintoul* [2003] NSWSC 662 at [23].

<sup>168</sup> *Commissioner of Police v Rintoul* [2003] NSWSC 662 at [23].

<sup>169</sup> *Commissioner of Police v Rintoul* [2003] NSWSC 662 at [23].

<sup>170</sup> *Commissioner of Police v Rintoul* [2003] NSWSC 662 at [24].

<sup>171</sup> *Commissioner of Police v Rintoul* [2003] NSWSC 662 at [21].

<sup>172</sup> *Commissioner of Police v Gabriel* (2004) 141 A Crim R 566.

<sup>173</sup> *Commissioner of Police v Gabriel* (2004) 141 A Crim R 566 at [15].

<sup>174</sup> *Commissioner of Police v Gabriel* (2004) 141 A Crim R 566 at [15].

spiteful determination to cause unpleasant consequences for those officers.

## 5. PROTEST OFFENCES

The offences considered below are those that are most immediately relevant to protests and which illustrate the extent to which the criminal law circumscribes the right to assembly. However, the list of offences considered below is not exhaustive because “[a]n analysis which referred to every possible demonstration offence would constitute a veritable summary of much of the criminal law”.<sup>175</sup>

### 5.1 Breaches of the peace, arrest without warrant and resisting arrest

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.<sup>176</sup> 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”.<sup>177</sup>

Section 4(2) of the *Law Enforcement (Powers and Responsibilities) Act 2002* specifies that “nothing in this Act affects the powers conferred by the common law on police officers to deal with breaches of the peace”. Those common law powers, which developed over time to protect and restore what was originally considered to be the King’s Peace, include: dispersal of crowds, confiscation of property and arrest.<sup>178</sup> As Professors Bronitt and Williams have said:<sup>179</sup>

With its open-ended definitions and powers, breach of the peace confers upon

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<sup>175</sup> R Douglas, *Dealing with Demonstrations: The Law of Public Protest and its Enforcement*, 2004, The Federation Press, Sydney, p 70.

<sup>176</sup> R Douglas, *Dealing with Demonstrations: The Law of Public Protest and its Enforcement*, 2004, The Federation Press, Sydney, p 52–53 citing *R v Howell* [1982] QB 416 (Eng CA) at 427 per the court.

<sup>177</sup> R Douglas, *Dealing with Demonstrations: The Law of Public Protest and its Enforcement*, 2004, The Federation Press, Sydney, p 52–53, citing *R v Chief Constable of Devon and Cornwall* [1982] QB 458 at 417 per Lord Denning. Some States have legislated (or attempted to legislate) to protect workplaces from protesters: for instance, *Workplaces (Protection from Protestors) Act 2014 (Tas)*, *Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015*. As discussed later in this paper, NSW has statutory offences specifically aimed at preventing protests on mining sites. Other offences, such as obstruction, hindering and entering “inclosed lands”, as well as police statutory and common law powers of arrest, also protect workplaces from protests that are not in the permissible form of a peaceful assembly.

<sup>178</sup> S Bronitt and G Williams, *Political Freedom as an Outlaw: Republican Theory and Political Protest* (1996) 18 Adel L Rev 289 at 315; F Brennan, *Too Much Order with Too Little Law*, 1983, University of Queensland Press, Queensland, pp 7–8. G Flick, *Civil Liberties in Australia*, 1981, Law Book Company, Sydney, pp 15–18.

<sup>179</sup> S Bronitt and G Williams, *Political Freedom as an Outlaw: Republican Theory and Political Protest* (1996) 18 Adel L Rev 289 at 315. The authors argue that this flexibility entails a degree of uncertainty.



the police a flexible “on the spot” legal resource for dealing with new threats to public disorder.

However, police are rarely in a position where they have to rely solely on their common law powers to deal with breaches of the peace.<sup>180</sup> For instance, s 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* provides police with broad powers to arrest without warrant.

Further, s 546C of the *Crimes Act 1900* makes it an offence for any person to resist or hinder a police officer in the execution of their duty, or to incite any other person to do the same. The offence carries a maximum penalty of 12 months imprisonment and/or a fine of \$1100.<sup>181</sup>

In the case of public disorders, police have broad powers under Part 6A of the *Law Enforcement (Powers and Responsibilities) Act 2002*. Those powers apply in respect of public places that are the “target” of an “authorisation”.<sup>182</sup> Within those public places, police have the power to disperse groups, establish roadblocks and search vehicles.<sup>183</sup> The potential to use the powers under Part 6A in relation to protests is particularly contentious. Those powers were a direct response to the Cronulla Riots and related events.<sup>184</sup> Their use in relation to *peaceful* protests was specifically excluded, with the Special Minister of State, John Della Bosca, stating that Part 6A:<sup>185</sup>

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. One of the most central parts of this bill relates to lockdown powers, which will enable police to declare an area on the basis that large-scale public disorder is occurring or threatens to occur, and then to set up roadblocks and employ stop and search powers in or around that area.

Part 6A contains no express limitation on the scope of the powers it provides police other than that they apply to prevent or control a “large-scale public disorder”.<sup>186</sup> Section 87A defines “public disorder” to mean a “riot or other civil disturbance that gives rise to a serious risk to public safety”.

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<sup>180</sup> R Douglas, *Dealing with Demonstrations: The Law of Public Protest and its Enforcement*, 2004, The Federation Press, Sydney, p 109.

<sup>181</sup> Fine amounts provided in this paper are based upon s 17 of the *Crimes (Sentencing Procedure) Act 1999*, which provides that one penalty unit equals \$110.

<sup>182</sup> *Law Enforcement (Powers and Responsibilities) Act 2002*, ss 87D and 87E.

<sup>183</sup> The power to disperse groups during a time of public disorder is conferred by s 87MA and the power to establish roadblocks is provided by s 87I.

<sup>184</sup> See NSW Police Force, [Strike Force Neil, Cronulla Riots: a Review of the Police Report](#), Vol 1 of 4.

<sup>185</sup> J Della Bosca, *Law Enforcement Legislation Amendment (Public Safety) Bill 2005*, NSW Legislative Council, Hansard, 15 December 2005, p 20,582

<sup>186</sup> *Law Enforcement (Powers and Responsibilities) Act 2002*, s 87D(1)(a).

The Part 6A powers were used at a Camp for Climate Action protest against the expansion of the Newcastle coal port.<sup>187</sup> The Ombudsman reported that the Part 6A powers were not misused because police had “genuine and well-documented grounds for concern” about the likelihood of violent confrontation and the formal authorisation to use the powers under Part 6A occurred “only after police were alerted to an apparent attempt to derail a coal train”.<sup>188</sup>

In light of the contested nature of Part 6A, the Ombudsman has recommended that Parliament consider amending it to expressly protect the right to peaceful assembly.<sup>189</sup> The Ombudsman has further reported:<sup>190</sup>

The police authorisation to use Part 6A powers for the Camp for Climate Action protest at Newcastle highlights the need for transparent standards about when an otherwise peaceful assembly — arranged with the approval of police under a statutory framework established by Part 4 of the *Summary Offences Act 1998* — might become subject to the emergency powers.

Police also have powers to give directions (including “move on” directions under Part 14 of the *Law Enforcement (Powers and Responsibilities) Act 2002*; but s 200 expressly provides that the Part 14 powers do not apply in relation to a “genuine demonstration or protest” or “organised assembly.”<sup>191</sup>

## 5.2 Obstruction

Section 6 of the *Summary Offences Act 1988* provides that it is an offence for a person, without reasonable excuse, to wilfully prevent in any manner the free passage of a person, vehicle or vessel in a public place. The maximum penalty for an offence against s 6 is a fine of \$440. Obstruction is a particularly important offence with respect to protests, given that a protest conducted in most urban areas will, without the assistance of police, invariably obstruct persons and vehicles in some way.

Obstruction is also prohibited by cl 236 of the *Road Rules 2014*, as is the related offence of causing a traffic hazard. Clause 236(1) provides that a pedestrian must not cause a traffic hazard by moving into the path of a driver. Clause 236(2) provides that a pedestrian must not unreasonably obstruct the path of any driver or another pedestrian. The offences prohibited by cl 236 attract a maximum penalty of a \$2,200 fine, five times higher than the penalty for the offence of obstruction under s 6 of the *Summary Offences Act 1988*.

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<sup>187</sup> Z Hutchinson and H Creenaune, *A Stifling Climate: targeting social movements and policing protests* (2010) Dissent Autumn/Winter 33 at 34.

<sup>188</sup> NSW Ombudsman, *Annual Report 2008–2009*, Sydney, pp 154–155.

<sup>189</sup> NSW Ombudsman, *Review Emergency Powers to Prevent or Control Disorder*, 2007, Sydney, pp vi and 12.

<sup>190</sup> NSW Ombudsman, *Annual Report 2008–2009*, Sydney, p 156.

<sup>191</sup> Section 200 was applied in *Police v Castle* [2011] NSWLC 22 at [13] to dismiss a s 199 charge against a protester. Another case where a protester was, despite s 200, charged with an offence against s 199 was the Sydney Occupy case of *O’Flaherty v City of Sydney Council* [2013] FCA 344 at [4].

### 5.3 Offensive conduct and offensive language

Section 4 of the *Summary Offences Act 1988* states that: a person must not conduct himself or herself in an offensive manner in, or near, or within view or hearing from, a public place or a school. The maximum penalty for this offense is \$660 or imprisonment for 3 months. Section 4A of the *Summary Offences Act 1988* prohibits the use of offensive language in the same context and provides for a maximum penalty of \$660.

These offenses have the potential to significantly limit the right to protest. All that they require in order to be committed is for a “hypothetical reasonable ordinary person” to be offended.<sup>192</sup> This fault element — offensiveness — has been criticised for its vagueness;<sup>193</sup> a vagueness which has only been compounded by the removal of a breach of the peace requirement.<sup>194</sup>

### 5.4 Unlawful assembly

Section 545C(1) of the *Crimes Act 1900* provides that it is an offence to knowingly join or continue to be part of an unlawful assembly. An unlawful assembly is defined by s 545C(3) to be any assembly of five or more persons whose common object is, by means of intimidation or injury, to compel any person to do what the person is not legally bound to do, or to abstain from doing what the person is legally entitled to do.

The offence carries a maximum penalty of 6 months’ imprisonment and/or a fine not exceeding \$550. Where a person in an unlawful assembly is armed, s 545C(2) provides that the maximum penalty increases to 12 months imprisonment and/or a fine not exceeding \$1,100.

### 5.5 Affray

Section 93C(1) of the *Crimes Act 1900* provides for the offence of affray, which is committed when a person uses or threatens unlawful violence towards another and that conduct causes a person of reasonable firmness who is present to fear for his or her safety. The offence of affray carries a maximum penalty of 10 years imprisonment.

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<sup>192</sup> *State of NSW v Beck; Commissioner of Police v Beck* [2013] NSWCA at [170] per Ward JA.

<sup>193</sup> J Quilter and L McNamara, *Time to Define “The Cornerstone of Public Order Legislation”: The Elements of Offensive Conduct and Language under the Summary Offences Act 1988 (NSW)* (2013) 36(2) UNSWLJ 534 at 538.

<sup>194</sup> J Quilter and L McNamara, *Time to Define “The Cornerstone of Public Order Legislation”: The Elements of Offensive Conduct and Language under the Summary Offences Act 1988 (NSW)* (2013) 36(2) UNSWLJ 534 at 539 to 541. The authors contrast s 4 of the *Summary Offences Act 1988* with s 6 of the *Vagrancy Act 1851* which expressly refers to breaches of the peace. The absence of a breach of the peace requirement is also problematic in terms of the implied freedom of political communication. In *Coleman v Power* (2004) 220 CLR 1 at [193]–[194] per Gummow and Hayne JJ and Kirby J at [256]–[257] the High Court saved a similar Queensland provision from invalidity by effectively attributing to it a breach of the peace requirement.

## 5.6 Assault during public disorder

Section 59A(1) of the *Crimes Act 1900* provides that a person who assaults any person during a “large-scale public disorder”, although not occasioning actual bodily harm, is liable to imprisonment for 5 years. Where the assault occasions actual bodily harm, s 59A(2) provides for a maximum term of imprisonment of 7 years. Section 4 of the *Crimes Act 1900* defines “public disorder” to mean “a riot or other civil disturbance that gives rise to a serious risk to public safety”.

## 5.7 Assault and other actions against police officers

This offence, under s 60 of the *Crimes Act 1900*, is particularly important in the context of protests because, when protests turn violent, the violence is often directed at police.

Under s 60(1), a person who assaults, throws a missile at, stalks, harasses or intimidates a police officer while the officer is executing his or her duty, although no actual bodily harm is occasioned, is liable to imprisonment for 5 years. Where a person commits that offence during a public disorder, s 60(1A) increases the maximum penalty to imprisonment for 7 years.

If actual bodily harm is occasioned to the officer, the maximum penalty increases to imprisonment for 7 years (s 60(2)) and imprisonment for 9 years if the offence occurred during a public disorder (s 60(2A)).

If the police officer is wounded or suffers grievous bodily harm, and the offender was reckless as to causing actual bodily harm to the officer, a maximum penalty of 12 years imprisonment applies (s 60(3)) and increases to 14 years if the offence occurred during a public disorder (s 60(3A)).

## 5.8 Violent disorder

Section 11A(1) of the *Summary Offences Act 1988* provides that if three or more persons who are present together use or threaten unlawful violence and their conduct (taken together) is such as would cause a person of reasonable firmness to fear for his or her personal safety, each of the persons using or threatening unlawful violence is guilty of an offence. This offence carries a maximum penalty of \$1,100 or imprisonment for 6 months.

## 5.9 Riot

Section 93B(1) of the *Crimes Act 1900* provides that, where 12 or more people together use or threaten unlawful violence for a common purpose and their conduct (taken together) causes a person of reasonable firmness to fear for his or her personal safety, each of the persons using unlawful violence for the common purpose is guilty of riot and liable to imprisonment for 15 years.<sup>195</sup>

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<sup>195</sup> For a recent case involving the charges of riot and affray, committed at the Villawood Immigration Detention Centre, see: *Parhizkar v R* [2014] NSWCCA 240.

### 5.10 Unlawful entry and offensive conduct on “inclosed lands”

Part 3(1) of the *Inclosed Lands Protection Act 1901* defines “inclosed lands” to be any land, public or private, that is fully surrounded by a fence or wall, or partly surrounded by a fence or wall and partly by a natural feature such as a cliff or river. Mining sites that are fenced are therefore inclosed lands for the purposes of the Act. Protesters entering and remaining on such sites without lawful excuse and without permission are committing an offence under s 4 of the Act, for which a maximum penalty of \$550 applies. If their conduct while on the premises is offensive, they commit an offence against s 4A, for which a maximum penalty of \$1100 applies.

Kirby J considered the s 4(1) offence in the context of protests in *DPP v Wille*.<sup>196</sup> His Honour concluded that the right to protest does not provide a lawful excuse for entering and remaining on inclosed lands.<sup>197</sup>

... entry to the premises by these defendants was not necessary to accomplish their purpose. Their purpose was to show their opposition to the proposed road. They could have protested outside the perimeter fence. Such a protest may not have been as dramatic, but that cannot matter. Were it otherwise, a person could invade another’s property because their purpose might be better accomplished in that location rather than elsewhere.

### 5.11 Destroying or damaging property

Protesters who intentionally or recklessly destroy or damage public property or the property of another person are, under s 195(1)(a) of the *Crimes Act 1900*, liable to imprisonment for 5 years. Higher penalties apply for this offence if the destruction or damage is caused while in the company of other persons<sup>198</sup> or during a public disorder;<sup>199</sup> or, in each case, where the cause of the destruction or damage is fire or explosives.<sup>200</sup>

When David Burgess and Will Saunders painted “No War” on the sails of the Sydney Opera House in protest against Australia’s participation in the war in Iraq, they were charged with this offence and sentenced to imprisonment for a fixed term of 9 months, to be served by way of periodic detention. They were also ordered to pay \$111,000 (in addition to \$40,000 initially paid as reparation) to the Sydney Opera House Trust.<sup>201</sup>

Such orders for compensation are available under the *Victims Rights and*

<sup>196</sup> *DPP v Wille* [1999] NSWSC 661.

<sup>197</sup> *DPP v Wille* [1999] NSWSC 661 at [38].

<sup>198</sup> *Crimes Act 1900*, s 195(1A)(a): imprisonment for 6 years.

<sup>199</sup> *Crimes Act 1900*, s 195(2)(a): imprisonment for 7 years.

<sup>200</sup> *Crimes Act 1900*, s 195(1)(b) (destroy or damage property by means of fire or explosives), imprisonment for 10 years; s 195(1A)(b) (destroy or damage property in company by means of fire or explosives), imprisonment for 11 years; s 195(2)(b) (destroy or damage property during public disorder by means of fire or explosives), imprisonment for 12 years.

<sup>201</sup> *R v Burgess; R v Saunders* [2005] NSWCCA 52 at [1].

*Support Act 2013* following conviction for offences giving rise to a loss. As s 97 of the *Victims Rights and Support Act 2013* provides, a court which convicts a person of “an offence” may direct the offender to pay compensation to any “aggrieved person” for any loss sustained through, or by reason of, the offence. By virtue of s 21 of the *Interpretation Act 1987*, “person” includes an individual, corporation or body corporate.<sup>202</sup> Under 97(2), a court can issue a direction for compensation on its own initiative or following an application by an aggrieved “person”.

### 5.12 Intimidation or annoyance by violence or otherwise (hindering)

This offence is provided for by s 545B(1)(a)(iii) of the *Crimes Act 1900* and carries a maximum penalty of imprisonment for 2 years and/or a fine of \$5,500. The offence can be committed when protesters, with a view to compelling workers to abstain from doing their lawful work, hinder the workers in the use of any tools, clothes or other property owned or used by them. Environmental protesters attaching themselves to equipment, standing on or in the way of equipment, or blocking access to equipment would constitute hindering.

### 5.13 Interfering with a mine

Also of particular relevance to environmental protesters is s 201 of the *Crimes Act 1900*, which prohibits interfering with a mine and carries a maximum penalty of imprisonment for 7 years. The offence under s 201 can be constituted by several different means, but includes intentionally or recklessly: destroying, damaging or rendering useless any equipment, building, road or bridge belonging to a mine; or hindering the working of equipment belonging to a mine. The offence of hindering the working of equipment belonging to a mine typically occurs when protesters chain themselves to mining equipment or blockade roads leading in and out of mining sites, as protesters recently did at the Maules Creek coal mine.<sup>203</sup>

### 5.14 Obstruction and hindering under the *Mining Act 1992*

The *Mining Act 1992* creates several obstruction and hindering offences that may be committed by protesters on mining sites. These are:

- s 257: obstructing, hindering or restricting any person who is doing anything in accordance with a permit issued under s 254.<sup>204</sup> (Maximum

<sup>202</sup> *R v Burgess; R v Saunders* [2005] NSWCCA 52 at [1]. The Sydney Opera House Trust is constituted as a body corporate under s 3(2) of the *Sydney Opera House Trust Act 1961*.

<sup>203</sup> [Former Wallabies captain David Pocock avoids conviction over Maules Creek coal mine protest](#), ABC News, 5/2/2015. In NSW at the moment mining protests are a particularly divisive issue: see, for example, A Klan, *Metgasco demands police action on coal-seam gas protests in NSW*, 28/4/2015, The Australian; and *Metgasco Limited v Minister for Resources and Energy* [2015] NSWSC 453.

<sup>204</sup> A permit under s 254 of the *Mining Act 1992* enables a person to enter land to inspect or mark out a proposed mineral claim, to inspect an opal prospecting block or to comply with the conditions of a mineral claim or opal prospecting licence.

penalty of \$11,000)

- s 378A: obstructing, hindering or resisting any person in the exercise of a function under the Act. (Maximum penalty, in the case of individuals, of \$220,000).
- s 378B: obstructing or hindering the holder of an authorisation<sup>205</sup> from doing anything that the holder is authorised to do. (Maximum penalty of \$11,000).

Table 2, although only indicative, provides an illustration of how the offences under the *Mining Act 1992* can be applied to mining protests and how large fines can result. Whitehaven Coal, the mine operator, expressed satisfaction with those sentences, stating that “[a] dozen activists have been slapped with more than \$35,000 in fines after a scathing rebuke of mining protests”.<sup>206</sup>

| Table 2: Fines recently imposed for the offence of hindering an authorisation holder (s 378B of the <i>Mining Act 1992</i> ) committed during protests at Maules Creek <sup>207</sup> |              |
|---|--------------|
| Action constituting the offence of hindering  | Fine amount  |
| Protester blocked a road near the open-cut coal mine for almost eight hours.  | \$7,750      |
| Protester locked onto a water pump station.   | \$6,000      |
| Two Protesters locked onto a drilling rig.  | \$6,000 each |
| Protester suspending from a tripod structure to block access to the mine.   | \$2,220      |
| Protester locked on to mining equipment.  | \$2,500      |
| Three protesters locked on to gates blocking a road leading to the mine.  | \$2,000 each |

### 5.15 Forestry Offences

Police officers are “authorised officers” under the *Forestry Act 2012*.<sup>208</sup> Section 83(1)(c) of the *Forestry Act 2012* prohibits a person from obstructing, delaying or hindering an authorised officer, and imposes a maximum penalty of \$2,200 for that offence. Section 83(2)(a) prohibits a person from assaulting, threatening or intimidating an authorised officer, and imposes a maximum penalty of \$5,500 for that offence.

Protesters can also be prosecuted for offences under s 38(1) of the *Forestry Act 2012* if, in the course of protesting, they damage or destroy forest materials. An offence against s 38(1) of the *Forestry Act 2012* carries a maximum penalty of \$5,500 penalty units and/or imprisonment for 6 months, and \$10 for each tree

<sup>205</sup> “Authorisation” means an authority (exploration licence, assessment lease or mining lease), small-scale title or environmental assessment permit.

<sup>206</sup> Whitehaven Coal, [Big Fines for anti-mining protesters](#), 1 April 2015. In contrast, see Greenpeace Australia: [Whitehaven Coal thwarted as fresh activists step in to stop forest clearing](#).

<sup>207</sup> Table 2 should be interpreted in an indicative light. It illustrates the type of offences that can apply, and the type of sentences that can be imposed, under the *Mining Act 1912*. Prosecutorial and judicial discretion determine, respectively, the offences and sentences that ultimately apply to any particular unlawful protest action. Table 2 is based on the following media report of anti-mining protests at Maules Creek: B Chillingworth, [Protesters cop massive fines](#), 1 April 2015, The Northern Daily Leader.

<sup>208</sup> *Forestry Act 2012*, s 71.



destroyed or damaged in the commission of the offence.

### 5.16 Site-specific prohibitions

Various site-specific provisions either prohibit protests or indirectly restrict them. These include:

- cl 52(1)(d) of the *Roads Regulation 2008*, which provides that a person must not, otherwise than in accordance with a permit, conduct or participate in any public assembly or procession on the Sydney Harbour Bridge or the ANZAC Bridge;
- cl 69 of the *Royal Botanic Gardens and Domain Trust Regulation 2013*, which provides that a person who, without the written consent of the Royal Botanic Gardens and Domain Trust, addresses a public demonstration or gathering in the Gardens is guilty of an offence.
- cl 70(3) of the *Royal Botanic Gardens and Domain Trust Regulation 2013*, which provides that a person who, without the written consent of the Royal Botanic Gardens and Domain Trust, addresses a public demonstration or other public gathering in the Domain before sunrise or after sunset is guilty of an offence.
- s 30(3) of the *Major Events Act 2009*, which prohibits the use of roads by pedestrians that have been closed for the purposes of conducting major events. Failing to follow a direction by an authorised officer to leave a closed road is an offence under s 30(4).
- s 28A of the *Sydney Opera House Trust Act 1961* provides that a person who enters, or remains at, any part of the Opera House as a trespasser (that is, without permission or after having been asked to leave) is guilty of an offence. Where the person does so with intent to cause damage to the Opera House, seriously disrupt the operations of the Opera House or commit any offence punishable by imprisonment or arising under the *Summary Offences Act 1988*, a separate offence under s 28B applies. A person who intentionally or recklessly damages the Opera House is guilty of an offence under s 28C, which carries a maximum penalty of 5 years imprisonment.
- s 632(2) of the *Local Government Act 1993* which authorises local councils to prohibit a broad range of activities in public locations, such as Martin Place,<sup>209</sup> and
- s 15 of the *Parliamentary Precincts Act 1997*, which empowers the Presiding Officers to make arrangements with the Commissioner of Police to preserve the security of Parliament and restrict access to Parliament in the event of an “actual, threatened or anticipated disturbance”, whether or not directed at Parliament or any members of Parliament.<sup>210</sup> Under s 23 this includes physically removing a person

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<sup>209</sup> For instance, as occurred in *O’Flaherty v City of Sydney Council* [2013] FCA 344.

<sup>210</sup> Detailed security protocols relating to protests at NSW Parliament House are contained in a



from, or preventing a person from entering, the “Parliamentary zone”<sup>211</sup> using such force as is reasonably necessary.

## 6. CIVIL LAW AND APPLICATIONS FOR VICTIMS COMPENSATION

While not the focus of this paper, it is important to recognise that civil law may also circumscribe the right to assembly; particularly the torts of trespass, nuisance, interference with contractual relations and injury to trade or business.<sup>212</sup>

Private civil law actions by corporations that are the objects of protests are collectively known as Strategic Lawsuits Against Public Participation (SLAPPS). Although mainly an overseas phenomenon, they are being used by Australian corporations to deter protest activity.<sup>213</sup>

Australian corporations that have brought SLAPPS have relied on:<sup>214</sup>

a broad set of new economic torts to litigate against a wide range of protest activities ... SLAPP filers invoke ‘economic torts’ of interference with trade and business ... interference with contractual relations and conspiracy. While these torts are established in the US, they are still emerging in Australia.

SLAPPS in NSW have taken the form of applications under the *Victims Rights and Support Act 2013*. As discussed in Chapter 5.11, a court that convicts a person of an offence may, under s 97(1), direct the offender to pay compensation to any “aggrieved person” by way of compensation for any loss sustained through, or by reason of, the offence. By virtue of s 21 of the *Interpretation Act 1987*, “person” includes an individual, corporation or body corporate. Section 97(2) provides that a direction for compensation may be given by the court on its own initiative or on an application made to it by or on behalf of an aggrieved person.

Under s 98(b) a court can direct that compensation be paid up to the maximum

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confidential Memorandum of Agreement between the Presiding Officers of the Parliament and the Commissioner of the NSW Police Force, entitled *Security Services for the Parliament of NSW*, 2009, pp 6–9.

<sup>211</sup> Section 14 of the *Parliamentary Precincts Act 1997* provides that the Parliamentary zone consists of the land described in Schedule 2 of the Act (specifically Deposited Plan 841390), together with all buildings, structures and works, and parts of buildings, structures and works, on, above or under that land.

<sup>212</sup> R Douglas, *Dealing with Demonstrations: The Law of Public Protest and its Enforcement*, 2004, The Federation Press, Sydney, Chapter 4.

<sup>213</sup> T Anthony, [Quantum of Strategic litigation—quashing public participation](#) (2009) 14(2) Australian Journal of Human Rights 1; [SLAPPS in Australia](#); G Ogle, [Gunning for Change: The Need for Public Participation Law Reform](#), 2005, Wilderness Society Inc., Hobart; S Beder, [SLAPPS: Strategic Lawsuits Against Public Participation: Coming to a Controversy Near You](#), 1995, 72(3) Current Affairs Bulletin, pp 22–29.

<sup>214</sup> T Anthony, [Quantum of Strategic litigation—quashing public participation](#) (2009) 14(2) Australian Journal of Human Rights 1 at 5. See also G Ogle, [Gunning for Change: The Need for Public Participation Law Reform](#), 2005, Wilderness Society Inc., Hobart.

amount that, in its civil jurisdiction, it is empowered to award in proceedings for the recovery of a debt.<sup>215</sup>

Corporations have been advised by law firms to consider making claims for victim's compensation because they are "usually much cheaper to obtain than a judgment in civil litigation".<sup>216</sup>

In 2011 protesters who had shut down Newcastle Port for several hours, by scaling on and suspending themselves above coal loaders, were convicted and fined \$379 each for offences against the *Inclosed Lands Protection Act 1901*.<sup>217</sup> Following the convictions, Port Waratah Coal Services unsuccessfully applied for \$525,000 in victim compensation.<sup>218</sup> The company had failed to properly specify their losses.<sup>219</sup> Magistrate Truscott, however, criticised the dangerous actions of the protesters and warned protesters that Port Waratah Coal Services could initiate additional compensation claims in respect of future protests.<sup>220</sup>

When criticised by one of the protesters for engaging in "corporate bullying", Port Waratah Coal Services general manager, Graham Davidson said "it is not about money ... it's about protecting lives".<sup>221</sup> As Mr Davidson elaborated:<sup>222</sup>

It's hard to comprehend their spin that they have a 'perfect safety record'. Dangling 60 metres from a moveable coal loader and chaining your neck to a conveyor belt is reckless and no training undertaken by occasional protesters can make their activities safe.

Conversely, Professor Clive Hamilton argues that:<sup>223</sup>

Victims' support legislation was designed to compensate victims of violent crimes, including families of homicide victims, not to provide global corporations

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<sup>215</sup> In *R v Wills; Application by Woolworths Ltd* [2013] NSWDC 1, a case of corporate fraud, Woolworths was awarded \$746,806, just under the District Court's jurisdictional limit of \$750,000 set by s 4(1) of the *District Court Act 1973* (discussed at [6]); discussed in T Meagher, A Moore and A Zheng, *Victim's compensation: an avenue worth exploring for corporate victims of fraud*, 26 September 2013, Clayton Utz Insights. Under s 29(1)(a) of the *Local Court Act 2007* the jurisdictional limit of the Local Court when sitting in the General Division of its civil jurisdiction \$100,000. See also *Local Courts Bench Book* at [10–100] (under the headings Compensation and restitution, *Victim Rights and Support Act 2013*, maximum award for compensation), 2015, Judicial Commission of NSW.

<sup>216</sup> T Meagher, A Moore and A Zheng, *Victim's compensation: an avenue worth exploring for corporate victims of fraud*, 26 September 2013, Clayton Utz Insights.

<sup>217</sup> A Bradley, *Rising Tide activists Win*, 3 March 2011, Newcastle Herald.

<sup>218</sup> A Bradley, *Rising Tide activists Win*, 3 March 2011, Newcastle Herald. *Coal Protesters in court today*, 31 January 2011, Australian Mining.

<sup>219</sup> A Bradley, *Rising Tide activists Win*, 3 March 2011, Newcastle Herald.

<sup>220</sup> *Port Waratah Coal protestors actions dangerous and unsafe, judge says*, 4 March 2011, Australian Mining.

<sup>221</sup> *Coal Protesters in court today*, 31 January 2011, Australian Mining.

<sup>222</sup> *Port Waratah Coal protestors actions dangerous and unsafe, judge says*, 4 March 2011, Australian Mining.

<sup>223</sup> C Hamilton, *Tackle Big Coal at your own risk*, 3 February 2011, The Age.

with a stick to beat their critics.

## 7. VICTORIAN, ACT AND QUEENSLAND MODELS

### 7.1 Human rights model of Victoria and the ACT

Victoria and the ACT expressly provide for a right to assembly in human rights legislation; namely, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT). The charters seek to promote and protect human rights by requiring laws to be made and interpreted, and public authorities to act, in accordance with the human rights they identify in their provisions.

Section 16(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) provides that “Every Person has the right of peaceful assembly”. Likewise, s 15(1) of the *Human Rights Act 2004* (ACT) provides that “Everyone has the right of peaceful assembly”. These human rights are not absolute. As the Federal Court of Australia said in the Melbourne Occupy case of *Muldoon v Melbourne City Council*,<sup>224</sup> the right of freedom of assembly provided for by s 16(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) is, under s 7(2), “subject to such reasonable limits as can be demonstrably justified in a free and democratic society”.<sup>225</sup> Further, those permitted restrictions “are not relevantly different from the permitted limitations on the implied freedom of political communication”.<sup>226</sup> Human rights provided under the *Human Rights Act 2004* (ACT) are, under s 28(1), also subject to “reasonable limits set by laws that can be demonstrably justified in a free and democratic society”.

As the court decided in *Muldoon*, neither the implied freedom of political communication nor the *Charter of Human Rights and Responsibilities Act 2006* (Vic) invalidated the impugned laws under which council officers issued notices of compliance and police officers arrested protesters who were camping in public gardens.<sup>227</sup>

### 7.2 Statutory rights model of Queensland

Queensland provides a statutory right to peaceful assembly in the *Peaceful Assembly Act 1992* (Qld), which in other respects is broadly similar to Part 4 of the *Summary Offences Act 1988*.

Section 5(1) of the *Peaceful Assembly Act 1992* (Qld) states that a person “has

<sup>224</sup> *Muldoon v Melbourne City Council* [2013] FCA 994 at [450].

<sup>225</sup> *Muldoon v Melbourne City Council* [2013] FCA 994 at [450].

<sup>226</sup> *Muldoon v Melbourne City Council* [2013] FCA 994 at [450]. Similar to the outcome of the Sydney Occupy case of *O’Flaherty v City of Sydney Council* [2014] FCAFC 56, neither the *Charter of Human Rights and Responsibilities Act 2006* (Vic), nor the implied freedom of political communication provided by the Australian Constitution, invalidated the impugned local laws: at [467].

<sup>227</sup> *Muldoon v Melbourne City Council* [2013] FCA 994. An overview of the court’s reasons is provided at [78].

the right to assemble peacefully with others in a public place”.<sup>228</sup> This statutory right is also not absolute. As s 5(2) provides, the statutory right to assembly is subject 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”.

Section 5(3) further provides that the reference in s 5(2)(c) to the rights of other persons specifically includes the right of members of the public to enjoy the natural environment and the rights of persons to carry on business. The Queensland Government explains the practical effect of the statutory right to assembly in the following terms:<sup>229</sup>

If the public assembly is authorised, peaceful and held in line with any conditions, you can't be prosecuted for offences such as obstructing a public place ... However, you can still be arrested for offensive, indecent or obscene behaviour; public drunkenness; vagrancy; breaches of peace; riot; trespass; and damage to property. All these offences still apply, whether or not the assembly has been authorised.

Practically speaking, do the human rights and statutory rights models provide greater protection for the right to assembly? It is fair to say that, overall, they do not. However, as Professor Douglas has said, the advantage of such a model as the *Peaceful Assembly Act 1992 (Qld)* is that it:<sup>230</sup>

... makes it clear that there is a very strong prima facie presumption in favour of the freedom to demonstrate, adopting a formula similar to that used in the *International Covenant on Civil and Political Rights* ... Its substantive advantages can, I think, be exaggerated, but in an area where symbolism matters, its symbolic superiority is an argument for its adoption.

Professors Bronitt and Williams also emphasise the symbolic significance of s 5 of the *Peaceful Assemblies Act 1992 (Qld)*, when they say that such provisions are “capable of educating individuals about the fundamental importance of political protest to Australian democracy.”<sup>231</sup>

## 8. NEW OFFENCES: TASMANIA AND WESTERN AUSTRALIA

### 8.1 Tasmania's new offences

The *Workplaces (Protection from Protesters) 2014 (Tas)* commenced on 24

<sup>228</sup> This accords with s 2(1)(a) of the *Peaceful Assembly Act 1992 (Qld)*, which provides that an objective of the Act is to “recognise the right of peaceful assembly”.

<sup>229</sup> Queensland Government, *Right to protest*, 2013.

<sup>230</sup> R Douglas, *Dealing with Demonstrations: The Law of Public Protest and its Enforcement*, 2004, The Federation Press, Sydney, p 142.

<sup>231</sup> S Bronitt and G Williams, *Political Freedom as an Outlaw: Republican Theory and Political Protest* (1996) 18 Adel L Rev 289 at 329.

December 2014.<sup>232</sup> The object of the Act is to: “ensure that protesters do not damage business premises or business-related objects, or prevent, impede or obstruct the carrying out of business activities on business premises”.<sup>233</sup>

As stated in its Second Reading Speech, the new offences introduced by the Bill were required in order to “rebalance the scales” between the right to protest and the rights of business to create economic opportunities and develop the economy:<sup>234</sup>

The rights of businesses to create economic opportunities and to develop the economy of this State, along with the rights of workers to go about their work without disruption, are equally important rights contributing to the wellbeing and prosperity of Tasmania.

Under the Act a “protest activity” is an activity that “takes place on business premises or a business access area”.<sup>235</sup> The Act therefore does not apply to street protests, unless the protest is blocking a business access area. Further, a person is not to be taken to be engaging in a protest activity in relation to a business if the person is the operator of that business, or a worker at that business acting with the express or implied consent of the business operator.<sup>236</sup>

Business premises under the Act specifically include: mining sites; forestry land; agricultural or other food production or packaging sites; manufacturing or construction sites; shops, markets and warehouses; and vehicles, vessels, aircraft or other mobile structures used by such business; premises used for administrative or ancillary purposes by such businesses.<sup>237</sup>

The Act creates a series of offences relating to:

- invading or hindering businesses;<sup>238</sup>
- causing or threatening damage or risk to safety;<sup>239</sup>
- failing complying with a direction of a police officer to leave and/or stay away from a business access area;<sup>240</sup> and
- preventing the removal of obstructions.<sup>241</sup>

The Act then sets out police powers, which include the power to:

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<sup>232</sup> [Tasmanian Government Gazette](#), 24 December 2014, Vol CCCXXIII, No 21 490, p 1920.

<sup>233</sup> [Workplaces \(Protection from Protesters\) Act 2014 \(Tas\)](#), Long Title.

<sup>234</sup> [Workplaces \(Protection from Protesters\) Bill 2015](#), [Second Reading Speech](#), Hansard, Parliament of Tasmania.

<sup>235</sup> [Workplaces \(Protection from Protesters\) Act 2014 \(Tas\)](#), s 4(2).

<sup>236</sup> [Workplaces \(Protection from Protesters\) Act 2014 \(Tas\)](#), s 4(6).

<sup>237</sup> [Workplaces \(Protection from Protesters\) Act 2014 \(Tas\)](#), s 5.

<sup>238</sup> [Workplaces \(Protection from Protesters\) Act 2014 \(Tas\)](#), s 6.

<sup>239</sup> [Workplaces \(Protection from Protesters\) Act 2014 \(Tas\)](#), s 7.

<sup>240</sup> [Workplaces \(Protection from Protesters\) Act 2014 \(Tas\)](#), s 8.

<sup>241</sup> [Workplaces \(Protection from Protesters\) Act 2014 \(Tas\)](#), s 9.

- demand proof of identity;<sup>242</sup>
- direct a person to leave business premises or business access areas;<sup>243</sup>
- remove obstructions;<sup>244</sup>
- arrest without warrant and remove persons from business areas;<sup>245</sup>
- use reasonable force;<sup>246</sup> and
- issue infringement notices.<sup>247</sup>

The Act also sets out a range of penalties<sup>248</sup> and provides for compensation orders following conviction.<sup>249</sup> Protesters who lock on to mining or forestry equipment are committing the offence of causing or threatening damage or risk to safety, which carries a maximum penalty of a fine not exceeding \$50,000 and/or a term of imprisonment not exceeding 5 years.<sup>250</sup>

## 8.2 Western Australia's proposed new offences

The Western Australian Government introduced the [Criminal Code Amendment \(Prevention of Lawful Activity\) Bill 2015 \(WA\)](#) on 25 February 2015 to deter environmental protesters from locking on to equipment at mining and logging sites or taking other obstructionist action.<sup>251</sup> The Bill aims to achieve this objective by rectifying two perceived limitations in Western Australian law:<sup>252</sup>

The main limitation is that ... devices [used by protesters to lock on to machinery] can generally be lawfully possessed and, so, in most cases police officers are not able to act until such time as the device is used. Another deficiency is the absence of an offence specific to situations where lawful activity is prevented from being carried out because of a barrier put in place by protesters.

The Bill proposes to amend the *Criminal Code* to introduce two new offences: physical prevention of lawful activity (clause 68AA); and preparation for physical prevention or trespass (clause 68AB).

<sup>242</sup> *Workplaces (Protection from Protesters) Act 2014* (Tas), s 10.

<sup>243</sup> *Workplaces (Protection from Protesters) Act 2014* (Tas), s 11.

<sup>244</sup> *Workplaces (Protection from Protesters) Act 2014* (Tas), s 12.

<sup>245</sup> *Workplaces (Protection from Protesters) Act 2014* (Tas), s 13.

<sup>246</sup> *Workplaces (Protection from Protesters) Act 2014* (Tas), s 14.

<sup>247</sup> *Workplaces (Protection from Protesters) Act 2014* (Tas), s 15. Infringement notices can be issued only in respect of offences created by ss 6(4) and 8(1).

<sup>248</sup> *Workplaces (Protection from Protesters) Act 2014* (Tas), ss 16 and 17.

<sup>249</sup> *Workplaces (Protection from Protesters) Act 2014* (Tas), s 18.

<sup>250</sup> *Workplaces (Protection from Protesters) Act 2014* (Tas), s 7.

<sup>251</sup> *Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015* (WA), [Second Reading Speech](#), 25 February 2015, Legislative Council, Parliament of Western Australia.

<sup>252</sup> *Criminal Code Amendment (Prevention of Lawful) Activity) Bill 2015* (WA), [Second Reading Speech](#), 25 February 2015, Hansard, Parliament of Western Australia.



Clause 68AA(2) provides that a person must not, with the intention of preventing a lawful activity that is being, or is about to be, carried on by another person, physically prevent that activity. The maximum penalty for the offence is imprisonment for 12 months *and* a fine of \$12,000.<sup>253</sup> Where the offence is committed in circumstances of aggravation (such that it causes injury to, or endangers the safety of, a person, including the offender or another protester) the penalty increases to imprisonment for 24 months *and* a fine of \$24,000.<sup>254</sup> Clause 68AA(3) reverses the onus of proof, so that a person is presumed to have the intention referred to in clause 68AA(2). Further, under clause 68AA(4), a court convicting a person of an offence under clause 68AA(2) may order the person to pay some or all of the reasonable expenses incurred by the police force in removing a physical barrier to lawful activity that was created or maintained by the person.

Clause 68AB(1) provides that a person must not make, adapt or knowingly possess a “thing”<sup>255</sup> for the purpose of using it, or enabling it to be used, in the commission of an offence against clause 68AA or the offence of trespass under s 70A of the *Criminal Code* (WA). The penalty for that offence is imprisonment for 12 months and a fine of \$12,000.

It has been reported that the Bill has been widely criticised for its broadness and severity by over 50 organisations and community groups, including the Western Australian Law Society and the Human Rights Law Centre.<sup>256</sup> The Western Australian Farmer Federation also criticised the Bill for its potential impact on farmers who protest against coal seam gas mining on their property.<sup>257</sup> As farmer and Western Australian Member of Parliament, Darren West, said in Parliament:<sup>258</sup>

I can tell the Attorney General that, thanks to his legislation, I am committing an offence if I lock my gate. If I lock my gate and park a truck or a piece of heavy earthmoving equipment in front of the gate and tell people they are not coming onto my land, to get lost and go and find their gas somewhere else, I will now be a criminal. That is one of the unintended consequences of this bill ... Did the Attorney General consider me, as a freehold landowner ... [the Attorney General] was trying to target a very small group of people and in doing so he has embroiled a much larger group.

<sup>253</sup> *Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015* (WA), cl 68AA(2)(b).

<sup>254</sup> *Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015* (WA), cl 68AA(2)(a)

<sup>255</sup> T Mitchell, [Colin Barnett is Trying To Criminalise a “Thing”. Literally](#), 17 March 2015, newmatilda.com

<sup>256</sup> T Mitchell, [Colin Barnett is Trying To Criminalise a “Thing”. Literally](#), 17 March 2015, newmatilda.com

<sup>257</sup> T Mitchell, [Colin Barnett is Trying To Criminalise a “Thing”. Literally](#), 17 March 2015, newmatilda.com

<sup>258</sup> D West, [Criminal Code Amendment \(Prevention of Lawful Activity\) Bill 2015](#), Legislative Council, Parliament of Western Australia, 11 March 2015, Hansard, p 991e–1003a, [5]–[6]; discussed in T Mitchell, [Colin Barnett is Trying To Criminalise a “Thing”. Literally](#), 17 March 2015, newmatilda.com



## 9. CONCLUSION

Liberal democracies cherish the right of their citizens to assemble together to protest peaceably. This right of peaceful assembly to actively dissent from policies, practices and ideas has a rich common law heritage. With the formulation by the High Court of the implied freedom of political communication, it can also be said to be protected under the Australian Constitution. In NSW, the immediate legislative context under which the right operates is Part 4 of the *Summary Offences Act 1988*, which seeks to facilitate the exercise of the right to assembly by encouraging co-operation between protest organisers and police.

No right is absolute. The right to peaceful assembly finds limits under the civil and criminal law; as well as in a constitutional context, as illustrated by the Sydney Occupy case of *O'Flaherty* and the *APEC Act 2007* case of *Gibson*.

In NSW the limits imposed on the right to assembly by the criminal law are extensive. The *Summary Offences Act 1988*, *Crimes Act 1900*, *Inclosed Lands Protection Act 1901*, *Forestry Act 2012* and *Mining Act 1992*, as well as the common law and many site-specific provisions, all circumscribe the exercise of the right to peaceful assembly.

Where to from here? The Baird Government has indicated that it will add to this already crowded field of legislation. In the meantime, Part 4 of the *Summary Offences Act 1988* has not escaped criticism from the courts; and corporations are exploring civil law options and applications under victim's rights legislation to deter environmental protesters. There is, too, the Queensland model to consider, with its admittedly symbolic recognition of the right to silence. A different point of departure is Tasmania's *Workplaces (Protection from Protesters) Act 2014* and Western Australia's *Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015*.