Supreme Court

New South Wales

Case Name:	Commissioner of Police (NSW) v Gibson
Medium Neutral Citation:	[2020] NSWSC 953
Hearing Date(s):	23 and 24 July 2020
Decision Date:	26 July 2020
Jurisdiction:	Common Law
Before:	Ierace J
Decision:	(1) In respect of the plaintiff's summons, grant the plaintiff's application for an order pursuant to s 25(1) of the Summary Offences Act 1988 (NSW) prohibiting the public assembly in the Sydney Central Business District on 28 July 2020. (2) In respect of the defendant's cross-summons, refuse the defendant's application for a declaration pursuant to s 75 of the Supreme Court Act 1970 (NSW). (3) Each party to pay their own costs of each application.
Catchwords:	PUBLIC ASSEMBLY – Summary Offences Act 1988 (NSW) – whether order should be made pursuant to s 25(1) prohibiting the holding of a public assembly ADMINISTRATIVE LAW – judicial review – apprehended bias – whether public statements by delegator vitiate the decision made by the delegate on the ground of apprehended bias ADMINISTRATIVE LAW – judicial review – apprehended bias – exceptions to bias rule –

necessity

ADMINISTRATIVE LAW – reviewability – jurisdiction – whether the Supreme Court has jurisdiction to entertain the application for a prohibition order under s 25 of the Summary Offences Act 1988 (NSW) – whether threshold requirement in s 25(2)(c) of the Summary Offences Act has been fulfilled – whether materials were properly considered in light of public statements made by the repository of power – whether application could properly be considered within a 17-minute time frame

CONSTITUTIONAL LAW – implied constitutional freedom of political communication – whether s 25 of the Summary Offences Act 1988 (NSW) must be read down so as not to infringe the implied constitutional freedom of political communication

Legislation Cited:

Civil Procedure Act 2005 (NSW), s 4
Commonwealth Constitution
Judiciary Act 1903 (Cth), s 79B
Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 4) 2020 (NSW), cll 18, 24
Public Health Act 2010 (NSW), s 7
Summary Offences Act 1988 (NSW), ss 22, 23, 24, 25
Summary Offences Regulation 2015 (NSW)
Supreme Court Act 1970 (NSW), s 75
Uniform Civil Procedure Rules 2005 (NSW), r 42.1

Cases Cited:

Bassi v Commissioner of Police (NSW) [2020] NSWCA 109
Brown v Tasmania (2017) 261 CLR 328; [2017] HCA 43
Clubb v Edwards; Preston v Avery (2019) 93 ALJR 448; [2019] HCA 11
Comcare v Banerji (2019) 93 ALJR 900; [2019] HCA 23
Commissioner of Police (NSW) v Supple [2020] NSWSC 727
Commissioner of Police v Bassi [2020] NSWSC 710
Commissioner of Police v Gray [2020] NSWSC 867
Commissioner of Police, New South Wales Police Force v Kumar (OBO National Union of Students)

	[2020] NSWSC 804 Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; [2000] HCA 6 Isbester v Knox City Council (2015) 255 CLR 135; [2015] HCA 20 Laws v Australian Broadcasting Tribunal (1990) 170 CLR 70; [1990] HCA 31 McCloy v New South Wales (2015) 257 CLR 178; [2015] HCA 23 McGovern v Ku-ring-gai Council (2008) 72 NSWLR 504; [2008] NSWCA 209 Minister for Home Affairs v Omar [2019] FCAFC 188 Minister for Immigration and Multicultural Affairs v Jia (2001) 205 CLR 507; [2001] HCA 17 Tickner v Chapman (1995) 57 FCR 451; [1995] FCAFC 1726
Category:	Principal judgment
Parties:	Commissioner of Police (NSW Police Force) (Plaintiff) Padraic Gibson (on behalf of Dungay Family) (Defendant) Attorney General for New South Wales (Intervener)
Representation:	Counsel: M Spartalis (Plaintiff) F Graham; C Longman (Defendant) M Sexton SC; E Jones (Intervener) Solicitors: Office of the General Counsel, NSW Police Force (Plaintiff) O'Brien Criminal & Civil Solicitors (Defendant) Crown Solicitor's Office (NSW) (Intervener)
File Number(s):	2020/213575

JUDGMENT

1 **HIS HONOUR**: The plaintiff, being the Commissioner of Police (NSW), filed a summons on 21 July 2020 seeking an order pursuant to s 25(1) of the *Summary Offences Act 1988* (NSW) ("the Act") prohibiting the holding of a public assembly and procession ("a prohibition order") that is planned for Tuesday 28 July 2020 in the Central Business District ("CBD") of Sydney ("the

protest"). The protest is being organised by the defendant, Padraic Gibson. The plaintiff seeks the prohibition order on the grounds of public health, citing concerns about the health and safety of participants, police and other members of the public in the context of a COVID-19 outbreak.

2 On 14 July 2020, the defendant submitted a notice to police in a prescribed form ("the Notice of Intention"), together with a covering email and some annexed documents ("the Notice of Intention documents"), proposing a public assembly of about 500 people, to be held on Tuesday 28 July 2020 between 12:00 noon and 12.30pm, at Sydney Town Hall Square. At 12:30pm, the assembly would become a public procession along named streets of the CBD, ending in a rally in Macquarie Street outside the State Parliament House. In the covering email, Mr Gibson revised the number of likely attendees, expressing the figure of 500 to be "*quite an optimistic estimate*".

3 The stated purpose of the protest is: "*To protest against Aboriginal deaths in custody and demand justice for David Dungay Jnr*". David Dungay Jnr was a Dunghutti man who died in Sydney's Long Bay Gaol in 2015, aged 26. The defendant is the organiser, on behalf of the Dungay family. Mr Paul Silva, who is a nephew of David Dungay Jnr, gave evidence in affidavit form that the protest will culminate with the delivery of a petition, which bears 90,000 signatures, to the New South Wales Attorney General, calling for:

> "a. Referral of my Uncle's matter to the NSW director of Public Prosecutions for and Safework NSW;
>
> b. Accountability from police, prisons, medical officers and governments for ALL black deaths in custody; and
>
> c. The implementation of all 339 recommendations of the Royal Commission into Aboriginal Deaths in Custody."

4 Mr Silva expressed a sense of urgency for the protest, stating:

> "They are winning real changes in America. We need to make changes here, starting with justice for my Uncle. It seems like things might be changing and we need to take advantage of the momentum and keep the pressure on."

5 On 15 July 2020, the defendant was served with a document titled a "*Notice of invitation to confer*" from Acting Assistant Commissioner and Acting Commander of the Central Metropolitan Region, Stacey Maloney, who had been delegated by the Commissioner of Police, Michael Fuller, to exercise his

functions under the relevant provisions of the Act. Acting Assistant Commissioner Maloney advised that she opposed the holding of the protest, explaining:

> "This opposition is at this time based on concerns about the health and safety of participants and the wider community associated with the ongoing COVID-19 public health issue. The current *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 4) 2020* directs that persons must not participate in a public gathering of more than 20 persons."

6 Acting Assistant Commissioner Maloney proposed a conference with Mr Gibson to consider any further matters or representations, as is required by the Act, which occurred on the morning of Monday 20 July 2020. The following day, the plaintiff filed the summons that is now before the Court.

7 The defendant opposes the declaration sought by the plaintiff, both on 'threshold' and substantive grounds. The two threshold grounds advanced are a constitutional bar, and a question of this Court's jurisdiction to entertain the plaintiff's application.

Relevant legislative provisions

Summary Offences Act

8 Part 4 of the Act is titled "*Public Assemblies*". The term "*public assembly*" is defined in s 22 to mean "*an assembly held in a public place, and includes a procession*". Section 23 sets out two requirements for a public assembly to be authorised. The first is that a notice of the proposed assembly must be served on the Commissioner, containing certain particulars of the proposed public assembly and complying with certain other matters: ss 23(1)(a)-(e). Section 23(1)(c) requires specification of the purpose, date, time and place of the assembly, the time, route and any stopping points of any procession, and any other prescribed particulars. The plaintiff does not contest that the defendant complied with these provisions, and the requirements of the Summary Offences Regulation 2015 (NSW) concerning the notice, which is known as a "*Form 1*", so it is unnecessary to consider them further.

9 The second requirement is as follows:

> "**23 Authorised public assemblies**
>
> (1) For the purposes of this Part, a public assembly is an authorised public assembly if:

…

(f) the Commissioner has notified the organiser of the public assembly that the Commissioner does not oppose the holding of the public assembly or:

(i) if the notice was served on the Commissioner at least 7 days before the date specified in the notice as the date on which it is proposed to hold the public assembly—the holding of the public assembly is not prohibited by a Court under section 25 (1), or

(ii) if the notice was served on the Commissioner less than 7 days before that date—the holding of the public assembly is authorised by a Court under section 26."

10 The notice was served 14 days before the date specified for the public assembly, so s 23(1)(f)(i) is applicable. Sections 24 and 25 of the Act are as follows:

"**24 Participation in authorised public assembly**

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.

25 Prohibition by a Court of a public assembly

(1) The Commissioner may apply to a Court for an order prohibiting the holding of a public assembly in respect of which a notice referred to in section 23 (1) has been served if the notice was served 7 days or more before the date specified in the notice as the date on which it is proposed to hold the public assembly.

(2) The Commissioner shall not apply for an order under subsection (1) relating to a public assembly in respect of which a notice referred to in section 23 (1) has been served unless:

(a) the Commissioner has caused to be served on the organiser of the public assembly a notice, in writing, inviting the organiser to confer with respect to the public assembly with a member of the Police Force specified in the notice at a time and place so specified, or to make written representations to the Commissioner, with respect to the public assembly, within a time so specified, and

(b) if the organiser has, in writing, informed the Commissioner that he or she wishes so to confer, the Commissioner has made available to confer with the organiser at the time and place specified in the notice:

(i) the member of the Police Force specified in the notice, or

(ii) if that member of the Police Force is for any reason unavailable so to confer, another member of the Police Force, and

(c) the Commissioner has taken into consideration any matters put by the organiser at the conference and in any representations made by the organiser …"

Relevant legal principles

Summary Offences Act

11 The Court of Appeal recently summarised the relevant principles of the Act in *Bassi v Commissioner of Police (NSW)* [2020] NSWCA 109 (per Bathurst CJ, Bell P and Leeming JA), at [17]:

> "The following observations may be made about the statutory scheme:
>
> (i) the Summary Offences Act differentiates between public assemblies for which notice has been given to the Commissioner at least seven days prior to the holding of the public assembly, and public assemblies for which notice has only been given less than seven days prior to the proposed assembly;
>
> (ii) authorisation of the public assembly may be secured by notified non-opposition to the proposed public assembly by the Commissioner or, depending on the timing of the notice of intention, the absence of an order prohibiting the public assembly (in the case of notice which has been given more than seven days in advance) or an order authorising the public assembly (in the case of notification less than seven days prior) by the Supreme Court or the District Court of New South Wales;
>
> (iii) the Summary Offences Act expressly contemplates, in s 24, that the particulars of a statutory notice of intention to hold a public assembly may be amended by agreement between the Commissioner and the organiser of the proposed public assembly;
>
> (iv) this reflects the scope for negotiation and co-operation between the Police and the organiser as to the details and proposed manner in which the public assembly is to be conducted;
>
> (v) the Court only assumes a role in relation to public assemblies in circumstances where:
>
> (a) in the case of a notice of intention provided more than seven days prior to the proposed assembly, the Commissioner has not notified non-opposition; or
>
> (b) where the notice of intention was served less than seven days prior to the proposed assembly;
>
> (vi) in the former case, the Commissioner in effect assumes the onus under s 25 of the *Summary Offences Act* of securing an order prohibiting the assembly whereas, in the latter case, the onus is placed on the organiser to secure court authorisation for the assembly;

(vii) before the Commissioner may apply for an order prohibiting the proposed public assembly, he or she must first engage in the co-operative process prescribed by s 25(2) of the Summary Offences Act with a view to securing, or at least exploring the possibility of securing a consensus in relation to the proposed public assembly;

(viii) whilst the Summary Offences Act does not make any express provision for a change of position by the Commissioner where, for example the Commissioner, for any reason, wishes to withdraw a prior notified stance of non-opposition, s 25 of the Summary Offences Act provides the route that must be taken by the Commissioner in that event."

Public Health Act 2010 (NSW)

12 In *Commissioner of Police v Gray* [2020] NSWSC 867, Adamson J decided a case in respect of a public assembly that also required the consideration of COVID-19 public health concerns, and her Honour considered the legislative framework of the *Public Health Act 2010* (NSW). I respectfully adopt her Honour's summary as reproduced in the following passages:

"23 Section 7 of the *Public Health Act 2010* (NSW) confers power on the relevant Minister (the Minister of Health) to give directions by order to deal with public health risks. Section 10 of the *Public Health Act* provides that a person who is subject to, and has notice of, a direction must not, without reasonable excuse, fail to comply with it. The maximum penalty for an offence under s 10 is 100 penalty units or imprisonment for 6 months or both.

24 The incidence and spread of the COVID-19 virus has given rise to a number of orders made by the Minister under the *Public Health Act*. Of present relevance, cl 18 of the Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 4) 2020 (NSW) (Order 4), which commenced on 1 July 2020 provides:

'18 Direction of Minister concerning outdoor public gatherings

(1) The Minister directs that a person must not participate in an outdoor public gathering of more than 20 people.

(2) This clause does not apply to a person who is—

(a) engaged in work, or

(b) providing care or assistance to vulnerable persons.

(3) This clause does not apply to the following—

(a) a gathering on premises for which a person is required by clause 7 of this Order to develop and keep a COVID-19 Safety Plan,

(b) a community sporting activity for which a person is required by clause 16 of this Order to develop and keep a COVID-19 Safety Plan,

(c) a gathering listed in Schedule 2 of this Order,

(d) a gathering of persons who are all from the same household,

(e) a gathering for a wedding, a funeral, a memorial service or a religious service or a gathering immediately after a wedding, a funeral, a memorial service or a religious service,

(f) a gathering to move to a new place of residence or a business moving to new premises,

(g) a gathering to provide emergency assistance to a person or persons,

(h) a gathering necessary to allow a person to fulfil a legal obligation,

(i) a gathering of persons on real property to enable persons to view or inspect the real property for the purposes of the sale or lease of that property,

(j) a gathering of persons at a display home or other display premises to enable persons to view or inspect the display home or display premises for the purpose of the sale or lease of real property.

25 Order 4 relevantly contains the following definitions in cl 3:

'…

public gathering means a meeting or assembly of persons for a common purpose, including an organised or planned event, in a public place (whether ticketed or not).

public place has the same meaning as in the Summary Offences Act 1988.

…'

26 I note that the predecessor to Order 4, Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 3) 2020 (NSW) (Order 3), which commenced on 29 May 2020 specified a limit of 10 people for outdoor public gatherings. This number was increased by Order 4 to 20 people.

…

28 It is important to note that the so-called 'social distancing rule', that persons except those in the same household, ought remain at least 1.5m apart, is not contained in an order under the Public Health Act. It remains a recommendation only and therefore does not give rise to criminal liability for breach."

The first threshold issue: Implied freedom of political communication under the Commonwealth Constitution

13 On 22 July 2020, the defendant filed and served a notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) to the Attorneys-General of the Commonwealth and of each of the States, alerting them to the defendant's intention to raise a constitutional issue ("s 78B notice"). The New South Wales Attorney General

intervened to make submissions on this issue both in written form and orally at the hearing.

14 The defendant's s 78B notice initially detailed two constitutional issues. The first was the contention that cl 18 of the Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 4) 2020 ("the Public Health Order"), as made under s 7 of the *Public Health Act 2010* (NSW) and amended on 16 July 2020, is *ultra vires* because it impermissibly burdens the implied freedom of political communication ("the implied freedom"). The second was that, in exercising its jurisdiction under s 25 of the Act, this Court is obliged to exercise its powers in conformity with the implied freedom, which requires the Court to read down the provision, so that it would not accede to the plaintiff's application for a prohibition order.

15 At the hearing, the defendant submitted that because both the plaintiff and the Attorney General had conceded in written submissions that an authorised public assembly confers immunity on participants from the penalties of a breach of cl 18 of the Public Health Order (per Adamson J in *Commissioner of Police v Gray* at [51]-[57]), the issue of cl 18 being *ultra vires* fell away. However, the second issue remained.

16 The test to be applied in determining whether legislation impermissibly burdens the implied freedom was recently stated in *Clubb v Edwards; Preston v Avery* (2019) 93 ALJR 448; [2019] HCA 11 at [5]-[6] (per Kiefel CJ, Bell and Keane JJ) as follows:

> "5. The test to be applied was adopted in [*McCloy v New South Wales* (2015) 257 CLR 178; [2015] HCA 23] by French CJ, Kiefel, Bell and Keane JJ, and it was applied in [*Brown v Tasmania* (2017) 261 CLR 328; [2017] HCA 43] by Kiefel CJ, Bell and Keane JJ and Nettle J. For convenience that test will be referred to as 'the *McCloy* test'. It is in the following terms:
>
> > 1. Does the law effectively burden the implied freedom in its terms, operation or effect?
> >
> > 2. If 'yes' to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
> >
> > 3. If 'yes' to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

> 6. The third step of the *McCloy* test is assisted by a proportionality analysis which asks whether the impugned law is 'suitable', in the sense that it has a rational connection to the purpose of the law, and 'necessary', in the sense that there is no obvious and compelling alternative, reasonably practical, means of achieving the same purpose which has a less burdensome effect on the implied freedom. If both these questions are answered in the affirmative, the question is then whether the challenged law is 'adequate in its balance'. This last criterion requires a judgment, consistently with the limits of the judicial function, as to the balance between the importance of the purpose served by the law and the extent of the restriction it imposes on the implied freedom." (footnotes omitted)

17 The defendant submitted the following basis for the constitutional challenge to a s 25 prohibition order on the s 78B notice:

> "2. In exercising its jurisdiction under s 25 *Summary Offences Act 1988* (NSW) (**SOA**), the NSW Supreme Court must recognise the limitation on state legislative power arising from the Implied Freedom and must exercise its jurisdiction conformably with the Implied Freedom. In this regard:
>
> a. A determination by the Supreme Court to 'prohibit' a proposed public assembly under s 25 *SOA* also burdens the Implied Freedom by denying a participant in the assembly an immunity under s 24 *SOA* from liability vis-à-vis cl 18(1) of the Order: see *Commissioner of Police v Gray* [2020] NSWSC 867 per Adamson J at [57].
>
> b. The burden on the Implied Freedom by cl 18(1) of the Order is subject to alleviation by authorisation of protest activity under the *SOA* – either by way of the Commissioner not opposing the holding of the public assembly as contemplated by s 23 *SOA*, by the Supreme Court refusing an application by the Commissioner under s 25 *SOA*, or by the Supreme Court granting an application by an organiser under s 26 *SOA*.
>
> c. To the extent possible, the Court must preserve the validity of cl 18 of the Order. This may be achieved in this case by not acceding to the Commissioner's application for a 'prohibition' order under s 25 *SOA* which would have the effect of the public assembly remaining 'authorised'.
>
> d. The Supreme Court must exercise its powers under the *SOA* so as to preserve compliance with the Implied Freedom, by refusing the Commissioner's application under s 25 *SOA* to 'prohibit' the public assembly."

18 In oral submissions, the defendant added that, in respect of the "*necessity*" and "*in the balance*" aspects of the test to be applied (as detailed in *Clubb* and *McCloy*: see [16] above), a prohibition order is not reasonably necessary where there is a less restrictive means of balancing public health goals with the public assembly. That less restrictive means is the authorisation of the public assembly to allow it to proceed, with suitable "*risk mitigation strategies in place*". Therefore, when the Court makes its decision under s 25, those

constitutional principles must be applied and the prohibition order must not be granted.

19 The Attorney General submitted that the burden is to be assessed by reference to how the relevant legislative provision affects the implied freedom generally, and not by reference to the burden placed on a particular group's ability to engage in political communication, citing *Brown v Tasmania* at [90] (per Kiefel CJ, Bell and Keane JJ) and *Comcare v Banerji* (2019) 93 ALJR 900*;* [2019] HCA 23 at [20] (per Kiefel CJ, Bell, Keane and Nettle JJ). The Attorney General further referred to the following passage by Gageler J in *Comcare v Banerji* at [96]:

> "*Wotton v Queensland* [(2012) 246 CLR 1; [2012] HCA 2] establishes that the validity of a law which burdens freedom of political communication by empowering an exercise of an administrative discretion is to be determined by asking in the first instance whether the burden is justified across the range of potential outcomes of the exercise of that discretion. If the burden is justified across the range of potential outcomes, that is the end of the constitutional inquiry. The law is valid and the validity of any particular outcome of the exercise of discretion is to be gauged by reference solely to the statutory limits of the discretion. There is no occasion to consider whether the scope of the discretion might be read down in order to ensure that the law is within constitutional power. There is in consequence no occasion to consider whether a particular outcome might fall within the scope of the discretion as so read down, and there is accordingly no occasion to consider whether a particular outcome falls within the scope of the discretion having regard to the implied freedom."

20 Applying the implied freedom test stated in *Clubb*, the Attorney General submitted that the purpose of Pt 4 of the Act is legitimate because it is "*designed to allow certain public assemblies to be held without fear of liability on the part of those participating for otherwise relevant offences*". The law is suitable, as it empowers a Court to decide whether or not to authorise such a public assembly after balancing competing interests, and the law is necessary, as there is no reasonably practical means of achieving the same purpose that is less burdensome on the implied freedom. Lastly, the law is adequate in its balance as it gives the Court the ability to balance the competing interests in arriving at its decision.

Consideration of the constitutional issue

21 Assuming, as the Attorney General has done, that s 25 of the Act does impose a burden on the implied freedom, the purpose of the law is legitimate, and it is

also suitable, in the sense that it is rationally connected to the purpose of allowing certain public assemblies to take place without sanction and prohibit others from taking place, on grounds that may include public order. Counsel for the defendant did not submit otherwise, focusing instead on the second limb of the proportionality analysis in the *McCloy* test regarding necessity, and the assessment of whether the law is "*adequate in its balance*".

22 I accept that the law is necessary. The *Summary Offences Act* requires the parties to attempt to resolve any concerns held by the Commissioner regarding the Notice of Intention and gives the Court discretion to decide whether to authorise a public assembly. There is no obvious and compelling, or reasonably practical alternative to achieving the purpose of the provision. It is also adequate in its balance, as it allows the Court to take into account a wide range of considerations and to limit the restriction imposed on the implied freedom where free speech and political communication considerations prevail over others.

23 In recent cases in this Court concerning the authorisation of political protests in the context of the COVID-19 pandemic, the Court has carefully undertaken this balancing exercise, and recognised the importance of public assembly and free speech. In *Commissioner of Police v Bassi* [2020] NSWSC 710, Fagan J said at [17]:

> "In deciding whether to make an order of this nature the Court usually has to strike a balance between two competing public interests. The first is the public interest in free speech and assembly and in the facilitation of public gatherings at which people with views on matters of public importance may gather together and show their strength, to demonstrate their solidarity with a point of view on a particular issue. The right of assembly and of expression by that means is of great importance in a democracy such as that enjoyed in Australia."

24 In *Commissioner of Police v Gray,* Adamson J said at [59]*:*

> "The importance of free speech as exemplified by public political gatherings does not need to be established. It is regarded as a hallmark of a democratic society … Demonstrations in public spaces remain a powerful method of advancing particular causes to governments and the general community, as well as engendering a feeling of solidarity among participants and those associated with them who may be unable to be present."

25 Adamson J exercised her discretion after undertaking the balancing exercise to not grant a prohibition order, deciding that free speech interests prevailed over

public health and other concerns, and thereby making the decision with the lightest burden on the implied freedom. The range of outcomes available in the exercise of the discretion contained in the provision, and the balancing exercise required by it, are such that I am satisfied that the defendant's submissions on the unconstitutionality of granting a prohibition order under s 25 are not made out.

The second threshold issue: jurisdiction of the Court

Fulfilment of the threshold requirement in s 25(2)(c) to bring an application to this Court

26 The defendant was granted leave to file a cross-claim in court, seeking "[*a*] *declaration pursuant to section 75 of the Supreme Court Act 1970 (NSW) that this Court does not have jurisdiction to hear an application for 'prohibition' under section 25 of* [*the Act*]", and an order for costs.

27 The defendant submitted that the plaintiff failed to comply with s 25(2)(c) of the Act, and therefore the Court is unable to consider the application for a prohibition order.

28 Section 25(2) of the Act sets out certain steps that must be satisfied before an application for a prohibition order can be made. The defendant does not dispute that Acting Assistant Commissioner Maloney's Notice of Invitation to Confer complied with the Act. It stated:

> "In accordance with s. 25(2)(a) of the *Summary Offences Act 1998* (NSW), I hereby invite you to meet with Chief Inspector Paul Dunstan, as the police officer nominated by me, to confer with respect to the proposed public assembly, at the following time and place …"

29 The defendant informed Acting Assistant Commissioner Maloney that he wished to confer and the plaintiff then complied with s 25(2)(b), by agreeing on an amended mutually acceptable place, time and date for meeting, being The Rocks Police Station at 10:30am on Monday 20 July 2020.

30 In an affidavit read at the hearing, Acting Assistant Commissioner Maloney stated:

> "11 At 9:20am on 20 July 2020 the defendant emailed written representations (submissions) in relation to the public assembly, all of which I have read. On 20 July 2020 at approximately 10:30am the defendant attended The Rocks Police Station to confer with Chief Inspector Paul Dunstan, the police officer

> nominated by me, in respect of the public assembly (**the Conference**). Also present at the Conference was Sgt Darren Struthers.
>
> 12 Following the Conference, I was provided with a briefing note dated 20 July 2020 prepared by Chief Inspector Dunstan in relation to the matters put by the defendant during the Conference in respect of the Public Assembly…
>
> 13 At the time of making this application I have read and taken into consideration [the Notice of Intention documents], the briefing note … including the eight documents listed on page 1 of the briefing note and any representations made by the defendant."

31 The defendant's written representations were contained in an 11-page document. The Notice of Intention documents comprised the Notice of Intention itself, a covering email, a "*COVID Safe Checklist*" setting out what steps are proposed to encourage social distancing, the wearing of masks and self-sanitising, and a request made to the NSW Minister for Health for an exemption pursuant to cl 24 of the Public Health Order. I note that the Minister for Health rejected the request on 23 July 2020. The briefing note included a copy of notes of the meeting taken by Sergeant Struthers. It concluded in these terms:

> "Submitted for consideration by the Commissioners delegate, Acting Assistant Commissioner Maloney, prior to deciding as to the authorisation of the proposed public assembly."

32 Earlier that morning, the New South Wales Police Commissioner was interviewed on Sydney Radio 2GB on the topic of the defendant's application for authorisation of the protest. The interview was published as an audio link on the station's website at 7:25am the same day, indicating it had occurred before that time. Part of the interview was as follows:

> "Interviewer: when I reported on this last week, no application had been made but there is now an application for this protest?
>
> Commissioner: That's correct, a [Notice of Intention] has been lodged and I've spoken to the Assistant Commissioner in charge, in the city, Mick Willing, and he has been instructed to take the matter to the Supreme Court, like we have with previous matters …"

33 Later that day, the Commissioner was interviewed on Sky News. Referring to the protest, he said "*we will take that matter to the Supreme Court*".

34 The defendant submitted that the terms of s 25(2)(c) of the Act oblige the Commissioner to actively consider "*any matters put by the organiser at the conference and … any representations made by the organiser*" before a

decision can be made on an application for a prohibition order. The Commissioner's comments displayed a determination to make the application for a prohibition order regardless of what matters were put forward, or representations made, at the conference later that morning. Thus, he could not have "*taken into consideration*" that material and his application cannot be considered by the Court.

35 Acting Assistant Commissioner Maloney said that she received the defendant's written representations, and Sergeant Struthers' notes of the meeting, by email on Monday afternoon. The email was produced, indicating that it was sent to Acting Assistant Commissioner Maloney at 3:55pm. She gave instructions to the Office of General Counsel ("OGC") by phone, in a call that commenced at 4:12pm, a time she was able to check on her phone while giving evidence.

36 Acting Assistant Commissioner Maloney's evidence was that she first became aware of the Commissioner had said on Radio 2GB before she gave instructions to the OGC, saying, "*it was all over the new*s". She said she did not receive any instructions from the Commissioner, or have any contact with him on this issue, prior to giving instructions to the OGC. She spoke to Assistant Commissioner Willing once that day, which was in a phone call at 4:51pm the same afternoon, to inform him of her decision and to discuss other matters.

37 The defendant advanced three grounds as to why s 25(2)(c) of the Act had not been satisfied.

1. Failure to give an opportunity to the defendant to be heard and to consider any matters and representations he put forward, because decision to apply to the Supreme Court was made before representations and conferral

38 The defendant submitted that it was apparent from the Commissioner's comments in the Radio 2GB interview that he had decided to make the application to the Supreme Court, regardless of what occurred at the conference, and therefore the plaintiff had not complied with s 25(2)(c) of the Act.

39 The plaintiff submitted that since the Commissioner had delegated his functions under the Act to Acting Assistant Commissioner Maloney, whatever

he said on that issue was irrelevant to the application. Provided Acting Assistant Commissioner Maloney had performed her functions correctly, there was no impediment to the plaintiff's application being considered on its merits. The terms of paragraph 13 of her affidavit, quoted above at [30], was evidence she had done so.

40 The instrument of delegation was tendered. Its terms were to the effect that the Commissioner delegated his functions under the Act to "*all police officers of or above the rank of Assistant* Commissioner". Acting Assistant Commissioner Maloney explained in evidence that she was the delegated officer, because the protest is planned to take place in the Central Metropolitan Region, for which she is the Acting Assistant Commissioner, in place of Assistant Commissioner Willing, who is on leave.

41 In *Minister for Home Affairs v Omar* [2019] FCAFC 188, the Full Court of the Federal Court was concerned with the meaning of a statutory duty to "*consider*" (whether explicit or implicit), in the context of a duty of the Assistant Minister to consider certain representations made by a person whose visa was cancelled. The Full Court cited Kiefel J (as her Honour then was) in *Tickner v Chapman* (1995) 57 FCR 451; [1995] FCAFC 1726 at 495 with approval, that to "*consider*" is to "*have regard to what is said in the representations, to bring his mind to bear upon the facts stated in them and the arguments or opinions put forwards and to appreciate who is making them*". To discharge the onus of proving that something was taken into consideration, the empowered decision-maker must engage in an "*active intellectual process with reference to those representations*": at [36(d)]. What this actually requires may differ on a case-by-case basis, but in *Omar*, it was held that the Assistant Minister could not just acknowledge or simply note that representations had been made, but could include making specific findings of fact, such as considering whether or not a particular representation was accepted or rejected: see [39]-[40].

42 Acting Assistant Commissioner Maloney was cross-examined as to whether she was influenced by what she understood the Commissioner had publicly said:

> "Q. Officer, you were in an absolutely impossible situation, you being the delegate of the commissioner, the commissioner being the actual holder of the power to bring proceedings to the Supreme Court?
>
> A. No, I don't agree.
>
> Q. You were never going to make a decision that was different to the one your boss had already made?
>
> A. I don't agree.
>
> Q. And I suggest to you that if your evidence is that you were actually not influenced in any way by the statements made by the commissioner, by your knowledge that the commissioner had already decided to bring the case to the Supreme Court where the commissioner was the actual holder of the power to do that, you are not telling the truth?
>
> …
>
> A. No, I don't agree. I had made up my own mind. The Commissioner has his own view but my name is the one that has to sign off on the section 25 aspects of the prohibition order for the Court.
>
> Q. I suggest to you that your evidence that you effectively ignored anything about the commissioner's decision to take the case to the Supreme Court is not the truth?
>
> A. I don't agree."

43 I accept Acting Assistant Commissioner Maloney's evidence to the effect that she, and not the Commissioner or Assistant Commissioner Willing, exercised the functions of the Commissioner in the application. I also accept her evidence that, prior to her instructions to the OGC to make the application to this Court, she had not been instructed to do so, in particular, by either the Commissioner or Acting Assistant Commissioner Willing, and that she considered the matters put forward by the defendant at the conference, and his written representations, in the manner required by the Act.

2. Failure to comply with s 25(2)(c) of the Act, because the process was vitiated by apprehended bias

44 The defendant submitted that, if the Court accepts Acting Assistant Commissioner Maloney's evidence that she made the decision to bring the application pursuant to the Commissioner's delegation, the decision itself was vitiated by apprehended bias.

45 The consideration of whether a decision is tainted by apprehended bias involves judicial review of a decision on the basis of procedural fairness. The parties have assumed in their submissions on this issue that the decision is appropriate for judicial review, and I will proceed on that basis.

46 The consequence of a finding of apprehended bias is that the decision in question would fall into jurisdictional error, and the decision would be taken to be null and void. The declaratory relief sought by the defendant pursuant to s 75 of the *Supreme Court Act 1970* (NSW) would be to that effect.

47 The test for an apprehension of bias was stated in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 6, and is summarised by Gageler J in *Isbester v Knox City Council* (2015) 255 CLR 135; [2015] HCA 20 at [57]:

> "The test for the appearance of disqualifying bias in an administrative context has often been stated in terms drawn from the test for apprehended bias in a curial context. The test, as so stated, is *whether a hypothetical fair-minded observer with knowledge of the statutory framework and factual context might reasonably apprehend that the administrator might not bring an impartial mind to the resolution of the question to be decided*. Such statements of the test have nevertheless been accompanied by acknowledgement that the application of this requirement of procedural fairness 'must sometimes recognise and accommodate differences between court proceedings and other kinds of decision making'". (emphasis added)

48 The majority (Kiefel, Bell, Keane and Nettle JJ) in *Isbester* had further comments on the application of the test to different circumstances:

> "20. The question whether a fair-minded lay observer might reasonably apprehend a lack of impartiality with respect to the decision to be made is largely a factual one, albeit one which it is necessary to consider in the legal, statutory and factual contexts in which the decision is made.
>
> 21. The principle governing cases of possible bias was said in *Ebner* to require two steps to be taken in its application. The first requires the identification of what it is said might lead a decision-maker to decide a case other than on its legal and factual merits. Where it is said that a decision-maker has an 'interest' in litigation, the nature of that interest must be spelled out. The second requires the articulation of the logical connection between that interest and the feared deviation from the course of deciding the case on its merits. As Hayne J observed in [*Minister for Immigration and Multicultural Affairs v Jia* (2005) 205 CLR 507; [2001] HCA 17], essentially the fear that is expressed in an assertion of apprehended bias, whatever its source, is of a deviation from the true course of decision-making.
>
> 22. It was observed in *Ebner* that the governing principle has been applied not only to the judicial system but also, by extension, to many other kinds of decision-making and decision-makers. It was accepted that the application of the principle to decision-makers other than judges must necessarily recognise and accommodate differences between court proceedings and other kinds of decision-making. The analogy with the curial process is less apposite the further divergence there is from the judicial paradigm. The content of the test for the decision in question may be different.

> 23. How the principle respecting apprehension of bias is applied may be said generally to depend upon the nature of the decision and its statutory context, what is involved in making the decision and the identity of the decision-maker. The principle is an aspect of wider principles of natural justice, which have been regarded as having a flexible quality, differing according to the circumstances in which a power is exercised. The hypothetical fair-minded observer assessing possible bias is to be taken to be aware of the nature of the decision and the context in which it was made as well as to have knowledge of the circumstances leading to the decision."

49 The application of the principle will differ on a case-by-case basis, and depends on a range of factors, including the identity of the decision-maker, the particular subject matter the decision is concerned with and the particular circumstances. The statutory framework is a key part of the assessment from the outset: see Spigelman CJ in *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504; [2008] NSWCA 209 at [6].

50 As to the nature of the decision-maker, the impartiality expected of judicial officers is more exacting, with a lower threshold for the finding of an appearance of bias, given the centrality of their independence and integrity. In the case of administrative decision-makers, and in particular government officials, the threshold will usually be higher. In *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507; [2001] HCA 17, the High Court considered certain political opinions expressed by the Minister, including statements as to how he would decide a particular migration case. The Minister subsequently cancelled the visa of that person. The High Court found that the Minister's statements did not give rise to a reasonable apprehension of bias in respect of his decision. In reaching its decision, the majority (Gleeson CJ and Gummow J at 539-540, Hayne J agreeing; Callinan J at 583-584) held that the Minister's conduct did not attract the same standards of detachment that would apply to a judicial officer. Rather, a minister is electorally and politically accountable; the role of a minister as an elected official includes being drawn into public debate and expressing opinions on issues that he may have the power to make decisions on.

51 The defendant submitted that a bystander with knowledge of all the material and objective facts would take into account that the protest was shown to be opposed by police prior to any material being submitted for consideration, as a result of the Commissioner's widely publicised statements. He would have

"*expected it to be followed, and expected the public to know that that was his decision*". The defendant contended that the effect of the statements was to create the impression that the Commissioner had already acted to uphold the views he expressed in the media. Acting Assistant Commissioner Maloney was aware of the comments made by the Commissioner and concerning Assistant Commissioner Willing, who is of a higher ranking to her, whilst making her decision. The public nature of the statements and the hierarchical structure of the organisation would have further undermined any legitimate decision-making, creating a perception of pressure on the actual decision-maker, being Acting Assistant Commissioner Maloney, to make the decision sought by the Commissioner. As a result, the reasonable observer would apprehend bias on the part of the decision-maker.

52 In response, the plaintiff submitted that the statutory context of s 25 is significant; the decision under s 25 "*is not a decision which, of itself, impacts on the rights of the defendant to hold the public assembly*", but rather, is a mechanism to allow the Court to decide whether the public assembly is authorised. The plaintiff further submitted that lower standards of detachment are expected from a public official such as the Commissioner, relying on *Minister for Immigration and Multicultural Affairs v Jia*. When this is taken into account, together with the fact that the Commissioner's statements related to a conversation he had with Assistant Commissioner Willing and not the actual decision-maker, a fair-minded lay observer would not reasonably apprehend that the Commissioner's delegate was biased in making the decision.

53 Lastly, the plaintiff contended that the doctrine of necessity was relevant. It was submitted:

> "If it were the case that there was a reasonable apprehension of bias when Assistant Commissioner Maloney made the decision, given the hierarchical nature of the police force, that conclusion would apply to any other person who could make the decision to commence proceedings under s 25 of the *Summary Offences Act*. The necessity exception to the rule against bias would be engaged and would operate to displace the requirement of procedural fairness …"

54 I accept the plaintiff's submission that the statutory context of the decision in question impacts on the standard of impartiality expected of the decision-maker. The decision concerns whether to apply for a prohibition order in this

Court. The decision-maker does not have power to directly determine anyone's right to public assembly under the statute, and that decision is instead left in the hands of the Court, which is expected to make the decision impartially, with higher standards of detachment required of judicial officers.

55 I also accept that the standards of detachment expected of the Commissioner of Police are lesser than those expected of a judicial officer. However, unlike the case of *Minister for Immigration and Multicultural Affairs v Jia*, which involved an elected government minister, the Commissioner is a public official who is not elected, and is not a member of a political party. Commissioner Fuller's comments to Radio 2GB and Sky News on 20 July 2020 suggest that he was unaware of the process required by s 25(2)(c) of the Act, which is regrettable.

56 Although a certain standard of impartiality is expected of the Commissioner, in my view, the fair-minded observer with knowledge of all material facts and circumstances would not reasonably apprehend bias in the present case. As I have found, the decision-maker was Acting Assistant Commissioner Maloney. The Commissioner did not make any statements in public to the effect that he had directly or indirectly instructed her to make the application, or influence her decision. There was no evidence that the Commissioner participated in the decision-making process that was engaged by Acting Assistant Commissioner Maloney, who was concerned with the feedback from the conference that morning, in the form of the notes of the meeting (by contrast with the case in *Isbester*, where a person with the appearance of bias was a constituting member of a panel that made a decision in respect of a person's rights).

57 Once the defendant had submitted materials for consideration, a police officer would be required to make a decision about whether or not to seek a prohibition order in Court. The defendant's allegation of apprehended bias, due to the Commissioner's statements in the media and the hierarchical nature of the organisation, and in spite of Acting Assistant Commissioner Maloney's absence of communication with the Commissioner, would appear to suggest that anyone in the police force would be infected by apprehended bias. If this were the case, no officer would be able to consider the submitted materials and

make any decision, and would not be able to discharge their duties. I therefore accept that, in these circumstances, if apprehended bias did exist, then the doctrine of necessity would operate to allow Acting Assistant Commissioner Maloney to make the decision despite the existence of apprehended bias: see *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70; [1990] HCA 31.

3. The short period of time (no more than 17 minutes) was insufficient for the delegate to discharge her obligation to "take into consideration" the material submitted

58 The period of time on Monday 20 July 2020 between the receipt by Acting Assistant Commissioner Maloney of the notes of that morning's conference with the defendant and her call to the OGC was 17 minutes. The defendant submitted that it would not have been possible for Acting Assistant Commissioner Maloney to properly consider the relevant material in that time.

59 The notes of the conference meeting had been transcribed and comprised two pages of typed material. Part of the defendant's 11 pages of written further representations repeated submissions that had been made previously. It is not a document that would have been difficult to understand or consider. Most, if not all, of the other material had been previously provided to her. It is apparent from the evidence of Acting Assistant Commissioner Maloney that over the previous week, she had given consideration to the Notice of Intention documents; she was not considering the application by the defendant for the first time. I do not think it was impossible for Acting Assistant Commissioner Maloney to properly consider the material she received at 3:55pm in the space of 17 minutes.

The application for a prohibition order

60 Having dealt with the threshold issues, I now turn now to consideration of the application for the prohibition order.

61 The public health implications of the Notice of Intention was the only concern cited by the plaintiff. The defendant's resistance to the prohibition order was based on the steps he proposed to minimise the risk of transmission of the COVID-19 virus, which he submitted are sufficient, effective and at least on par with the requirements that apply to gatherings of 20 or more persons that are exempted pursuant to cl 18 of the Public Health Order.

The evidence

Acting Assistant Commissioner Maloney

62 In her affidavit, Acting Assistant Commissioner Maloney elaborated on her reasons for opposing the protest:

> "In my opinion it would bring about a risk to attendees, attending police, and/or other members of the public in the vicinity of the public assembly being exposed to the possibility of transmission of the COVID-19 virus."

63 Acting Assistant Commissioner Maloney was of the view that the number of likely participants in the protest would be higher than the 500 persons indicated in the Notice of Intention. She checked the Facebook page for the protest at 7pm on the night of Wednesday 22 July, and saw that 1,200 people had indicated they would attend the protest and another 3,200 had expressed interest. Apart from the fact that some people who are not on Facebook would also attend and increase the number of participants, she thought the publicity generated by media reporting was likely to attract additional attendees.

64 Based on Acting Assistant Commissioner Maloney's experience with public gatherings, she said that protesters tend to stand and march in close groups, often chanting. The oral discharge of saliva increases the risk of transmission of the virus. She did not accept that the defendant would be able to ensure that the protesters maintained social distancing. She stated:

> "[O]n a Tuesday afternoon there will be a moderate number of the public present in the area where the public assembly will commence and conclude and along the proposed procession route, who may find it difficult to maintain social distancing … As the number of attendees increases, so does the disturbance to the public."

65 The Court was informed that, during a break in the hearing, the defendant made an offer through counsel to Acting Assistant Commissioner Maloney to amend his Notice of Intention, so that the protest would take place in the Domain and then proceed to Macquarie Street. Acting Assistant Commissioner Maloney indicated that she would remain opposed to the protest, confirming her position in evidence; she said that at a recent protest at the Domain, she observed that many of the protesters had not socially distanced.

66 Acting Assistant Commissioner Maloney considered that a protest of 500 participants would require approximately 350 police to properly resource the event, in order to attempt to enforce the 20-person gathering rule under the Public Health Order. She was conscious that those police officers would then also be exposed to the risk of transmission of the virus.

67 Acting Assistant Commissioner Maloney was cross-examined as to whether her opposition to the protest was inconsistent with the types and size of events that are permitted by the NSW Minister for Health pursuant to the Public Health Order, as exceptions to the rule in cl 18 that restricts outdoor public gatherings to no more than 20 people. She said:

> "All of those activities … are covered under a COVID Safety Plan … each of those organisations are generally well regulated and have the capacity to go through each of those requirements in their plan to cover off on that. Public gatherings, including public assemblies, do not have that opportunity. They are not enforceable."

68 Acting Assistant Commissioner Maloney also said:

> "In making my decision, since the last protest on 5 July there have been a huge increase or an increase since those protests in community transmissions in New South Wales and there are serious concerns in Victoria. And since that time a border operation has been put in place because of those concerns."

Dr Jeremy McAnulty

69 Dr Jeremy McAnulty, who is the Executive Director of Health Protection, NSW Department of Health, gave evidence. He is the Deputy Public Health Controller for the COVID-19 response in NSW, reporting to the Chief Health Officer, Dr Kerry Chant. In affidavit evidence, he made observations about the nature of the risk associated with public gatherings:

> "It is a well-established principle of infectious disease management that public gatherings bring people into close contact, and thereby increase the risk of transmission of diseases such as COVID-19. Public gatherings also involve a higher risk of the mixing of people who are not part of the same social networks. … If transmission occurs in that context, the cases of transmission can be distributed to social networks that are not a single social network and therefore spread more widely."

70 Dr McAnulty contrasted public gatherings with those of more than 20 people that are permitted by cl 18 of the Public Health Order, stating that they are either classified as essential gatherings or are required to have a COVID-19 safety plan. In evidence, he identified distinguishing features, such as the

ticketing of attendees and requiring their names and contact details, seating arrangements to ensure social distancing, and the staggering of events.

71 Dr McAnulty agreed that considerable progress had been made in confining the COVID-19 virus since March 2020. However, he noted that the Public Health Order was amended on 17 July 2020 to tighten restrictions, limiting group bookings in pubs to a maximum of 10 people and the number of customers inside a venue to 300 people.

72 Dr McAnulty expressed reservations about the defendant's "*COVID Safe Checklist*", noting that it did not appear to be mandatory or enforceable, that participants would be asked to provide contact details on a voluntary basis and that, although the wearing of masks was recommended, current evidence suggests that the effectiveness of masks varies, depending on the quality and how the masks are made.

73 Dr McAnulty noted that the defendant had relied on his representations to the Commissioner on evidence given by Dr Kerry Chant, the NSW Chief Medical Officer, in similar proceedings on 3 July 2020 concerning a protest, to the effect that the risk of transmission at a large public gathering in New South Wales was "*low*". Dr McAnulty said:

> "… in my opinion there has been a change in the situation in New South Wales since 3 July 2020. Whilst it is not possible to precisely quantify the risk, I do not think it would be accurate to describe it as 'low' at the present time, and it is probably more accurate to describe the risk as 'medium'."

74 In evidence, Dr McAnulty explained that, in general terms, he considered the level of risk of transmission of the virus at the protest would be medium, and that it is relative to the number of people present at the protest.

Mr Padraic Gibson

75 The defendant's uncontested evidence is that he is experienced in organising political protests, working cooperatively with police and ensuring the protestors are peaceful and compliant with the law.

76 The defendant's evidence was that he would take all reasonable steps to alleviate the risk of COVID-19 being transmitted at the protest. These steps include the assistance of 30 volunteers to work in "*COVID safety teams*" cautioning protesters to socially distance, dispersing protesters into

neighbouring streets if "*high numbers are starting to compromise physical distancing*", and distributing masks, hand sanitiser and an information sheet explaining COVID safety protocols for the day and where to get tested, if symptoms subsequently appear.

77 Other proposed measures include discouraging people with cold or flu-like symptoms from attending, urging participants to not use public transport to travel to the venue and to register their contact details, so that if there is evidence of transmission after the protest, participants may be contacted and advised to submit to testing. Mr Gibson gave evidence that deeply-respected Aboriginal Elders, including the mother of David Dungay, will be in attendance, and will call upon the protesters to embrace the COVID-19 checklist. I accept that evidence, and note that it would constitute strong encouragement for compliance.

78 The defendant was asked about the expected attendance at the protest, and said the following in cross-examination:

> "Q. You know full well, as you sit there in the witness box, that it is likely that the attendance is going to be in the thousands, isn't that right?
>
> A. The thousands, no, I don't think so. Potentially there will be more than 1,000 people. There is a lot more chance there will be more than 1,000 people now than there was last week."

79 The defendant said that he expected the attendees could be adequately managed under his COVID-19 Checklist.

Consideration

80 This is the fifth application made in recent months by the Commissioner for a prohibition order pursuant to s 25(1) of the Act, in the context of the COVID-19 pandemic. In each of the previous cases, as I do now, this Court has recognised the central importance of free speech and the right to advance political causes by demonstrations; *Commissioner of Police v Bassi* [2020] NSWSC 710 per Fagan at [18], *Commissioner of Police (NSW) v Supple* [2020] NSWSC 727 per Walton J at [6], *Commissioner of Police v Kumar (OBO National Union of Students)* [2020] NSWSC 804 per Lonergan J at [14] and *Commissioner of Police v Gray* [2020] NSWSC 867 per Adamson J at [56] and [59].

81 I accept the evidence of Mr Silva that there is a risk of momentum being lost in this campaign if public demonstrations in support of the "*Black Lives Matter*" movement, in the Australian context, do not continue to be held. There is no evidence that the "*Black Lives Matter*" protest that was held in Sydney Town Hall Square on the afternoon of Saturday 6 June 2020 led to any transmissions of the COVID-19 virus, in spite of there being at least 10,000 people in attendance by most estimates.

82 However, the expert evidence in relation to the level of risk of transmission of the COVID-19 virus at that time was rated as "*low*", whereas I accept the evidence of Dr McAnulty that it is now "*medium*", as a consequence of the current significant resurgence of the virus in Victoria. That current assessment of the level of risk, in spite of relatively low numbers of community transmission, is consistent with New South Wales presently being on the knife-edge of a further escalation in community transmission of the virus.

83 It is also relevant, in my opinion, that the protest is to occur on a weekday lunchtime in the heart of the CBD, being a location in which it can be expected that large numbers of pedestrians not associated with the protest will move through the public assembly, making social distancing more difficult. Some of the egress points to Town Hall train station are at that location. This is particularly concerning, as the contact particulars of passing pedestrians will be unknown and they may not have taken the same precautionary steps as the protesters, such as wearing masks.

84 In my view, the balancing of the competing concerns of the right to free speech and to demonstrate, as against the safety of the community at large, at this particular phase of the pandemic, necessitates the granting of the order prohibiting the holding of the public assembly. In so finding, I take into account the defendant's proposed safety measures, but also the absence of a mechanism to enforce them and the current rating of the risk of transmission of the COVID-19 virus at public assemblies as being "*medium*".

Costs

85 As the proceedings are "*civil proceedings*" within the meaning of s 4 of the *Civil Procedure Act 2005* (NSW), r 42.1 of the Uniform Civil Procedure Rules 2005

(NSW) applies. However, in view of the public interest in the defendant's opposition to the orders sought, it is appropriate that the defendant not be liable for the plaintiff's costs. Accordingly, each party will be required to pay their own costs.

Orders

86 For the reasons given above, I make the following orders:

(1) In respect of the plaintiff's summons, grant the plaintiff's application for an order pursuant to s 25(1) of the *Summary Offences Act 1988* (NSW) prohibiting the public assembly in the Sydney Central Business District on 28 July 2020.

(2) In respect of the defendant's cross-summons, refuse the defendant's application for a declaration pursuant to s 75 of the *Supreme Court Act 1970* (NSW).

(3) Each party to pay their own costs of each application.

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Amendments

01 February 2021 - Minor typographical errors corrected throughout judgment