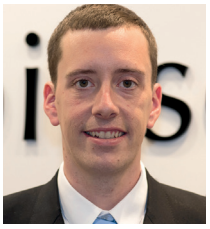
PROTEST PROHIBITED: *COMMISSIONER OF POLICE v KEEP SYDNEY OPEN*

By Daniel Meyerowitz-Katz and Benjamin Brady

Daniel Meyerowitz-Katz and **Benjamin Brady** are associates at Levitt Robinson.



In the recent decision of *NSW Commissioner of Police v Keep Sydney Open Ltd* [2017] NSWSC 5, anti-lockouts advocacy organisation Keep Sydney Open Ltd (**'KSO'**) had planned to hold a rally in Kings Cross on 21 January 2017 to protest the NSW government's 'lockout laws', a series of provisions of the *Liquor Act 2007* (NSW) and the *Liquor Regulation 2008* (NSW) which restrict trading times and conditions for venues licensed to sell alcohol.

In broad terms, KSO argues that the lockout laws have caused ongoing damage to Sydney's nightlife, to small businesses located in the lockouts precinct, to youth employment, and to Sydney's cultural sector, including its music and live performance scenes. The time and location of the rally were selected for their symbolism, as Kings Cross is the area most closely associated with the lockout laws, and the laws have impacted the area's nightlife, especially on weekends.

Statutory framework

Part 4 of the *Summary Offences Act 1988* (NSW) (**'*SO Act*'**) is concerned with assemblies held in public places. Under section 23, if a person who proposes to organise a public assembly gives notice to the Police Commissioner at least seven days in advance of the date the assembly is proposed to take place, then the assembly thereby becomes an 'authorised public assembly', meaning its attendees are granted protection under section 24, which provides that 'a person is not, by reason of anything 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' (emphasis added).

Snapshot

- Part 4 of the *Summary Offences Act 1988* (NSW) gives participants in a public assembly protection from prosecution for participating in that assembly but the Police Commissioner can apply under s 25(1) of the Act for an order prohibiting an otherwise authorised public assembly.
- In *Commissioner of Police v Keep Sydney Open* [2017] NSWSC5 the Commissioner successfully obtained such a prohibition order in a last-minute application.
- The case highlights a number of weaknesses in the current statutory framework.

Section 25(1) of the *SO Act* provides that, if a notice is given to the organiser under section 25(2) inviting the organiser to confer with the police regarding the assembly, and the Commissioner takes into consideration any matters put forward by the organiser, the Commissioner can then apply to a court for an order prohibiting the holding of the public assembly.

Facts of the case

On 9 January 2017, Mr Tyson Koh, a director of KSO, served a section 23 notice on the Commissioner. The Commissioner then issued a section 25(2) notice inviting KSO to confer with police about the assembly, which it did.

At 4pm on Thursday 19 January 2017, two days before the rally was scheduled to take place, the Commissioner filed a Summons in the Supreme Court seeking a section 25(1) 'prohibition order' against KSO and Mr Koh in relation to the rally.

The Equity Vacation Duty Judge, Lindsay J, made urgent *ex parte* orders abridging the time for service of the Summons to 8pm that day and listed the matter for trial at 10am the following day.

The Summons and the Commissioner's evidence were served on KSO at 5:20pm. The evidence included: an affidavit by the Acting Superintendent of the Kings Cross Police Local Area Command setting out his objections to the rally; an affidavit by a tactical commander in the Police Public Order and Riot Squad, providing an expert opinion as to the likely crowd control implications; and an affidavit by the Principal Manager, Major Events at the Transport Management Centre of Transport for NSW, providing an expert opinion on the likely impact of the proposed rally on pedestrian and vehicular traffic.

At about 1am on 20 January 2017, KSO served an affidavit of Mr Koh, setting out KSO's reasons for holding the rally, the significance of the time and location, the crowd control measures taken by KSO such as employing volunteer marshalls, and the efforts made by KSO to address the police concerns such as offering to move the time forward by several hours.

Findings of Lindsay J

After a brief hearing on the morning of 20 January 2017, Lindsay J gave an *ex tempore* judgment granting the Commissioner's application. His Honour found (at [3]), based on a line of authority regarding Part 4 of the *SO Act*, that the effect of an order under section 25(1) of the *SO Act* 'is not, of itself, to prohibit an assembly, but to deny to participants the qualified protection from criminal prosecution' under section 24. His Honour also quoted (at [10]-[13]) passages from *NSW Commissioner v Bainbridge* (2007) 175 ACrimR 226 suggesting that the purpose of Part 4 of the *SO Act* is to balance the right of

freedom of assembly and freedom of expression with 'the need to regulate the exercise of that right where it is necessary to do so to avoid injury to persons or property or otherwise unduly to interfere with the undertaking by other citizens of lawful conduct.'

His Honour noted (at [8]) that KSO had endeavoured to cater for the orderly conduct of the event by arranging volunteer marshals and the attendance of an ambulance service, but that they had not made comprehensive measures for the control of traffic and pedestrians, and they did not have insurance in case of misadventure. On that basis, his Honour concluded (at [14]) that it was not appropriate for the event to be protected under section 24 of the *SO Act* because '[t]he logistical problems of the event are too large, and too unknown, to deny to police officers powers that might reasonably be required ... to be exercised in management of the large number of people expected to participate'. It follows that his Honour's judgment is one of the 'rare case[s] in which a prohibiting order is not based upon the likelihood of breaches of the peace or of offences being committed if the assembly or procession takes place' (*Commissioner of Police (NSW) v Allen* (1984) 14 ACrimR 244 at 250 ('***Allen***')).

His Honour therefore ordered that the holding of the public assembly be prohibited.

Implications of the case

Part 4 of the *SO Act* is designed to protect the 'right, jealously guarded, of the citizen to exercise freedom of speech and assembly integral to a democratic system of government', balanced against 'the right of other citizens not to have their own activities impeded or obstructed or curtailed by the exercise of those rights' (*Commissioner of Police v Rintoul* [2003] NSWSC 662 at [5]). It establishes a regime permitting public assemblies to be held without fear of prosecution. The *KSO* case reveals two particular weaknesses in the current statutory framework, both of which can arguably be resolved through relatively straightforward reforms.

Procedural unfairness

Due to the obvious time constraints, Lindsay J's judgment in the *KSO* case was necessarily brief. This article has set out certain matters, including the nature of the evidence that was filed and the time at which it was filed, which were not referred to in his Honour's judgment, to illustrate the procedural unfairness to which the organiser of a rally can arguably be subjected in a section 25(1) application.

KSO was served with three affidavits, including two expert opinions, after office hours and had 17 hours overnight to prepare a defence for a trial the following morning. Ordinarily, this would be grounds for the hearing to be adjourned. In this case there was no such option. The matter had to be heard and determined that day. It is unsurprising that KSO was not able to assemble sufficient evidence to successfully contest the application. It could be assumed that the Commissioner's evidence took several days to prepare.

In order to avoid such problems, the Act should be amended to require that the Commissioner file and serve any application under section 25(1) no later than three business days prior to the date on which the rally is proposed to be held. This will afford organisers at least a day in which to prepare their case, and could also permit sufficient time for an appeal should the defence fail.

Vagueness of legislation

The Court's discretion under section 25(1) of the *SO Act* is broad and unfettered—no criteria are stated which the Court must take into consideration (*Commissioner of Police (NSW) v Gabriel* (2004) 141 ACrimR 566 at [4]-[5]) 9 ('***Gabriel***')). The case law provides some limited guidance on this topic, but given the inevitably short timeframes involved, it is extremely difficult for the parties and the Court to be across all relevant authorities in time for an application to be heard and determined.

The most important factor to take into account is the effect of the proposed order. As Lindsay J held, the effect of a section 25(1) order is not in fact to 'prohibit' the assembly, but merely to deny it section 24 protection. However, the purpose of Part 4 of the *SO Act* is 'not to prohibit public assemblies but ... to facilitate them by protecting participants in appropriate circumstances from prosecution for certain offences which might otherwise be regarded as having been committed' (*Gabriel* at [1]; *KSO* at [13]).

Without the section 24 protection, participants in a protest could be prosecuted under section 6 of the *SO Act* for obstructing vehicles or pedestrians. Further, police could direct the participants to leave the assembly in order to prevent an obstruction to persons or traffic, pursuant to section 197 of the *Law Enforcement (Powers And Responsibilities) Act 2002* (NSW), and the participants could be prosecuted under section 199 of that Act for failing to comply with any such directions (see generally, *Allen* at 246-247).

For these reasons, we argue that the legislation should be amended to include an express list of matters that the Court should take into account in relation to an application under section 25(1). In our opinion, these should include: (a) the nature and purpose of the assembly (*Commissioner of Police v Langosch* [2012] NSWSC 499 at [22]-[26]); (b) the likelihood of breaches of the peace or of offences being committed (*Allen* at 250); (c) the likely disruption caused by the assembly to third parties (*Commissioner of Police v Ridgewell* [2014] NSWSC 1138 at [15]); (d) the extent to which the objectives of the assembly could be achieved through reasonable accommodations (*Bainbridge* at [33]); (e) the duty and ability of the police force to keep the peace (*Langosch* at [31]); and (f) the right to freedom of assembly and of expression (*Rintoul* at [5]).

Finally, we argue that the provision should also require that the Court only make a prohibition order when it is satisfied that the proposed assembly would otherwise pose an unacceptable risk to public safety.

Conclusion

The rights of freedom of assembly and expression are fundamental to the functioning of any democracy. Part 4 of the *SO Act* creates a regime to protect people from being prosecuted when they seek to exercise those rights. However the *KSO* case reveals flaws in the statutory framework which are currently facilitating the erosion of these essential democratic rights. **LSJ**

Note: Levitt Robinson acted for Keep Sydney Open in the proceeding.