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Sia Lagos

Registrar

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Federal Court of Australia
District Registry: Victoria
Division: Administrative and Constitutional Law and Human Rights



No. VID1612 of 2025

TARNEEN ONUS BROWNE

First Applicant

BENJAMIN ZABLE

Second Applicant

ASSISTANT COMMISSIONER OF POLICE, NORTH WEST METRO REGION

First Respondent

STATE OF VICTORIA

Second Respondent

WRITTEN SUBMISSIONS OF THE APPLICANTS

A INTRODUCTION

- 1 On 24 November 2025, a delegate of the Chief **Commissioner** of Police (**First Respondent**) declared an area of Melbourne to be a “designated area” (**Declaration**), relying on s 10D(1)(b) of the *Control of Weapons Act 1990* (Vic). Notice was published in the *Government Gazette* (S 646),¹ which identifies the **Designated Area** as “Melbourne CBD and Vicinity”, being all of Melbourne, East Melbourne and South Bank, and parts of West Melbourne, Carlton, Docklands, South Wharf, South Yarra and South Melbourne.² The Declaration is to operate from 12:00am on Sunday 30 November 2025 until 11:59pm on Friday 29 May 2026.³
- 2 During that 6-month period, “police officers” and “protective services officers” have “**search powers**”, not otherwise available to them,⁴ namely: the power, without warrant and without suspicion, to (a) stop and search a person, and search any thing in the possession of or under the control of the person, for “weapons”, if the person (and the thing) are in a “public place”⁵ within the Designated Area: **ss 10G, 10GA**; and (b) to stop and search a vehicle, and any thing in or on the vehicle, for weapons if the vehicle is in a public place within the Designated Area (and a person is in or on the vehicle): **s 10H**.⁶ Police officers also gain the **face covering power**: the power to direct a person wearing a “face covering”⁷ to leave the Designated Area if: (a) the officer reasonably believes the person is using the face covering primarily to conceal their identity, or to protect themselves from the effects of “crowd-controlling substances”; and (b) the person refuses to remove the face covering when requested: **s 10KA(1)**.⁸
- 3 Prayers 1 and 2 of the Amended Originating Application are directed to the Declaration: **Parts C-FC**. Grounds 1 to 7 contend that the Declaration is affected by jurisdictional error and is therefore “invalid”,⁹ and on that basis the Applicants seek a quashing order and a declaration. The Applicants rely primarily on the material in the **Brief (B)**, being the *only* material relied upon by the First Respondent in making the Declaration.¹⁰ The Applicants allege non-compliance with the “precondition” in s 10D(1)(b), being that the Commissioner must hold a particular state of mind.¹¹ For the precondition to be met, the Commissioner must:

¹ See Weapons Act, s 10D(4)(a), (5)(a), (5A).

² See <https://www.land.vic.gov.au/place-naming/services-and-resources/locality-names-and-boundary-maps>.

³ See Weapons Act, s 10D(5)(d), (6).

⁴ Cf Weapons Act, ss 10 and 10AA, which are available at all times.

⁵ As defined in s 3(1) of the Weapons Act, primarily by reference to the *Summary Offences Act 1966* (Vic).

⁶ Offence to obstruct or hinder an officer in the exercise of a power under ss 10G, 10GA and 10H: s 10L(1), (3).

⁷ Face covering is undefined but can be interpreted according to its ordinary meaning as any object covering the whole or part of the face, such as sunglasses, bandanas, balaclavas, scarves, surgical masks and stylised masks.

⁸ Offence to fail to comply with a direction given by a police officer under s 10KA: s 10L(2).

⁹ See *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at [23]-[24] (Kiefel CJ, Gageler and Keane JJ); *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321 at [2] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

¹⁰ The bundle was produced on 16 December 2025, consistently with Order 1 of that date, which required production of “all material” before the First Respondent “or which was otherwise relied upon by the First Respondent”. On 19 December, the Respondents confirmed “[n]o notes taken by the First Respondent exist in relation to the decision”.

¹¹ *Wilkie v Commonwealth* (2017) 263 CLR 487 at [98] (the Court); *Gedeon v Commissioner of NSW Crime Commission* (2008) 236 CLR 120 at [43] (the Court). The label “jurisdictional fact” may (cautiously) be used:

in fact, personally form the requisite state of mind (**Ground 1**), and do so on a “correct understanding of the law” (**Ground 2**) and “reasonably” (**Ground 3**). If the power was enlivened, the Applicants allege non-compliance with the size condition in s 10D(2) (**Ground 4**); the time condition in s 10D(3)(a) (**Ground 5**); the “proper purpose” condition (**Ground 6**); and the “reasonableness” condition (**Ground 7**). The Applicants also allege non-compliance with the “substantive” and “procedural” obligations in s 38(1) of the *Charter of Human Rights and Responsibilities 2006* (Vic) (**Grounds 8-9**). The Applicants assume the failure to comply with those obligations renders the Declaration “unlawful” (but not “invalid”) and seek a declaration to that effect: prayer 2(b)-(c): **CR [17]**.¹²

- 4 Prayers 3 and 4 are directed to the constitutional validity of s 10KA(1): **Part G**. The Applicants contend that the face covering power must be construed so as not to be exercisable in respect of persons engaged in political communication, or it is otherwise wholly invalid for contravening the implied freedom of political communication.

B STANDING, “MATTER” AND JURISDICTION

- 5 The Applicants have standing to seek the relief in the Amended Originating Application (and there is a Ch III “matter”) because they have a “sufficient interest” in the subject matter of the claims: cf **CR [2]-[3]**.¹³ By reason of the making of the Declaration, any person within the Designated Area may be stopped and searched for no reason. Both Applicants have been within the Designated Area since the Declaration was made, and both propose to enter it again before the Declaration ceases to operate. They have therefore been exposed to the potential exercise of the search powers, and will again be exposed if they enter the Designated Area as they propose to do. Those powers interfere with the Applicants’ fundamental common law rights, including liberty and bodily integrity.¹⁴ The past and future exposure of the Applicants to the exercise of those powers is enough to give them a sufficient interest. That a large number of persons might have the same interest does not deprive them of that interest: cf **CR [2]**.

- 6 In addition, both Applicants plan to attend the Invasion Day rally, inside the Designated Area, and are concerned about the powers being used against them at that event. Ms Onus Browne is a well-known activist who sometimes wears face coverings at protests because they do not want to be identified;¹⁵ and Mr Zable is a performance artist who regularly attends protests in costume with a face covering, has been previously told by police to remove his face covering

Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd (2016) 260 CLR 340 at [47] (the Court); *El Khouri v Gemaveld Pty Ltd* [2023] NSWCA 78 at [33]-[36] (Leeming JA).

¹² *Bare v IBAC* (2015) 48 VR 129 at [139]-[153] (Warren CJ), [328]-[329], [378]-[396] (Tate JA), [560]-[569], [599]-[626] (Santamaria JA).

¹³ *Unions NSW v NSW (Unions (No 3))* (2023) 277 CLR 627 at [17], [21]-[23], [26]-[27] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ). See also *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 35-36 (Gibbs J).

¹⁴ See *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at [9], [12] (Gageler CJ, Gordon, Gleeson and Jagot JJ)

¹⁵ Affidavit of Tarneen **Onus Browne** (7 January 2026) at [18]-[19].

in a designated area, has worn his face covering in the current Designated Area, and plans to attend the Invasion Day rally in his costume this year.¹⁶ As an organiser of the rally, Ms Onus Browne is also concerned about how the Declaration and use of the search powers and face covering power will affect attendees (including whether people will be deterred from attending),¹⁷ and is planning on providing information about the powers to attendees in advance of the rally.¹⁸

- 7 As to justiciability and the identification of a “matter”, there is a backward-looking element of the dispute, in so far as the Applicants are persons who have entered the Designated Area since it was made and thereby been exposed to the potential exercise of the search powers. There is also a forward-looking element in so far as the dispute concerns the Applicants’ future conduct (including but not limited to conducted in connection with the Invasion Day Rally), and it is well-established that a dispute is not hypothetical or abstract simply because it relates to proposed future conduct: cf **CR [3]**.¹⁹ There is an evident risk that the search powers and the face covering power will be exercised at the Invasion Day Rally, and at other points in the future within the Designated Area.²⁰ The declaratory relief will produce “foreseeable consequences” for the parties, including because of the “considerable public interest” in the powers in s 10D(1)(b) and s 10KA being exercised in a lawful fashion.²¹
- 8 Finally, the claims all form part of the same “matter” or “single justiciable controversy” within the Court’s jurisdiction because they arise from “a common substratum of facts”, concerning the exercise of the search powers and the face covering power in the Melbourne CBD and Vicinity, which require the existence of a designated area: cf **CR [4]**.²²

C GROUNDS 1 TO 3: FAILURE TO COMPLY WITH THE PRECONDITION IN S 10D(1)(B)

C.1 Proper construction of s 10D(1)(b)(ii)

- 9 Section 10D(1)(b) is a power to declare “an area” to be a “designated area”, for a particular period of time not exceeding 6 months: s 10D(3)(b)(ii). To exercise the power, the Commissioner must be “satisfied” of the two criteria in s 10D(1)(b). The Applicants’ challenge relates only to the second of those criteria, contained in sub-para (ii). Properly construed,²³ that requires the Commissioner — *before* exercising the power to declare a particular area to be a designated area for a particular period of time — to be “satisfied” of two things: **(1)** that some “violence or disorder”, involving the use of “weapons”, is “likely”

¹⁶ Affidavit of Benjamin **Zable** (6 January 2026) at [2], [10]-[11], [18]-[32].

¹⁷ Onus Browne Affidavit at [30]-[31].

¹⁸ Onus Browne Affidavit at [25]-[26].

¹⁹ See, eg, *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 at [102] (Nettle J).

²⁰ See *Unions (No 3)* (2023) 277 CLR 627 at [27] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ); *Brown v Tasmania* (2017) 261 CLR 328 at [17] (Kiefel CJ, Bell and Keane JJ), [499] (Edelman J); *Clubb v Edwards* (2019) 267 CLR 171 at [38] (Kiefel CJ, Bell and Keane JJ).

²¹ See *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at [103] (the Court).

²² See *Re Wakim; Ex parte McNally* 198 CLR 511 at [139]-[140] (Gummow and Hayne JJ); *Palmer v Ayres* (2017) 259 CLR 478 at [26] (Kiefel, Keane, Nettle and Gordon JJ).

²³ *Palmanova Pty Ltd v Commonwealth* (2025) 99 ALJR 1362 at [4] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ).

to occur within that particular area, within that particular period of time (**Threat Satisfaction**); and (2) that it is “necessary” to designate that area, for that period of time, “for the purpose of enabling police officers or protective services officers to exercise” the search powers “to prevent or deter” the identified “violence or disorder” (**Necessity Satisfaction**).

- 10 **Threat Satisfaction:** Three matters must be noted. *First*, the Commissioner will only be able to assess if the exercise of search powers is “necessary” to prevent or deter the likely violence or disorder if the Commissioner has first identified that anticipated violence or disorder with some specificity (eg, by type, location or other feature). *Second*, the anticipated violence or disorder must involve the use of “weapons” because: (a) an overall purpose of the Act is to regulate weapons (s 1(a)); (b) a declaration authorises officers to exercise powers to search “for weapons”, and therefore it would be impossible for the Commissioner to form the Necessity Satisfaction if the Commissioner identified anticipated violence or disorder that did not involve the use of weapons; (c) the legislative clarification in s 10D(1A) can attach to s 10D(1)(b) only if it applies to violence or disorder “involving the use of weapons”; and (d) other provisions that refer to “violence or disorder” must mean “involving the use of weapons”: eg, ss 10D(2), 10D(3), 10E. *Third*, a “weapon” is a “prohibited weapon”, a “controlled weapon” or a “dangerous article”, but does not include a “firearm”.²⁴
- 11 **Necessity Satisfaction:** The word “necessary” requires a certain degree of connection or relationship between means and ends. Because the word has “different shades of meaning”,²⁵ the requisite degree of connection or relationship is sensitive to the context. It may mean its ordinary meaning (eg, “essential” or “required”); or, it may import notions of “proportionality” (eg, “reasonably necessary” or “appropriate and adapted”).²⁶ In s 10D(1)(b)(ii), “necessary” is used in a “strong” sense.²⁷ It means “needed to be done” or “required” in the sense of “requisite”, or something “that cannot be dispensed with”.²⁸ That is consistent with its ordinary meaning; no “straining” is involved: cf **CR [5]**. In addition: (a) “necessary” is used in s 10D(1)(b)(ii) in contradistinction from “reasonably necessary”, which is used in s 10D(2) and (3)(a);²⁹ (b) s 10D(1)(b) was deliberately “tightly framed” by Parliament;³⁰ (c) the making of a declaration enables the exercise of powers involving significant interference with fundamental rights of liberty, bodily integrity and personal property, and a stronger meaning of “necessary” involves lesser interference with those

²⁴ See Weapons Act, ss 1(a), 3(1), 4(1), 10C; *Control of Weapons Regulations 2021* (Vic), cls 7-8 and Schs 1-2.

²⁵ See *Mulholland v AEC* (2004) 220 CLR 181 at [39]-[40] (Gleeson CJ).

²⁶ See *Thomas v Mowbray* (2007) 233 CLR 307 at [20]-[26] (Gleeson CJ); *Hogan v Hinch* (2011) 243 CLR 506 at [70]-[72] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

²⁷ See *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at [30] (the Court).

²⁸ *NSW v Robinson* (2016) 93 NSWLR 280 at [43] (the Court).

²⁹ See also Weapons Act, ss 10(6), 10AA(7), 10E(3), 10E(4)(a), 10G(4), 10G(5), 10H(2), Sch 1 cl 6(5).

³⁰ See *Hansard* (LC), 18 March 2025 at 980 (Supp Statement of Compatibility for Bill, introducing current s 10D(1)(b)); see also 27 November 2009 at 5786 (Statement of Compatibility for Bill, introducing s 10E(1)(b)).

rights;³¹ (d) in analogous contexts (arrest without warrant; strip searches), “necessary” has been construed in accordance with its ordinary meaning;³² and (e) s 32(1) of the *Charter* requires adopting an open interpretation “which *least* infringes *Charter* rights”.³³

- 12 It is therefore insufficient for the Commissioner to be satisfied that the declaration would be “efficient” (cf CR [5]), or that it would be “convenient, reasonable or sensible, or to serve some notion of the public interest”.³⁴ Instead, the Commissioner must ask: is the ability of officers to exercise the search powers — within the proposed designated area and for the proposed period — *indispensable* to preventing or deterring the anticipated violence or disorder? Logically, that question entails two more specific inquiries: (1) would enabling officers to exercise the search powers within the proposed designated area for the proposed period of time have the effect of deterring or preventing the identified anticipated violence or disorder?; and (2) if the designation was not made over the proposed area for the proposed period of time, could the identified anticipated violence or disorder be prevented or deterred by other means?³⁵ Only if the Commissioner answered the first question “yes” and the second question “no” could the Commissioner be satisfied that the declaration was “necessary” to prevent or deter the anticipated violence or disorder.

C.2 Ground 1: failure to in fact form the state of mind

- 13 The First Respondent had to, in fact, personally “form a state of mind that [could] be described as one of satisfaction”.³⁶ He could only do so if he independently turned his mind to, and considered, each of the criteria in s 10D(1)(b).³⁷ The material in the Brief establishes that the First Respondent did not, as a matter of fact, undertake that task.

- 14 *First*, there are only five meaningful possible references to the “satisfaction” requirement in s 10D(1)(b). They all suffer from a material error or defect.

14.1 The “**Issue Cover Sheet**” states that the “OMNI operation” is applied for on the basis of s 10D(3)(b): **B001**. That should be a reference to s 10D(1)(b). It then replicates the content of s 10D(1)(b), but it fails to identify its source in that provision.

14.2 The document at **B006**, which appears to be the “Summary of legislative changes as of 26 March 2025” referred to in Issue Cover Sheet, seeks to summarise various criteria contained in s 10D(1). The second dot black point under the heading “s 10D(1)” is an

³¹ *North Australian Aboriginal Justice Agency Ltd v NT* (2015) 256 CLR 569 at [11] (French CJ, Kiefel and Bell JJ).

³² *Robinson* (2016) 93 NSWLR 280 at [37]-[43] (the Court); *Meredith v NSW (No 5)* [2025] NSWSC 1133 at [159]-[163] (Yehia J).

³³ See *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1 at [24]-[27] (Nettle JA), see also [192] (Tate JA). See also *Slaveski v Smith* (2012) 34 VR 206 at [24] (the Court).

³⁴ *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at [31] (the Court).

³⁵ Other means could encompass: eg, police presence and patrol of areas of concern; any other police strategy or intelligence-led operation relying on a (less extensive) exercise of the s 10D(1)(b) power or any other available powers (or combination of powers): eg search powers under ss 10, 10AA, 10D(1)(a), (c) or (d).

³⁶ *Palmer v WA* (2021) 272 CLR 505 at [158] (Gageler J); *El Khouri* [2023] NSWCA 78 at [34] (Leeming JA).

³⁷ See *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39 (Mason J).

amalgam of s 10D(1)(b), (c) and (d); it does not correctly distinguish between those distinct powers. Significantly, the second white dot point under the second black dot point incorrectly summarises s 10D(1)(b) by omitting the concluding words “that the ... Commissioner is satisfied is likely to occur” (ie. it misses the Threat Satisfaction component). Similarly, the purported summary of the criterion in s 10D(1)(b)(ii) under the heading “s 10D(3)(b)” is incorrect because the second black square dot point under the second white circle dot point omits the words “the CCP is satisfied” (ie. it fails to refer to the requirement that the Commissioner himself be “satisfied” of that criterion).

- 14.3 The “**Victoria Police Manual**” document headed “Designated areas: Conducting searches and issuing directions” (Appendix 2) is outdated: **B010**.
- 14.4 Part 1 of the document titled “**OMNI Support Summary**” (Appendix 3) is headed “Criteria for OMNI – CONTROL OF WEAPONS ACT 1990 – SECT 10D”. Without identifying any particular provision in s 10D, it then sets out the content of s 10D(1)(a)(i) and (1)(b)(i) (which are the same), along with the content of s 10D(1)(a)(ii) and (1)(b)(ii) (which are different). The summary fails to refer to the requirement that the Commissioner be “satisfied” of those criteria: **B020**.
- 14.5 The “**OMNI Checklist**”, being part of the document titled “Application to Declare a Designated Area” (**Application Form**) (Appendix 7), also fails to mention the requirement that the Commissioner must be satisfied of the criteria: **B060**.
- 15 *Second*, the documents did not prompt the First Respondent to form the state of satisfaction required by s 10D(1)(b). The Issue Cover Sheet merely recommended that he “approve the OMNI operation application” (by reference to “Supported” or “Not Supported”), and to “sign” Part C of the Application Form: **B002-003**. The Application Form asked him only “to determine whether a declaration should be approved”: **B057**.
- 16 *Third*, the First Respondent was not satisfied in relation to any particular “designated area”. In general, the Brief refers to the “designated area” by reference to an image from Google Maps, overlaid with a red line (perhaps drawn in Microsoft Paint or similar, noting the rough corners of the boundary): **B005, 021, 026-027, 050, 052, 055**. That image appears in the Gazette. However, that map does not accurately reflect the written description of the “designated area” that appears in the Gazette, or elsewhere in the Brief: **(a)** the written description is confined to “public places”, but that is not reflected on the map; **(b)** the written description identifies a boundary extending “north to the intersection of St Kilda Road and Park Street” from the intersection of Domain Rd and St Kilda Rd, but that boundary is missing from the map; and as a consequence, the line on the map that is supposed to run “southwest to the intersection of Park Street and Clarendon Street” is in the wrong place; and **(c)** the map contains a line running from the “intersection of Dudley Street and Peel Street” north to the

intersection of Peel St and Victoria St, but this line is absent from the description: see **B005, 048-049, 052, 055, 056**.³⁸

- 17 *Fourth*, there is no evidence of any active consideration of the applicable statutory criteria.
- 17.1 The only evidence of the First Respondent’s decision is his signature on the third page of the Issue Cover Sheet, where he indicates the OMNI application is “supported” and appears to have written “I have approved the Omni from 0000 30/11/2025 to 29/5/2026”; and his signature on the Application Form, to signify that he “declare[s] the area specified at Part A, for the period specified, to be a designated area and authorise a Notice of Declaration ... to be issued”: **B003, 057**.
- 17.2 It is unclear whether the “tick boxes” in Part C of the Application, headed “Authorised Officer Declaration” were filled by the First Respondent. In any event, the only potentially relevant item is “OMNI Checklist reviewed”, which suffers from the deficiency identified in paragraph 14.5 above. Further, to be asked to “review” a document is not to be asked to form a state of satisfaction. Finally, that Checklist was filled by the “applicant” for the declaration, not the First Respondent.³⁹
- 18 *Fifth*, on 30 December 2025, the Applicants informally sought production of a specific document that would be relevant to how long the First Respondent spent considering the Brief,⁴⁰ noting the Application Form records that the First Respondent received the Application Form at 11:35am on 24 November 2025 but does not record when he signed it.⁴¹ If the period was short, that would reinforce the points above.⁴² Unfortunately, on 6 January 2026, the Respondents refused the request (and confirmed that refusal on 7 January 2026). The Applicants will continue to agitate for production of the document as soon as possible.

C.3 Ground 2: state of mind formed on incorrect understanding of the law

- 19 The First Respondent was required to form the requisite state of mind on a “a correct understanding and application of the applicable law”.⁴³ If the First Respondent in fact formed a state of satisfaction (contrary to Ground 1), the material in the Brief establishes that the First

³⁸ Compare the designated area declaration of 22 November 2025, which accurately describes and depicts the start and end point at “the intersection of Peel Street and Victoria Street”: <https://www.police.vic.gov.au/public-notice-melbourne-central-business-district-and-surrounds-saturday-13-september-2025> (last accessed 2 January 2026).

³⁹ See instruction at **B056**, “IMPORTANT: Must complete the OMNI Checklist (page 4) prior to submitting”.

⁴⁰ Namely, “the first-in-time internal email or other time-stamped document that records or confirms that the Assistant Commissioner had approved the Issue Cover Sheet and Application”.

⁴¹ Further, in response to an earlier request on 29 December 2025, the Respondents advised the “Issue Cover Sheet and Application were reviewed and approved in hard copy only and there is no time stamped record”.

⁴² See, eg, *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352 at [123], [128]-[130] (the Court).

⁴³ *Hossain* (2018) 264 CLR 123 at [34] (Kiefel CJ, Gageler and Keane JJ). See also *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at [57] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); *LPDT* (2024) 280 CLR 321 at [3] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at [59] (French CJ).

Respondent formed it on an incorrect understanding of the law. That is clear from the three points in paragraphs 14 to 16 above, each of which is sufficient to establish Ground 2.

- 20 If more were needed, the First Respondent’s incorrect understanding of the law can also be inferred from the absence of any explanation in the Brief of the requirement to form *both* the Threat Satisfaction and the Necessity Satisfaction or of their content. The Brief also contains numerous statements that are inconsistent with the proper construction of those satisfaction requirements, such as: (a) stating one aim of the “operation” as being “to prevent the use of face coverings to conceal identities or protect from crowd control substances” (B001), yet only the “search powers” are relevant to forming the Necessity Satisfaction; (b) listing “Objectives” as “Help members of the Victorian public feel safe by providing a visible and accessible police presence”; and “Provide a first point of contact for persons experiencing social, health, and/or welfare challenges” (B004), which do not relate to preventing or deterring anticipated violence or disorder involving weapons; (c) reliance on “firearms” incidents (B004, 028-029), which are not “weapons”.

C.4 Ground 3: state of mind formed unreasonably

- 21 The First Respondent was required to form the requisite state of mind “reasonably”. To be “reasonable”, his state of mind must have been: (a) “open to be formed by a reasonable person” in the position of the First Respondent on “the basis of the information available” to him; and (b) in fact formed by the First Respondent by an “intelligible process of reasoning on the basis of that available information”.⁴⁴ If the First Respondent in fact formed a state of satisfaction (contrary to Ground 1), neither requirement was satisfied.
- 22 *Not open:* For Ground 3, the primary problem with the material in the Brief is with the information in the “OMNI Support Summary”, which appears to be the sole basis for the tick next to “Evidence of previous weapons violence or weapons offences justifies designation” on the Application Form: **B020-043, 057**.
- 23 *Threat Satisfaction.* The OMNI Support Summary does not discuss *future* occurrences of violence or disorder involving the use of weapons within the Designated Area. Thus, to reach the Threat Satisfaction, a reasonable person in the position of the First Respondent would need to draw an inference about that future likelihood by reference to the past.⁴⁵ No reasonable person could logically draw any such inference based on the Brief because that information was significantly overinclusive and underinclusive in various ways:
- 23.1 Data was extracted for offences committed in the “Melbourne and Yarra PSAs” for the period between 1 November 2024 and 31 October 2025: **B020**. The data was filtered by

⁴⁴ *Palmer* (2021) 272 CLR 505 at [158] (Gageler J). See also *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 289 FCR 21 at [21], [33]-[35] (the Court).

⁴⁵ See *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 574-575 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ); *Djokovic* (2022) 289 FCR 1 at [39] (the Court).

the certain offence types (“Assault, Robbery, Weapons/Explosives, and Behaviour in public where linked offending includes assault, weapons/explosives or behaviour in public offences”), none of which are a suitable proxy for offences that meet the description of “violence or disorder involving the use of a weapon.” Any offence data that does not meet that description are irrelevant to forming the Threat Satisfaction.

- 23.2 Of the 4223 offences meeting the OMNI summary request identified within the designated area in the period, only 636 are referable to offences involving a “weapon” within the meaning of the Weapons Act: **B021**.⁴⁶ Of those 636 weapons offences, 578 were “possession” offences.⁴⁷ That leaves only **58** offences in the entire dataset that a reasonable person could be sure falls within the description of “violence or disorder involving the use of a weapon” and thus is relevant to forming the Threat Satisfaction. The remaining 4165 offences are irrelevant because they do not (or cannot be said to)⁴⁸ fall within that description.⁴⁹
- 23.3 The map (**B026**) appears to plot some of the offence data, at the approximate locations of offending within the Designated Area. However, because the data has not been filtered by reference to offences meeting the description of “violence or disorder involving use of a weapon” and there is no raw data (in terms of specific offences or offence locations), it is not possible to discern which datapoints on the map are relevant to forming the Threat Satisfaction. No reasonable person could logically identify from the spread of datapoints on the map any area in which violence or disorder involving the use of a weapon has occurred. Accordingly, the map and the concluding sentence in the “Analysis” (**B031**) that offences “were spread widely throughout the entire designated area” cannot reasonably be relied on to form the Threat Satisfaction.
- 23.4 The “Trends Analysis” (**B024-025**) sets out bar graphs for some of the offence data, depicting the number of offences (Y axis) per month (X axis) over the relevant period. As there is no bar graph filtered by reference to offences meeting the description of “violence or disorder involving the use of a weapon” and there is no temporal data for specific offences, it is not possible to identify any trend over time regarding past offences that would be relevant to forming the Threat Satisfaction.⁵⁰ In any case, the

⁴⁶ The sum of: 476 “Possess/Carry/Use Controlled Weapon Without Excuse” offences, 102 “Possess/Carry/Use Prohibited Weapon W/O Exemption” offences, 58 “Possess Dangerous Article in Public Place” offences: **B021**.

⁴⁷ Being the sum of 476 “Possess Controlled Weapon Without Excuse” offences and 102 “Possess Prohibited Weapon W/O Exemp/Appr” offences: **B022** (table 3).

⁴⁸ For example, the 80 “Armed Robbery” offences and 74 “Assault with Weapon” offences would be relevant to the Threat Satisfaction if it were clearly indicated that those offences did not involve use of a firearm: **B022** (Table 3). In the absence of any such indication, they cannot be said to meet the description of “violence or disorder involving the use of a weapon” and thus cannot be said to be relevant to forming the Threat Satisfaction.

⁴⁹ And even if all “Weapons/Explosives” offences were to be deemed relevant (which they are not), the vast majority of the offence data would still be irrelevant (3586 offences).

⁵⁰ The bar graph of “Weapons/Explosives Offences by Year/Month” (**B025**) shows that somewhere between 55 and 90 such offences occurred over the relevant 12-month period in the designated area. While many of those offences

variance in the monthly data militates against the identification of a 6-month period of consistent “violence or disorder involving the use of a weapon”. The reference to “elevated” offences in November 2024, January 2025, April 2025 and August 2025, which have “since declined” (**B022**) also does not support there being any such period. The Aoristic Time Charts are irrelevant because the underlying data comprises “all offences” and is not filtered by reference to weapons offences (**B023**).

- 23.5 A number of the “Incidents of Note” (**B028-B030**) are not relevant to the Threat Satisfaction because they involved firearms⁵¹ or occurred outside the Designated Area.⁵²
- 24 *Necessity Satisfaction*. In any event, no reasonable decision-maker could form the Necessity Satisfaction based only on the material in the Brief.
- 24.1 There is nothing to indicate that exercising the search powers within the proposed designated area for 6 months would effectively deter or prevent the identified anticipated violence or disorder. The only information on the efficacy of the search powers are the results of a previous OMNI operation, on a single day at Melbourne Central (then a designated area): **B031**. Despite Melbourne Central being characterised as a “hotspot” that is “notorious for ... weapons offences”, the results of that operation yielded the seizure of only three weapons (two knives and an imitation firearm) from 548 searches,⁵³ revealing an extremely low efficacy rate for the search powers (0.5%).
- 24.2 The data includes offences at locations that are not public places.⁵⁴ Given that the search powers in ss 10G, 10GA and 10H can only be exercised in public places within designated areas, that offence data is irrelevant to forming the Necessity Satisfaction.
- 24.3 There is nothing further in the Brief to assist with considering the counterfactual: whether the identified anticipated violence or disorder be prevented or deterred by other means.⁵⁵ No other powers (or combination) of powers under the Weapons Act or any other legislation are mentioned.
- 24.4 Size. Even if it could be relied on, the map shows that large areas where no or few weapons offences were identified within the preceding 12-month period, as well as “hotspots” in which there is a high level of offending: **B026-027, 31**. The reasonable

would be “possession” offences and thus would not be relevant to the Threat Satisfaction, there is such variance in the trend that it could not support any 6-month period of offending for the Threat Satisfaction.

⁵¹ See “IFS VP-2025-026586- Firearms incident”; “IFS VP-VP-2025-031867 – Death – Murder/Manslaughter”; “IFS VP- 2025-031050 - Firearms incident”; “IFS VP- 2025-019134 - Firearms incident”: **B028-029**.

⁵² The Incidents of Note include a stabbing in Abbotsford, and the Information Reports include incidents in Collingwood and West Melbourne (outside the Designated Area): **B028-030** (revised redacted version).

⁵³ The results of “ND1-CHARLIE-2025” includes 3 arrests for either or both of possession of controlled/prohibited weapon and possession drug of dependence, the latter of which is not a weapons offence: **B031**.

⁵⁴ See the reference to 167 offences in “Flat/Unit/Apartment”: **B022** (Table 4).

⁵⁵ Without being exhaustive, other means could encompass: police presence and patrol of areas of concern; any other police strategy or intelligence-led operation relying on a (less extensive) exercise of the s 10D(1)(b) power or any other available powers (eg other search powers under ss 10 or 10D of the Weapons Act or any other law).

person would ask why a smaller designated area, which does not include those areas in which no weapons offences occurred, would not effectively prevent or deter violence or disorder involving use of a weapon. The Brief supplies no reasonable answer to that question. No alternative options for the size area are assessed (or even contemplated). Moreover, there is no offence data outside of the proposed area, so the reasonable person also could not assess the proposed area as against a hypothetical larger area by comparing relevant incidents of violence of disorder *inside* as against *outside* that area. In those circumstances, a reasonable person relying on the Brief could not reasonably draw an inference about any counterfactual involving a different size of designated area.

24.5 Time. The Brief did not present any alternatives to a 6-month duration, but there are numerous references in the Brief which indicate that a shorter timeframe would achieve the purpose: (a) the Issues Cover Page indicates the powers are needed especially “over summer including New Years eve and the summer school holidays” where there is “traditionally an increase in related offending” (B001); (b) the specified list of events that the decision-maker is asked to give consideration due to the possible “impact on CBD crowds” (B031) are all scheduled in December 2025; (c) the note of Superintendent Dunstan (B003) refers to the 6-month period and asserts a need for weekly scheduled operations to “ensure implementation complies” with the Weapons Act; (d) that the operation will run “as deemed necessary” within the six-month period (B004); and (e) the reference to “elevated” offences resulting in serious injury in November 2024, January 2025, April 2025 and August 2025, which have “since declined” (B022). In those circumstances, a reasonable person relying on the information contained in the Brief alone could not reasonably draw the inference that a 6-month period of operation is necessary.

25 **No intelligible reasoning:** To the extent the First Respondent engaged in any active reasoning process, it appears that it involved him accepting the correctness of the information set out in the OMNI Support Summary — being the “evidence” said to “justif[y] designation” (B057) — and, based on that information, reasoning to the conclusion that he was satisfied of both criteria in s 10D(1)(b). That line of reasoning is not intelligible because the material contained in the OMNI Support Summary both contained too much and too little information for the First Respondent to reason in that way: see paragraphs 23 to 24 above.

D NON-COMPLIANCE WITH SIZE AND TIME CONDITIONS: GROUNDS 4 AND 5

26 If the precondition in s 10D(1)(b) was satisfied (contrary to Grounds 1 to 3), such that the power in s 10D(1)(b) was *enlivened*, the next issue is whether the exercise of power complied with all of the conditions on its *exercise*. Those conditions include a **size condition** (s 10D(2)) and a **time condition** (s 10D(3)). If one of those conditions is not complied with, the exercise

of the power in s 10D(1)(b) will be invalid. Here, the Declaration does not comply with either the size or the time condition. That does not turn on what was “open” to the Commissioner: cf **CR [10]**. Rather, it depends on the Court’s own assessment of what was “reasonably necessary”, judged on the evidence before it. That follows from s 10D(2) and (3)(a) being cast objectively, in a context where the Commissioner must be subjectively satisfied in relation to those same matters under s 10D(1)(b)(ii).⁵⁶

D.1 Sections 10D(2) and 10D(3) impose conditions

- 27 Whether an act done in breach of a condition is invalid “depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition”.⁵⁷ Here, there is a purpose that non-compliance with either the size or time condition will result in invalidity, having regard “to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition”.⁵⁸
- 28 *First*, s 10D(2) and (3)(a) both read “must not”. The “mere use of imperative language to express a condition” imports no *presumption* that non-compliance would spell invalidity.⁵⁹ But it may support that conclusion. *Gedeon* provides an illustrative example of a similarly structured provision: a power enlivened by a subjective state of mind, conditioned by an objective limit. There, the High Court held that the “must not” formulation “conveys the notion of a contraction in the content of what would be the power otherwise conferred”.⁶⁰
- 29 *Second*, s 10D(2) and (3)(a) concern substantive matters, dictating both where and when the search powers (and other powers) may be exercised. The provisions are important safeguards, the powers themselves being conferred in terms that are relatively unconstrained and authorise significant incursions of fundamental common law and human rights.
- 30 *Third*, that being the nature of the powers, the consequences of holding invalid a declaration made in breach of the size or time condition support the conclusion that non-compliance will result in invalidity. The most immediate consequence would be that the search powers (and other powers) would not be available to be exercised. That must have been Parliament’s intended outcome: otherwise, the position would be that those powers could be exercised at a particular location at a particular point in time, even though it may not be reasonably necessary for those search powers to be exercised at that place or at that time to “effectively respond to the threat of violence or disorder”.

⁵⁶ See *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at [34]-[38] (Gleeson CJ, Gummow, Kirby and Hayne JJ); *M70* (2011) 244 CLR 144 at [103] (Gummow, Hayne, Crennan and Bell JJ).

⁵⁷ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [91] (McHugh, Gummow, Kirby and Hayne JJ).

⁵⁸ *Project Blue Sky* (1998) 194 CLR 355 at [91] (McHugh, Gummow, Kirby and Hayne JJ).

⁵⁹ *Miller v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 278 CLR 628 at [28] (the Court).

⁶⁰ *Gedeon* (2008) 236 CLR 120 at [46] (the Court).

31 *Fourth*, the size and time conditions must be understood in the context of the Necessity Satisfaction in s 10D(1)(b)(ii). As explained in paragraph 12 above, the Necessity Satisfaction requires the Commissioner to make their own assessment of the size and duration of a declaration. In that context, the purpose of the conditions is clear: the decision-maker is to be subjectively satisfied that the declaration is “necessary” (including as to size and duration), but the court is to supervise and enforce the statutory limits on geographic and temporal scope in s 10D(2) and (3) by application of the well-recognised “reasonably necessary” criterion.⁶¹

D.2 Grounds 4 and 5: breach of size and time conditions

32 Under Grounds 4 and 5, the questions for the Court to determine are whether the Designated Area is “*larger* than is reasonably necessary to enable police officers or protective services officers to effectively respond to the threat of violence or disorder”, or whether the 6-month length of the Declaration is “*longer* than is reasonably necessary to enable police officers or protective services officers to effectively respond to the threat of violence or disorder”.

33 The “reasonably necessary” criterion in s 10D(2) and (3)(a) imports a requirement of proportionality.⁶² The precise content of such a requirement depends on the context. The Weapons Act “does not specify how that test is to be applied, nor what countervailing values and interests are to be balanced against the aims” of enabling police officers or protective services officers to effectively respond to the identified threat of violence or disorder.⁶³ In those circumstances, s 32(1) of the Charter supplies that content:⁶⁴ the size and duration of a designated area must be compatible with human rights, in the sense that those rights must be subject to “only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom”: Charter, s 7(2).

34 Even absent the Charter, where what is involved is an infringement on common law rights, “reasonably necessary” should be understood as inviting an inquiry into whether the size and duration of the designated area “imposes a greater degree of restraint than the reasonable protection of the public requires”.⁶⁵ Here, that inquiry may be resolved by asking: *first*, whether the identified threat does not exist or is inadequate to warrant the designation; *second*, whether the declaration would not be effective in responding to that threat; or *third*, whether there are “alternative, effective measures available to achieve the same object, but which have less restrictive effects”.⁶⁶

⁶¹ See *Thomas* (2007) CLR 307 at [20] (Gleeson CJ).

⁶² *Wotton v Queensland* (2012) 246 CLR 1 at [91] (Kiefel J), see also at [32] (French CJ, Gummow, Hayne, Crennan and Bell JJ). See further *Hinch* (2011) 243 CLR 506 at [72] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Victoria v Sportsbet Pty Ltd* (2012) 207 FCR 8 at [230]-[231] (Kenny and Middleton JJ).

⁶³ See *Schubert v Wanganui District Council* [2011] NZHC 48; [2011] NZAR 233 at [138] (Clifford J).

⁶⁴ See *Schubert* [2011] NZHC 48 at [139]-[151] (Clifford J). See also *Cotterill v Romanes* [2023] VSCA 7; 413 ALR 360 at [110]-[111] (the Court).

⁶⁵ *Thomas* (2007) 233 CLR 307 at [22] (Gleeson CJ). See also *Palmer* (2021) 272 CLR 505 at [136]-[138] (Gageler J).

⁶⁶ *Palmer* (2021) 272 CLR 505 at [51] (Kiefel CJ and Keane JJ), [142] (Gageler J); *Wotton* (2012) 246 CLR 1 at [89] (Kiefel J); *Jankovic* [2020] NSWCA 31; (2020) 281 A Crim R 357 at [55]-[62] (Barrett AJA), also [9] (White JA).

- 35 *No identified threat.* The size must be no larger, and the time no longer, than reasonably necessary to effectively respond to an identified “*threat of violence or disorder*” involving the use of a weapon. There is no identification of a sufficiently specific threat in the Brief: see paragraph 23 above. On reviewing the Brief (including OMNI Support Summary), the only reasonable inference available to be drawn by the Court is that there is no identified threat spanning the size of the Designated Area for a period of 6 months.
- 36 *No efficacy.* The size must be no larger, and the time no longer, than reasonably necessary to “*effectively respond*” to the identified threat. The Brief does not demonstrate that the “search powers” are an effective response to any identified threat: see paragraph 24.1 above. Annual reporting under s 10B(bd) of the Weapons Act reveals the general inefficacy of no-suspicion searches (including when compared to reasonable suspicion searches). In the 2024-2025 financial year, no prohibited, dangerous or controlled weapons were found from 10G searches (no suspicion) despite 35 declarations being made under 10D and one unplanned declaration under s 10E.⁶⁷ By contrast, 820 such weapons were found from searches under ss 10 and 10AA (reasonable suspicion) in that period.⁶⁸
- 37 *Alternatives.* Here, the issue of less restrictive measures can be approached by the Court considering whether a smaller designated area, or a declaration of a shorter duration, could also have been effective to respond to the identified threat of violence or disorder. If it could, then it will follow that there will be a lack of “reasonably necessity”.⁶⁹
- 37.1 *Size.* The Designated Area covers an area including the entirety of the Melbourne CBD, East Melbourne and South Bank, as well as parts of West Melbourne, Carlton, Docklands, South Yarra and South Melbourne. According to the Brief, the rationale for designating “Melbourne and Vicinity” was to “allow for resources to be deployed to specific areas at the discretion of the Police Commander based on events, incidents and contemporary intelligence”: **B002**. That rationale reveals ignorance of the size condition, as the selected area was not calibrated to any identified threat of violence or disorder, but rather was set larger than necessary to enable police achieve operational gains in general policing and responding to future identified threats in more specific locations. The size is not calibrated to any hot spots of offending or even to any other areas in which the data shows weapons-related offending. On the information available, a smaller designated area that was calibrated to those areas could have been made. That was an available alternative that would be effective.
- 37.2 *Time.* The Declaration was made for the maximum 6-month duration. According to the Brief, this was based on intelligence indicating “ongoing and consistent relevant

⁶⁷ See Victoria Police Annual Report 2024-2025 at 41-42.

⁶⁸ Victoria Police Annual Report 2024-2025 at 41.

⁶⁹ See *Palmer* (2021) 272 CLR 505 at [51] (Kiefel CJ and Keane JJ)

offending within the proposed designated area throughout the proceeding 12 months”. That intelligence appears to be a reference to the OMNI Support Summary and is said to “fully support” the Declaration: **B002**. The data and analysis in that document are largely irrelevant to the Court’s determination of reasonable necessity for the same reasons it is largely irrelevant to forming the Threat and Necessity Satisfaction: see paragraphs 23-24 above. There are numerous references throughout the Brief that suggest the period of operation is longer than needed: see paragraph 24.5 above. There are also references to potential identified threats of violence or disorder over summer: see paragraph 24.5 above. A declaration with a shorter period of operation, calibrated to those identified threats, could have been made. That would have been an available and effective alternative to the Declaration that has been purportedly made.

E NON-COMPLIANCE WITH IMPLIED CONDITIONS: GROUNDS 6 AND 7

E.1 Ground 6: improper purpose

- 38 A statutory power must be exercised for the “purpose” for which it was granted, and not for an “ulterior purpose”.⁷⁰ The purported exercise of power will be vitiated if the ulterior purpose is a “substantial” purpose; it need not be the “sole” purpose.⁷¹ The ultimate purpose of the power in s 10D(1)(b) is apparent on the terms of the statute: to authorise the exercise of the search powers, so as to prevent or deter the occurrence of likely violence or disorder involving weapons. That specific purpose is the *only* purpose for which it can be exercised. However, the Brief reveals other substantial purposes of the First Respondent in exercising the s 10D(1)(b) power, which are all ultimately directed towards “convenience”.
- 39 The Brief demonstrates that the power in s 10D(1)(b) was exercised for the purpose of establishing a standing authorisation for officers to exercise the search powers over the Designated Area for six months, allowing resources to be deployed at specific areas at the discretion of the Police Commander “based on events, incidents and contemporary intelligence” (with a proposal for weekly scheduled operations to “ensure implementation complies” with the statutory requirements) (**B002-003**). This is revealing: it suggests the purpose of this particular exercise of the s 10D(1)(b) power was (or was also) to provide for administrative and operational efficiency for police — designating a large area for the statutory maximum period to create the flexibility for shorter, smaller operations to be conducted within the area when deemed necessary in future, based on (as yet unknown) intelligence, without having to make a new declaration under s 10D each time a new identified threat or the necessity arises.

⁷⁰ *Thompson v Randwick Corporation* (1950) 81 CLR 87 at 106 (Williams, Webb and Kitto JJ).

⁷¹ *Samrein v Metropolitan Water Sewerage and Drainage Board* (1982) 56 ALJR 678 at 679 (the Court).

40 That more general purpose of convenience can be inferred from the Operation Order, which was “reviewed” by the First Respondent before signing the Application: **B057**.

40.1 The Operation Order reveals purposes directed not at preventing or deterring violence or disorder involving weapons, but at broader policing and public relations objectives unconnected to that statutory purpose. Under the heading “Mission Critical Issues”, equal importance is given to “creating a safe, orderly secure environment by removing illegal weapons” (which might support the proper purpose) alongside “providing high visible presence” (which does not require a designated area), “reducing crime” generally (not weapon-specific), and “increasing public confidence” (unrelated to preventing weapons-based violence).

40.2 The three stated "Objectives" are similarly revealing: only one supports the proper purpose (“Detect and seize weapons to reduce potential for community harm from weapon and violent disorder offences”), while the other two relate to general policing matters foreign to the Act (“Help public feel safe by providing a visible and accessible police presence" and "Provide a first point of contact for persons experiencing social, health, and/or welfare challenges”).

40.3 Under “Measures of Success”, the document identifies both measures relevant to the proper purpose (“Prevent offending”, “Detect and apprehend offenders”, “Preserve the peace” and “Reduce serious & violent crime”) and measures directed to objectives unrelated to preventing weapons-based violence or disorder (“Increase community trust and confidence”, “community first through service excellence”, and “Our people are high performing”).

41 These purposes — operational efficiency, general crime reduction, visible policing, public confidence building, and social service provision — are foreign to s 10D(1)(b): cf **CR [11]**. They reveal that the power was exercised substantially for an improper purpose, which could reasonably be characterised as a general purpose of convenience.

E.2 Ground 7: unreasonableness

42 Ground 7 assumes that the power in s 10D(1)(b) was enlivened (contrary to Grounds 1 to 3) and that the other conditions were otherwise complied with (contrary to Grounds 4 to 6), and contends that it was nonetheless “unreasonable” for the First Respondent to exercise the power in the way that he did⁷² — noting the First Respondent “may” choose not to exercise the power, even if he forms the requisite state of belief.⁷³ In doing so, Ground 7 focuses on the “outcome” of the exercise of the power, rather than any specific error.⁷⁴

⁷² See *Graham* (2017) 263 CLR 1 at [57] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

⁷³ See *Interpretation of Legislation Act 1984* (Vic), s 45(1).

⁷⁴ *Djokovic* (2022) 289 FCR 21 at [30] (the Court).

43 The standard of legal unreasonableness is informed by “[t]he terms, scope and policy of the statute and the fundamental values that attend the proper exercise of power – a rejection of unfairness, of unreasonableness and arbitrariness; equality; and the humanity and dignity of the individual”.⁷⁵ In the context of the Weapons Act, that standard must be informed by the common law and *Charter* rights to be affected by exercise of the search powers. That undoubtedly high standard of legal unreasonableness has been breached by the outcome in this case, taking into account all of the matters identified in Grounds 1 to 6 above.

F THE CHARTER: GROUNDS 8 AND 9

44 The First Respondent is a “public authority” for the purposes of the *Charter*.⁷⁶ And the Declaration is not a subordinate instrument as it is not otherwise of a legislative character.⁷⁷ Accordingly, under s 38(1) of the Charter, the First Respondent was obliged: *first*, not to act in a way incompatible with human rights, and *second*, to give proper consideration to relevant human rights.⁷⁸ The First Respondent breached both obligations.

F.1 Ground 8: incompatibility with human rights

45 **Limitations:** Charter rights are limited by any act of a public authority that has “a *potential effect* on the rights of a class of persons”⁷⁹: cf **CR [8]**. Accordingly, the following rights of persons residing in, working in, travelling through and visiting the Melbourne CBD and Vicinity were (and are) limited by the First Respondent making the Declaration.

46 *Right to privacy (s 13)*: The Declaration interferes with the right to privacy of persons in two ways: by empowering searches of persons, their possessions and their vehicles; and by empowering police to request the removal of face coverings.⁸⁰ Addressing each of the internal limitations in 13(a), those interferences are both: **(a)** “unlawful”, because the making of the Declaration infringed an applicable law,⁸¹ being the conditions of validity under the Weapons Act; and **(b)** “arbitrary”, in the sense that the interferences “are capricious, or [will result in] ... conduct which is unpredictable, unjust or unreasonable in the sense of not being proportionate to the legitimate aim sought”,⁸² for the same reasons as set out above for why the time and size conditions were breached.

⁷⁵ *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 at [9], see also [5]-[6] (Allsop CJ).

⁷⁶ See Charter, s 4(1)(d); *Brown v Victoria (No 3)* [2025] VSC 765 at [80] (Harris J).

⁷⁷ See *Interpretation of Legislation Act 1984* (Vic), s 38; Weapons Act, s 10D(10). Cf *Kerrison v Melbourne City Council* (2014) 228 FCR 87 at [182], [187] (the Court).

⁷⁸ *Baker (a pseudonym) v DPP* [2017] VSCA 58 at [48] (Tate JA; Maxwell P and Beach JA agreeing).

⁷⁹ *Certain Children (No 2) v Minister for Families and Children (No 2)* (2017) 52 VR 441 at [190], see also at [195]-[196] (John Dixon J). See also *Berih v Homes Victoria (No 4)* [2025] VSC 169 at [204]-[205] (Richards J) and *Mallard v Homes Victoria* [2025] VSCA 339 at [158] (the Court); cf **CR [13]**.

⁸⁰ As to searches, see *Gillan v UK* (ECHR, Fourth Section, App No 49458/06, 28 June 2010) at [61]-[65]; *Roberts v Commissioner of Police* [2015] UKSC 79 at [3] (Baroness Hale and Lord Reed JSC). As to face coverings, see *DPP v Kaba* (2014) 44 VR 526 at [90], [104], [119], [132] (Bell J); *Glukhin v Russia* (ECHR, Third Section, App No 11519/20, 4 October 2023) at [66]. See also UN High Commissioner for Human Rights, “Impact of new technologies on the promotion and protection of human rights in the context of assemblies, including peaceful protests” (A/HRC/44/24) at [33]-[34].

⁸¹ *Thompson v Minogue* (2021) 67 VR 301 at [49] (the Court).

⁸² *Minogue* (2021) 67 VR 301 at [55] (the Court).

- 47 *Protection of children (s 17)*: The right of children to protection in their best interests, given their particular vulnerability, is limited because the powers apply fully to children with little modification.⁸³
- 48 *Rights to freedom of movement (s 12) and liberty (s 21)*: Persons may be stopped in a public place, and detained for so long as is reasonably necessary to conduct the search.⁸⁴ Depending on the duration and manner of implementation, the effect on an individual may range from a temporary restriction on movement falling short of physical detention (s 12) to physical detention (s 21).⁸⁵ Persons wearing face coverings may also be directed to leave the Melbourne CBD and Vicinity under s 10KA(1), limiting their right to “establish themselves in a place of their choice” and enjoy this right through “wanting to move *or to stay* in a place”.⁸⁶ More generally, the Declaration may impair the willingness of members of the public to enter and move within the Melbourne CBD and Vicinity.⁸⁷
- 49 *Rights to freedom of expression (s 15) and peaceful assembly (s 16)*: the search powers and face covering power can be exercised against persons engaged in free expression or peaceful assembly (for example, a protest),⁸⁸ thereby interfering with expression or assembly.
- 50 *Right to equality (s 8) and cultural rights (s 19)*: the search powers and face covering power are likely to be particularly intrusive and disadvantageous to:
- 50.1 persons with protected attributes under s 6 of the *Equal Opportunity Act 2010* (Vic), including race,⁸⁹ religious belief or activity (see paragraph 50.2 below), age (see paragraph 47 above), and disability (such as persons with immunocompromising conditions and persons with metal implants) (s 8(2), (3)).⁹⁰ This indirect discrimination is not “reasonable”, because the disadvantage is not proportionate to the result sought to be achieved. The lack of proportionality described below may be more pronounced in respect of such persons or groups by reason of the discriminatory impact of the Declaration on them and their protected attributes as compared to the rights-limiting impacts experienced by the general public.⁹¹

⁸³ See Hansard (LC), 27 November 2009 at 5788; 24 June 2010 at 3125; 6 March 2025 at 851, 854; 18 March 2025 at 979-980; 20 November 2025 at 156-157. See also *Certain Children (No 2)* (2017) 52 VR 441 at [273]-[274] (John Dixon J). Since the Declaration was made, the Weapons Act was amended to further facilitate searches of children: *Justice Legislation Amendment (Police and Other Matters) Act 2025* (Vic), Pt 3, inserting Sch 1, cl 11(4A) and (4B).

⁸⁴ Weapons Act, ss 10G(4), 10GA(5) and 10H(2).

⁸⁵ See *Gillan* (ECHR, 2010) at [56]-[57] (the Court); *Kaba* (2014) 44 VR 526 at [59], [78], [97], [101], [110], [112], [118] (Bell J); *Brown (No 3)* [2025] VSC 765 at [512]-[513] (Harris J).

⁸⁶ *Brown (No 3)* [2025] VSC 765 at [513] (Harris J).

⁸⁷ See Hansard (LC), 20 November 2025 at 151.

⁸⁸ See Human Rights Committee, General Comment No. 37 (2020) on the right of peaceful assembly (art 21, ICCPR) at [23], [60]. See also *Kerrison* (2014) 228 FCR 87 at [232]-[233] (the Court); *Gillan* (ECHR, 2010) at [7]-[9], [86].

⁸⁹ There is a clear risk of arbitrariness in giving such a broad discretion: *Gillan* (ECHR, 2010) at [85]; and no obvious means of enforcing the requirement in the VPM (B009) that people not be selected solely based on their race.

⁹⁰ Charter, s 3(1) (definition of discrimination). See also Hansard (LC), 20 November 2025 at 147.

⁹¹ *Equal Opportunity Act 2010* (Vic), s 9(3). See also *DPP v Natale* [2018] VSC 339 at [85]-[90] (Bell J).

50.2 persons engaged in religious or cultural practises that involve the carrying of a weapon (with lawful excuse or exemption under the Weapons Act) or the wearing of a face covering or religious headwear that may be required to be removed as a result of a search or a request under s 10KA (s 19).⁹²

51 **Justification:** Once it is established that a human right has been limited, the onus rests upon the public authority to prove that the limitation is demonstrably justified under s 7(2) of the *Charter*, and therefore, “compatible” with the human right.⁹³ The requirement that the limitation be “demonstrably justified” involves considerations of proportionality between the limitation and its purpose, inviting “a greater degree of scrutiny” than is traditionally undertaken by the Court in a judicial review proceeding.⁹⁴ Given the onus, the Applicants will address justification in more detail in their reply and orally. In short, the limitations on rights cannot be demonstrably justified because the Declaration was: (a) “unlawful”, by reason of Grounds 1 to 7; and (b) in any event, was not proportionate to its purpose, because the Declaration (including its size and duration) was not reasonably necessary for the reasons set out above in Grounds 3, 4 and 5.

F.2 Ground 9: no proper consideration of human rights

52 The procedural limb did not require the First Respondent to undertake a “sophisticated legal exercise” (CR [16]), but did require him to: “(a) understand in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision; (b) seriously turn their mind to the possible impact of the decision on a person’s human rights and the implications for the affected person; (c) identify the countervailing interests or obligations; and (d) balance competing private and public interests as part of the exercise of justification”.⁹⁵ Whether the obligation is satisfied must be decided objectively.⁹⁶ The consideration of relevant human rights must be one of substance rather than tokenistic.⁹⁷ The obligation to give proper consideration to a relevant human right arises where a potential decision “engages” the right — that is, that it may apparently limit the right.⁹⁸

53 The Court can infer that the First Respondent did not “properly consider” human rights, because (1) the Brief did not inform him of his obligation to do so;⁹⁹ and (2) the “**Human Rights Risk Assessment**” (B044) was plainly insufficient to assist him:

⁹² See *Hansard* (LC), 20 November 2025 at 150.

⁹³ *Minogue* (2021) 67 VR 301 at [48] (the Court). Evidence ordinarily needs to be adduced: [74].

⁹⁴ *Minogue* (2021) 67 VR 301 at [71]-[72] (the Court).

⁹⁵ *Mallard* [2025] VSCA 339 at [213] (the Court), and the authorities there cited.

⁹⁶ *Minogue* (2021) 67 VR 301 at [90] (the Court).

⁹⁷ *Minogue* (2021) 67 VR 301 at [91] (the Court).

⁹⁸ *Berih* [2025] VSC 169 at [139] (Richards J).

⁹⁹ The application requirement stated “Human Rights Risk Assessment attached and reviewed”: B057.

- 53.1 The Assessment has been performed only for no suspicion searches (and related seizure of weapons). There is no mention of the other powers that officers can exercise in the Designated Area if the Declaration is made, including the face covering power. The absence of any human rights assessment on these matters is sufficient to establish breach of the proper consideration obligation.
- 53.2 In relation to no suspicion searches, the Assessment wrongly stated various rights were “not limited”, including: **(a)** the equality right (s 8) and cultural rights (s 19), based on the incorrect premise that the Weapons Act “states that persons must be selected at random” **(B045)** and failing to consider that all searches (even random searches) may be particularly intrusive or disadvantageous to persons with certain protected attributes or who carry weapons for religious or cultural reasons; **(b)** the rights to freedom of expression and peaceful assembly (ss 15 and 16); and **(c)** the right of children to protection in their best interests (s 17), on the misunderstanding that s 17 is concerned only with a person’s right to protect their family and children.
- 53.3 Where limits were identified, the Assessment failed to explain how the rights were limited, other than to state, in effectively the same terms for each right, that authority is given to police to stop and search persons.
- 53.4 The Assessment did not consider or explain any justification for limitations on rights, such as by identifying the competing public and private interests in deciding whether to make the Declaration (including what size and duration), and considering how those interests might be weighed or balanced.¹⁰⁰ Instead, it set out a “suggested risk mitigation strategy” for conducting the operation, on the assumption that the proposed Declaration would be made.

54 The Respondents assert the Human Rights Risk Assessment “is not a complete record of the Assistant Commissioner’s consideration of Charter rights”: **CR [16]**. If the Respondents file evidence that supports that assertion, the Applicants will address it in reply or orally.

G CONSTITUTIONAL VALIDITY OF SECTION 10KA(1)

G.1 Section 10KA(1) insufficiently constrained by its terms

55 Because s 10KA(1) confers a statutory power, whether it contravenes the implied freedom 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”.¹⁰¹ That will be the case only if the terms of s 10KA(1) are “sufficiently constrained” such that the “requisite standard of justification” will necessarily be satisfied “across the range of potential outcomes”.¹⁰² The

¹⁰⁰ *Bare* (2015) 48 VR 129 at [285] (Tate JA).

¹⁰¹ See *Comcare v Banerji* (2019) 267 CLR 373 at [96], also at [50], [53] (Gageler J).

¹⁰² *Palmer* (2021) 272 CLR 50 at [127] (Gageler J), see also at [201]-[202], [208] (Gordon J), [227]-[228] (Edelman J); *Cotterill* (2023) 413 ALR 360 at [76]-[87] (the Court); and generally Stellios, “*Marbury v Madison*: Constitutional limitations and statutory discretions” (2016) 42 *Australian Bar Review* 324 at 331-335.

resolution of that issue depends on: *first*, whether s 10KA(1) may be exercised to impose an “effective burden” upon political communication; *second*, whether any such burden can be “explained” by the pursuit of a “legitimate” purpose; and *third*, whether any such burden is “justified”.¹⁰³ Both the legal operation and the practical effect of the impugned law must be examined.¹⁰⁴ In doing so, the Court will likely need to find “constitutional facts”, drawing on such probative material as is available, unconstrained by the rules of evidence.¹⁰⁵

56 **Burden:** “Effectively burden” means “nothing more complicated than that the effect of the law is to prohibit, or put some limitation on, the making or the content of political communications”.¹⁰⁶ It is also useful to consider the nature and extent of the burden at the outset, because that informs the degree of justification that is required.¹⁰⁷ The exercise of the power in s 10KA(1) will burden the implied freedom in two scenarios, both of which are raised by the circumstances of the Applicants: cf **CR [18]**.

57 *First*, where the power is exercised in respect of a person who is within the Designated Area and is wearing a face covering *as a form of political communication*. Mr Zable’s experience shows that the potential exercise of the power in this first scenario is not far-fetched. Police have previously requested that he remove his mask within a designated area.¹⁰⁸ In this first scenario, the exercise of the power will have the direct and immediate effect of *prohibiting* the making of that political communication at any place within the Designated Area. That burden is also substantial, having regard to the wearing of masks as a powerful form of symbolic expressive conduct,¹⁰⁹ and the history in Australia and globally of using face coverings as political communication.¹¹⁰ Mr Zable is part of that history: he has been wearing his Greedozer costume and mask for 45 years at protests in Melbourne CBD, other places in Australia and globally.¹¹¹

58 *Second*, where the power is exercised in respect of a person who is within the Designated Area and engaged in political communication (for example, attending a protest) and is also wearing a face covering (which may or may not be political communication itself). Again, the potential exercise of the power in this way is not far-fetched: Parliament expressly contemplated that

¹⁰³ See *McCloy v NSW* (2015) 257 CLR 178 at [126]-[132] (Gageler J); *Farmer v Minister for Home Affairs* (2025) 99 ALJR 1408 at [39]-[40], [53]-[54], [56]-[57] (Gageler CJ, Gordon and Beech-Jones JJ), [165] (Gleeson J).

¹⁰⁴ See *Farmer* (2025) 99 ALJR 1408 at [42], [48] (Gageler CJ, Gordon and Beech-Jones JJ), [193] (Gleeson J)

¹⁰⁵ See *Vanderstock v Victoria* (2023) 279 CLR 333 at [153] (Kiefel CJ, Gageler and Gleeson JJ), [923] (Jagot J); *Lendlease Building Contractors Pty Ltd v ABCC (No 2)* [2022] FCA 192 at [159]-[184] (Snaden J).

¹⁰⁶ *Farmer* (2025) 99 ALJR 1408 at [40] (Gageler CJ, Gordon and Beech-Jones JJ), [194] (Gleeson J).

¹⁰⁷ See *Farmer* (2025) 99 ALJR 1408 at [40], [44], [57], [61] (Gageler CJ, Gordon and Beech-Jones JJ), [165] (Gleeson J), [249]-[251], [258] (Jagot J).

¹⁰⁸ Zable Affidavit at [19]-[23], see also at [27]-[29].

¹⁰⁹ As is evident from the images in Schwartz Affidavit, SS-1 to SS-14 (and as common experience confirms), face masks have a “communicative power ... [that] lies in the generation of images capable of attracting the attention of the public and of politicians”: see *Brown* (2017) 261 CLR 328 at [191] (Gageler J) in respect of on-site protests .

¹¹⁰ Schwartz Affidavit at [5]-[20].

¹¹¹ Zable Affidavit at [9], see generally at [6]-[17].

the power would be exercised against persons at protests.¹¹² In this second scenario, the exercise of the power will have the direct and immediate effect of putting some *limitation* on the making of the political communication in the Designated Area — the person’s ability to continue participating in their chosen form of political communication (a public demonstration) will be conditional upon the person removing their face covering. That burden is also substantial, noting that protests are “oldest and most orthodox form of public expression of political dissent in a representative democracy”.¹¹³

59 The burden imposed by the exercise of power in either of those scenarios is supplemented by the prospect that persons who wish to wear a face covering, either as a form of political communication or while engaging in political communication, may be deterred from doing so because of the possibility that the power may be exercised against them.¹¹⁴

60 **Purpose:** The second question involves identifying the purpose of the law and assessing whether that purpose is “legitimate”, in the sense of “compatible with the system of representative government for which the Constitution provides”.¹¹⁵ The purpose of the law is that which the law is “designed to achieve in fact”.¹¹⁶ It is to be identified by reference to the text and context (understood widely) of the provision.¹¹⁷ On that approach, the Applicants accept that the purposes asserted by the Respondents (**CR [19]**) are “plausible” and “legitimate”, such that the analysis can progress to the final stage.¹¹⁸

61 **Justification:** The third question is whether “the means (the manner in which the law pursues that purpose) are reasonably appropriate and adapted to advance that purpose in a manner that is compatible with the maintenance of the constitutionally prescribed system of government”.¹¹⁹ The burden being direct and substantial, the Respondents¹²⁰ must establish a “compelling justification”.¹²¹ That requires any burden imposed by s 10KA(1) to be “no more than is reasonably necessary” to achieve the identified purpose.¹²² Here, the Respondents cannot discharge that persuasive onus, because the preconditions for the exercise of the

¹¹² See *Hansard* (LC) 9 May 2017 at 1902-1904.

¹¹³ *Clubb* (2019) 267 CLR 171 at [164] (Gageler J); *Lees v NSW* [2025] NSWSC 1209 at [126] (Mitchelmore J).

¹¹⁴ See *Brown* (2017) 261 CLR 328 at [77]-[78] (Kiefel CJ, Bell and Keane JJ). See also *Talley v California* 362 US 60 (1960) at 64 (Black J, for the Court); *Glukhin* (ECHR, Third Section, App No 11519/20, 4 October 2023) at [88].

¹¹⁵ *Farmer* (2025) 99 ALJR 1408 at [53] (Gageler CJ, Gordon and Beech-Jones JJ).

¹¹⁶ *Farmer* (2025) 99 ALJR 1408 at [54] (Gageler CJ, Gordon and Beech-Jones JJ).

¹¹⁷ See *Ravbar v Commonwealth* (2025) 99 ALJR 1000 at [41]-[45] (Gageler CJ), [117]-[120] (Gordon J), [172]-[174] (Edelman J), [370] (Jagot J), [459] (Beech-Jones J).

¹¹⁸ See *Brown* (2017) 261 CLR at [216] (Gageler J).

¹¹⁹ *Farmer* (2025) 99 ALJR 1408 at [56], see also at [39] (Gageler CJ, Gordon and Beech-Jones JJ), [243] (Jagot J).

¹²⁰ *Unions (No 3)* (2023) 277 CLR 627 at [31] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ).

¹²¹ See *Farmer* (2025) 99 ALJR 1408 at [39], [57] (Gageler CJ, Gordon and Beech-Jones JJ), [243] (Jagot J); *Babet v Commonwealth* (2025) 99 ALJR 883 at [48] (Gageler CJ and Jagot J), [250] (Beech-Jones J).

¹²² See *Tajjour v NSW* (2014) 254 CLR 508 at [151] (Gageler J); *Brown* (2017) 261 CLR 328 at [200]-[206] (Gageler J); *Clubb* (2019) 267 CLR 171 at [183]-[185] (Gageler J); *Banerji* (2019) 267 CLR 373 at [97] (Gageler J).

s 10KA(1) are not “so tightly constrained” as to protect against unjustified burdens of the implied freedom.¹²³ That is for at least three reasons (further reasons may arise in reply).

62 *First*, the terms of s 10KA(1) do not ensure any degree of proportionality between the exercise of the power and the identified purpose: cf CR [20]. Indeed, the power may be exercised in circumstances where it is incapable of realising that purpose (and such exercises will lack a “rational connection” with that purpose).¹²⁴ The power may be exercised against persons who pose no threat of any violence or disorder (eg, peaceful protestors), because there is nothing in the terms of s 10KA(1) that ensure it can only be exercised against “persons who threaten violence while expressing their views”.¹²⁵

62.1 It cannot be assumed that a person who is wearing a face covering for the purpose of concealing their identity (s 10KA(1)(a)(i)) is a person who poses a risk of violence or disorder. There are perfectly valid reasons for why a person may wish to conceal their identity while engaging in political communication. For example, as Mr Zable explains, the face mask component of the Greedozer costume is *part* of the political communication and is also about maintaining anonymity, ensuring the focus remains on that political communication and does not shift to the identity of the wearer.¹²⁶ A person may wish to maintain anonymity for various other valid reasons at a protest,¹²⁷ including to protect their right to privacy,¹²⁸ to avoid unwarranted surveillance,¹²⁹ or to prevent them being “doxxed” or harassed.¹³⁰

62.2 Nor can it be assumed that a person who is wearing a face covering to protect themselves from the “effects of crowd-controlling substances” (s 10KA(1)(a)(ii)) is a person who poses a risk of violence or disorder. The term “crowd-controlling substances” is not defined, but it is clear that Parliament was primarily concerned with face coverings worn “to shield the wearer from capsicum [OC] spray”.¹³¹ But the use of the term “crowd-controlling substances” is a misnomer; police cannot lawfully deploy OC spray for the purpose of controlling crowds (that is, for police tactical objectives such as maintaining

¹²³ *Palmer* (2021) 272 CLR 505 at [208] (Gordon J).

¹²⁴ See *Banerji* (2019) 267 CLR 373 at [33] (Kiefel CJ, Bell, Keane and Nettle JJ). See also *McCloy* (2015) 257 CLR 178 at [133] (Gageler J).

¹²⁵ Hansard (LC) 9 May 2017 at 1902.

¹²⁶ Zable Affidavit at [10]-[11].

¹²⁷ See *McIntyre v Ohio* 514 U.S. 334 (1995) at 341-342 (Stevens J, for the Court).

¹²⁸ A human right recognised under the *Charter* as including “the right of the individual to determine for himself when, how and to what extent he will release personal information about himself”, particularly information about political activities or beliefs: *Kaba* [2014] VSC 52 at [119] (Bell J).

¹²⁹ Whether by private persons or entities, or Australian or foreign governments: see Schwartz Affidavit at [26]-[29]. See also *Glukhin* (ECHR, Third Section, App No 11519/20, 4 October 2023) at [35].

¹³⁰ Schwartz Affidavit at [21], [24], [29]. A person may fear retaliation or reprisals as a result of being identified at a protest, for example from employers, counter-protestors or extremist groups. Ms Onus Browne has worn facemasks at protests to protect themselves from being targeted or identified by neo-Nazis: Onus Browne Affidavit at [16]. See also Affidavit of Danielle **Roubin** (7 January 2026) at [9]-[10].

¹³¹ Hansard (LC) 9 May 2017 at 1904.

police lines or making space);¹³² rather, OC spray is a use of force, a weapon with “serious debilitating physical and psychological effects”¹³³, and may only be used with lawful justification.¹³⁴ In a crowd, the use of OC spray may harm persons *other* than the intended target,¹³⁵ including peaceful protesters who pose no risk of violence or disorder.

63 *Second*, apart from purposes relating to concealment of identity and crowd controlling substances, there are a range of other valid reasons that a person may wish to wear a face covering while engaging in political communication — for example, to protect their own health and safety;¹³⁶ to protect the health of others;¹³⁷ or to observe or practise their religion or culture. Those possibilities are not fully accounted for by the terms of s 10KA(1).

63.1 That is a problem because, in its “deployment of a possibly mistaken, albeit reasonable, belief of a police officer as the mechanism by which it operates”, the power may also lawfully be exercised against persons who wear face coverings primarily for those *other* valid purposes, in effect terminating the protest activity.¹³⁸ That would be so even where the officer’s mistaken belief is unreasonable, because it is not practically possible for such a person to resist a direction and test in court the reasonableness of the officer’s belief, in time to rejoin the protest.¹³⁹

63.2 That prospect of a police officer forming a mistaken belief is elevated by the nature of the belief that the police officer is required to form — by reference to the reason or purpose for which the person is “primarily” wearing the face covering. In the real world, a person may wear a face covering for a combination of reasons, without any clear “primary” reason or purpose — for example, a person may wear sunglasses because they wish to protect their eyes from the sun, and also to conceal their identity or to protect against incidental exposure to OC spray. Further, at any given protest, one person’s reasons for wearing a face covering may well differ from the person beside them (and the reasons will be unlikely to be apparent from their appearance). The latitude given to police in forming their belief and exercising the discretion¹⁴⁰ allows for selective or discriminatory use of the power against protestors, and, potentially, against protestors expressing particular viewpoints.

¹³² *Brown (No 3)* [2025] VSC 765 at [175(b), (c)].

¹³³ See *Brown (No 3)* [2025] VSC 765 at [175(a)] (Harris J).

¹³⁴ See eg, *Crimes Act*, ss 322K (use of force in self-defence); 462A (to prevent an indictable offence or to effect an arrest). See *Brown (No 3)* [2025] VSC 765 at [147] (Harris J).

¹³⁵ See *Brown (No 3)* [2025] VSC 765 at [175(d)] (Harris J).

¹³⁶ Schwartz Affidavit at [30]-[31]; Roubin Affidavit at [9]-[10].

¹³⁷ In the past, participants at the Invasion Day rallies have been encouraged to wear face masks to protect attendees from illnesses such as COVID-19, especially people with disability and Elders: Onus Browne Affidavit at [13].

¹³⁸ *Brown* (2017) 261 CLR at [79] (Kiefel CJ, Bell and Keane JJ), also at [225]-[227] (Gageler J), [292]-[295] (Nettle J).

¹³⁹ See *Brown* (2017) 261 CLR at [79]-[80] (Kiefel CJ, Bell and Keane JJ).

¹⁴⁰ The statute does not require police to make enquiries of the person wearing the face covering before exercising the power, or to state the basis of their belief.

64 *Third*, there are obvious, more targeted alternatives that would serve the same purpose, but with less restrictive effects on the freedom.¹⁴¹ For example, a power dependent on a reasonable belief that the person wearing the face covering has committed an offence or intends to commit an offence (as is soon to be inserted into the *Summary Offences Act 1966* (Vic)),¹⁴² or on a reasonable suspicion the person may have committed an offence or is likely to commit an offence (as exists in New South Wales).¹⁴³ It must also be recognised that s 10KA(1) sits alongside s 10KA(2), which empowers police officers to direct a person to leave the designated area if they reasonably believe the person intends to engage in conduct that would constitute an offence under ss 195H (affray) or 195I (violent disorder) of the *Crimes Act 1958* (Vic), as well as the powers in ss 10G and 10GA to search a person for weapons without need for any reasonable belief or suspicion.¹⁴⁴

G.2 Section 10KA(1) must be “read down” to save its validity

65 On the analysis above, s 10KA(1) confers a power that is “insufficiently controlled” by its terms to ensure that it can only be exercised in a manner that is consistent with the implied freedom.¹⁴⁵ In particular, if the power is exercised in either of the two scenarios identified in paragraphs 57 and 58 above, it will impose an unjustified burden on the freedom. That being so, it must be “read down” (or, perhaps more precisely, properly construed or partially disapplied) to permit only those exercises of power that are consistent with the implied freedom.¹⁴⁶ In the circumstances, that can be achieved by construing or disappling s 10KA(1) so that it does not empower a police officer give a direction to a person who is engaged in political communication, meaning it could not be exercised in either of the two problematic scenarios.¹⁴⁷ If it cannot be construed in that way, the provision will be wholly invalid.

Thomas Wood

Rohan Nanthakumar

Margie Brown

Dated: 7 January 2026

¹⁴¹ *Brown* (2017) 261 CLR 328 at [139] (Kiefel CJ, Bell and Keane JJ).

¹⁴² *Justice Legislation Amendment (Police and Other Matters) Act 2025*, s 80, inserting 6D on 4 March 2026.

¹⁴³ *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 19A(1)(c).

¹⁴⁴ Police also may be able to remove a face covering incidental to an arrest (*DPP v Tupper* (2018) 55 VR 720 at [35]-[36] (Macaulay J)), and may require a person to give their name and address if they believe on reasonable grounds the person has committed or is about to commit an offence (whether indictable or summary) or may be able to assist in the investigation of an indictable offence: *Crimes Act 1958* (Vic), s 465AA. This power is exercisable in “designated places” under the *Victoria Police Act 2013* (Vic), see ss 3(1) and s 3A.

¹⁴⁵ Cf *Palmer* (2021) 272 CLR 505 at [208] (Gordon J).

¹⁴⁶ See *Wotton* (2012) 246 CLR 1 at [9]-[10] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Wainohu v NSW* (2011) 243 CLR 181 at [113] (Gummow, Hayne, Crennan and Bell JJ); *Banerji* (2019) 267 CLR 373 at [44] (Kiefel CJ, Bell, Keane and Nettle JJ), [209]-[211] (Edelman J).

¹⁴⁷ See, eg, *Coleman v Power* (2004) 220 CLR 1 at [110] (McHugh J); *Tajjour* (2014) 254 CLR 508 at [138] (Gageler J), *Chubb* (2019) 267 CLR 171 at [149] (Gageler J), [330], [341] (Gordon J), [440] (Edelman J); *Farm Transparency International Ltd v NSW* (2022) 277 CLR 527 at [97] (Gageler J).