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Document Lodged:	Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	14/01/2026 4:03:00 PM AEDT
Date Accepted for Filing:	14/01/2026 4:02:57 PM AEDT
File Number:	VID1612/2025
File Title:	TARNEEN ONUS BROWNE & ANOR v ASSISTANT COMMISSIONER OF POLICE, NORTH WEST METRO REGION & ANOR
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA

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No. VID1612 of 2025

Federal Court of Australia

District Registry: Victoria

Division: Administrative and Constitutional Law and Human Rights

TARNEEN ONUS BROWNE & ANOR

Applicants

ASSISTANT COMMISSIONER OF POLICE, NORTH WEST METRO REGION & ANOR

Respondents

RESPONDENTS' WRITTEN SUBMISSIONS

Filed on behalf of (name & role of party)	Assistant Commissioner of Police, North West Region (First Respondent) and the State of Victoria (Second Respondent)
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A INTRODUCTION

1 The Applicants challenge the validity of the **Declaration** by the First Respondent (**Assistant Commissioner**) on 25 November 2025, under s 10D(1)(b) of the *Control of Weapons Act 1990* (Vic) (the **Act**), of a "designated area" (the **Designated Area**). The Applicants further challenge the constitutional validity of s 10KA(1) of the Act, which is a power to direct a person using a face covering to leave the area the subject of such a declaration in certain circumstances.

2 The Declaration the subject of this proceeding ceased operation at 11.59pm on Friday, 9 January 2026. The Applicants maintain their pleas for declaratory relief. The Respondents accept that the Applicants have standing to seek declaratory relief in relation to the lawfulness of the Declaration on the basis of joinder of the Third Applicant on 12 January 2026. Subject to the observations below at paragraphs at 85 to 87, the Respondents also accept that the Applicants have standing to seek declaratory relief in relation to s 10KA(1) on the basis that the Second Applicant was previously subject to a request to remove a face covering in a designated area (**AS [6], [57]**). Further, as a consequence of the emergence of these two factual matters, the Respondents accept that the Court has jurisdiction in relation to the whole of the proceeding under s 39B(1A)(b) of the *Judiciary Act 1903* (Cth).

3 Each of the Applicants' grounds of judicial review is flawed and none ought to be accepted. The Applicants proceed on a mischaracterisation of the statutory scheme. The grounds allege legal error but, in reality, seek to impugn the merits of the Assistant Commissioner's decision, which are not open to challenge in judicial review.

4 The Applicants' constitutional claim should also fail. Section 10KA(1) of the Act is consistent with the implied freedom of political communication in its entirety and in all of its applications. Further, and alternatively, it should be not read down in the way contended for by the Applicants.

5 By way of evidence in the proceeding, the Respondents rely on the affidavit of the Assistant Commissioner affirmed 14 January 2026 (**Curran Affidavit**), which deposes to the making of the Declaration.

B THE APPLICANTS' CHALLENGE TO THE DECLARATION

Proper construction of the power of declaration in s 10D(1)(b)

6 Section 10D(1)(b) confers a planned power of designation. Unlike ss 10D(1)(a), (c) and (d) — which are directed to particular events and/or the recurrence of previous incidents of violence or disorder — s 10D(1)(b) is concerned with an anticipated risk of violence or disorder over a future period of up to six months. Section 10D(1)(b) thereby authorises a declaration where the decision-maker is satisfied that violence or disorder is likely to occur in the area during the proposed period, and the designation is "necessary" to prevent or deter that violence or disorder.

7 The provision is forward-looking and predictive. It does not require identification of a discrete triggering event. Its evident purpose is to permit pre-emptive, intelligence-informed policing to prevent or deter violence or disorder involving the use of weapons through the use of search powers, where the risk of violence or disorder is ongoing or diffuse.

8 Section 10D(1)(b) requires the decision-maker to be subjectively satisfied of two matters — *first,* under **(b)(i)** that, in the area to be designated, more than one incident of violence or disorder has occurred in the previous 12 months that involved the use of weapons; and under **(b)(ii)** that it is "necessary" to designate the area, for the purpose of enabling officers to exercise search powers, to prevent or deter the occurrence of "any violence or disorder" that the decision-maker is satisfied is likely to occur.

9 The phrase "<u>any</u> violence or disorder" in s 10D(1)(b)(ii) is deliberately broad. It reflects the breadth of the nature and types of violence or public disorder covered by the provision. Violence or disorder may escalate unpredictably, and may or may not involve the actual use of weapons, depending on the conduct of participants and the circumstances as they unfold. It is therefore practical and

explicable that the statutory task is to assess the likelihood of violence or disorder occurring; not to predict with unrealistic specificity, what it will be, or the precise means by which it may occur. Further, s 10D(1A) provides that "likely" does not mean "more likely than not". The statute therefore permits action on a real and non-trivial risk of violence or disorder, notwithstanding the inherent uncertainty of predictive assessments.

10 The language of "necessary" is capable of a range of meanings and must be construed in its particular statutory context.[1] Because the decision-maker's assessment in s 10D(1)(b)(ii) is prospective, predictive and involves matters of practical judgment, "necessary" should not be construed as requiring satisfaction that designation is the only conceivable means of prevention or deterrence; nor does it require the decision-maker to conclude that all other policing powers would be ineffective. The provision would be unworkable if "necessary", in this context, meant "absolutely necessary" or "essential". Rather, it ought to be construed as "reasonably required in the circumstances".[2]

11 That construction is reinforced by ss 10D(2) and (3)(a), which separately require the decision-maker to ensure that the area declared and the duration of the declaration are no greater and no longer than is "reasonably necessary" to enable officers to effectively respond to the threat of violence or disorder. The language of "reasonably necessary", as it is deployed in the context of those provisions, is akin to the meaning of "reasonably appropriate and adapted".[3] Those provisions would have little work to do if "necessary" in s 10D(1)(b)(ii) already meant

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1 See *Levi v ASIC (No 2)* (2013) 277 FLR 461, 466 [32]–[34]; *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52, 65 [46]; *Australian Society for Kangaroos Inc v Secretary, Department of Environment, Land, Water and Planning (No 2)* [2018] VSC 407 at [92]. See also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 199 [39].

2 See, analogously, *Pelechowski v Registrar, Court of Appeal* (1999) 198 CLR 435, 452 [51] (Gaudron, Gummow and Callinan JJ), quoting *State Drug Crime Commission of NSW v Chapman* (1987) 12 NSWLR 447, 452. See also *Attorney-General v Leveller Magazine Ltd* [1979] AC 440, 450; *Proprietors Units Plan No 52 v Gold* (1993) 44 FCR 123, 126. See further *A v Corruption and Crime Commission* [2013] WASCA 288 at [67]–[81]; *Australian Society for Kangaroos Inc v Secretary, Department of Environment, Land, Water and Planning (No 2) Australian Society for Kangaroos Inc v Secretary, Department of Environment, Land, Water and Planning (No 2)* [2018] VSC 407 at [96]-[97] (Garde J).

3 *Director of Public Prosecutions (NSW) v Greenhalgh* [2022] NSWSC 980 at [184]; and see further *Thomas v Mowbray* (2007) 233 CLR 307 at [20] to [27] per Gleeson CJ.

"indispensable" or "unavoidable". Read as a whole, the scheme confirms that s 10D(1)(b)(ii) requires a practical judgment that designation is reasonably required as a preventive measure, with "proportionality" (in the flexible sense of that term) then dealt with by ss 10D(2) and (3)(a).

12 It is then necessary to make two observations about the Applicants' construction of the statutory scheme. ***First***, the Applicants construe term the "necessary" in s 10D(1)(b)(ii) to mean "requisite" or "something that cannot be dispensed with": **AS [11].** It is principally on that basis that the Applicants contend — by ground 3, but also in the course of several other grounds — that it was erroneous for the Assistant Commissioner to have formed the state of satisfaction mandated by s 10D(1)(b)(ii). Such a construction imposes a degree of certainty that is at odds with the predictive nature of the assessment required by s 10D(1)(b)(ii). That construction would also sterilise the power in s 10D(1)(b): it is hard to imagine a circumstance where a Declaration is "necessary" in the sense that there is *no other alternative* to prevent or deter violence or disorder especially where the violence or disorder is yet to occur. ***Second***, the Applicants construe s 10D(2) and (3)(a) as calling for this Court to perform the analysis of whether the area declared or the duration of the Declaration are "reasonably necessary": **AS [27]–[31]**. As discussed in response to grounds 4 and 5 below, there is no indication in the statutory text that Parliament intended for s 10D(2) and (3) to require an independent *judicial* assessment of reasonable necessity; rather, that assessment was intended to be reposed in the decision-maker exercising the statutory discretion in s 10D(1). Those aspects of the Applicants' construction — alone, and in combination — result in a construction of s 10D(1)(b) that would be manifestly unfit in achieving its purpose, of preventing and deterring a risk of future violence or disorder through the use of search powers.

Grounds 1, 2 and 3 — "Failure to comply with the precondition in s 10D(1)(b)"

13 The Applicants' allegations of error in grounds 1, 2 and 3 are essentially, speculative. The Assistant Commissioner was not required to provide reasons for making the Declaration. To advance those grounds, the Applicants treat the briefing material that was before the Assistant Commissioner as interchangeable

with the Assistant Commissioner's reasoning, such that any omission or inconsistency in the briefing material is said to demonstrate error by the decision maker. The approach is logically flawed.

14 There are select cases where briefing material might provide a rational basis to draw an inference that the decision-maker has erred — for instance, where the briefing material is an exhaustive record of the material that was considered, and omitted a mandatory consideration[4] — but this is not such a case. The Assistant Commissioner's evidence in this proceeding demonstrates that his analysis was grounded in the statutory criteria. He had regard to the briefing material before him — drawing rational and reasonable conclusions — in making the Declaration decision. The Applicants do not have any proper basis to contend otherwise; and to the extent that they have speculated otherwise on the basis of the briefing material, the Assistant Commissioner's affidavit evidence demonstrates that his decision-making process was not affected by jurisdictional error.

15 **Ground 1** can otherwise be dealt with in short form. Contrary to **AS [13] & [17],** the Assistant Commissioner was aware of, and actively engaged with, the correct statutory criteria in s 10D(1)(b): see Curran Affidavit at [34]–[38]. The balance of the Applicants' claims at **AS [14]–[16]** raise granular issues with the briefing material going to alleged inconsistencies or irregularities — none of which are sufficient alone or in combination, to demonstrate error by the Assistant Commissioner. As to **AS [18],** the Assistant Commissioner had adequate time to consider the briefing material before him: particularly in a context where he had ongoing discussions with advisors regarding the Declaration before making the Declaration decision. This is not a case where the decision-maker has purported to read a large volume of material afresh, in an impossibly narrow window.[5] Ground 1 should be dismissed.

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4 See, eg, *Abramov v Minister for Foreign Affairs (No 2)* [2023] FCA 1099 at [111]-[124] (Kenny J).

5 Cf *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352, where the respondent Minister had claimed to consider two files over 700 pages in length in less than 40 minutes, without prior engagement with the matter for determination. See rejection of a similar ground of unreasonableness, on the basis that the decision-maker had inadequate time to consider a large volume of material, in *Loielo v Giles* (2020) 63 VR 1 at [161] and [168]-[180] (Ginnane J).

16 **Ground 2** can similarly be dealt with swiftly. The Assistant Commissioner was required to act reasonably on a correct understanding of the law.[6] He did so. This is not a case where the briefing material misstated the statutory criteria, so as to lead the decision-maker to misunderstand the scope of their statutory power or the conditions on its exercise. Even if there was some misconstruction of the statute in the briefing materials — which the Respondents do not accept — that misconstruction must have been material. That is, in order to constitute jurisdictional error of the nature alleged by the Applicants, the briefing material must have misstated the statutory criteria in a way that led the Assistant Commissioner to act outside of power.[7] The features of the briefing material identified by the Applicants are not material — they did not lead the Assistant Commissioner to make a decision that he was otherwise not empowered to make.

17 As to **Ground 3,** there is no dispute that the Assistant Commissioner was required to act reasonably in making the Declaration decision. And he did so.

18 The characterisation of a decision (or a state of satisfaction) as legally unreasonable because of illogicality or irrationality is not easily made.[8] It is said that a court should be slow to intervene: "[n]ot every lapse of logic will give rise to jurisdictional error".[9] Ultimately, the question is whether the satisfaction of the relevant state of affairs or matter reached by the decision-maker was so irrational or illogical, that it was simply not possible for the conclusion to be made or the satisfaction reached logically or rationally on the material available.[10]

19 Importantly, the issue is not whether this Court would reach the same conclusion in making the relevant decision.[11] Nor is the issue whether a different decision-maker might have reached a different conclusion on the same material. Probative

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6 See, eg, *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611.

7 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123.

8 See ***Djokovic*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 289 FCR 21 at [33] (the Court), and the authorities there cited.

9 *Minister for Immigration and Citizenship v* ***SZMDS*** (2010) 240 CLR 611 at [130] (Crennan and Bell JJ).

10 *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12 at [38] (Gummow and Hayne JJ); see further *Djokovic* (2022) 289 FCR 21 at [35] (the Court).

11 *SZMDS* (2010) 240 CLR 611 at [78] (Heydon J); see further ***DCP16*** *v Minister for Immigration & Border Protection* [2019] FCAFC 91 at [81]–[86] (Beach, O'Callaghan and Anastassiou JJ).

evidence can give rise to different process of reasoning, leading to different conclusions, without any basis to suspect error.[12] Rather, consistent with the nature of the judicial review, this Court is asked to determine whether the state of mind in fact formed by the decision-maker in this case, was open to be formed by a reasonable person in the decision-maker's position, on the basis of the information before them.[13]

20 As is clear from those general statements of principle, there is a high bar to demonstrate illogicality or irrationality of the nature alleged. The Applicants have not met that high bar in this case.

21 The primary aspect of the Applicants' case on ground 3 is that it was "not open" to the Assistant Commissioner to reach the state of satisfaction mandated by s 10D(1)(b)(ii) on the basis of the briefing material: **AS [22] to [24]**. To succeed on that argument, the Applicants would need to demonstrate that the conclusion reached by the Assistant Commissioner involved a lapse in logic that no reasonable-decision maker in his position would make, such that the decision he made was not open. However, contrary to the Applicants' argument, the Assistant Commissioner's reasoning was logically sound, and the conclusion he reached available, on the material before him.

22 ***First****,* and as to **AS [23],** it was open to the Assistant Commissioner to conclude that — on the basis of the evidence in the briefing material, demonstrating numerous previous incidents of violence or disorder in the Designated Area, including those involving the use of weapons, and also a large number of weapons possession offences — there was a likelihood of violence or disorder occurring in the Designated Area, during the Declaration's period of operation, including violence and disorder involving the use of weapons. There is nothing illogical about the Assistant Commissioner drawing an inference about that future

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12 *SZMDS* (2010) 240 CLR 611 at [130] (Crennan and Bell JJ).

13 *DCP16* [2019] FCAFC 91 at [82]–[88] (Beach, O'Callaghan and Anastassiou JJ).

likelihood by reference to the specific evidence of past conduct that he was presented with.[14]

23 Importantly, the Applicants put that "*any offence data that does not meet [the] description [of violence or disorder involving the use of a weapon] are irrelevant to informing the Threat Satisfaction]*," at **AS [23.1]**. That is an artificial construction of what s 10D(1)(b)(ii) requires. For instance, it was not illogical for the Assistant Commissioner to reason that — based on his experience and knowledge of the nature of the LEAP offence data he was presented with — incidents of violence or disorder identified in the briefing material data may have escalated into incidents involving the use of weapons, on the basis that it was likely that those involved were carrying weapons (even if they were not actively utilised in the offence and/or otherwise reported in the data).[15] Further, and contra [**AS 23.2**], it was not illogical or irrational for the Assistant Commissioner to reason that the data of possession offences was relevant to his assessment of the likelihood of violence or disorder involving the use of weapons — the possession of a weapon creates the opportunity for such weapon to be used.[16]

24 In that respect, s 10D(1)(b)(ii) refers broadly to the likelihood of "<u>any</u> violence or disorder" that the Assistant Commissioner is satisfied is likely to occur. Further, s 10D(1A) provides that the assessment of whether that violence or disorder is "likely" does <u>not</u> mean "more likely than not". The statutory text does not indicate any basis to infer that a decision-maker reaching the state of satisfaction required by s 10D(1)(b)(ii), must logically restrict themselves to consider only evidence of past incidents of violence or disorder that involved the use of a weapon.

25 And for those reasons, it is incorrect for the Applicants to suggest, at **AS [23.3] to [23.4],** that the mapping of offence data across the area declared, or graphs indicating its occurrence over time, was irrelevant to the Assistant Commissioner's decision. As this Court has observed, the ***"***use of expressions such as 'illogicality' or 'irrationality' may be no more than to strongly emphasise

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14 Cf AS [23], and the authorities cited at n 45.

15 Curran Affidavit at [41] and [42].

16 Curran Affidavit at [43].

disagreement with someone else's process of reasoning on an issue of fact. But that does not in and of itself establish jurisdictional error". [17] Similarly, it is incorrect to suggest at **AS [23.5]** that the Assistant Commissioner must have strayed into jurisdictional error, because some of the "incidents of note" referred to in the briefing material included incidents involving the use of firearms.

26 ***Second***, and contra **AS [24]**, there is nothing illogical or irrational in the Assistant Commissioner's assessment that it was "necessary" to designate the area for the purpose of enabling police officers or protecting services officers to exercise search powers to prevent or deter the occurrence of any violence or disorder that he was satisfied would occur, within the meaning under s 10D(1)(b)(ii).

(a) As to **AS [24.1],** the Assistant Commissioner reasoned that the power to search for weapons in the designated area, including on a random basis, would deter persons from bringing weapons into the designated area.[18] There is nothing illogical in that reasoning.

(b) The premise of **AS [24.2]** is false. The fact that some offending occurred in private places does not render that data "irrelevant" to the Assistant Commissioner's consideration of what was "necessary". Offending that occurs in private places may still be probative of the existence, prevalence, and characteristics of violence or disorder involving weapons within the designated area. The statutory task is not confined to identifying past offending that would itself have been amenable to a suspicion-less search, but to assessing whether there is a sufficient threat of weapons-related violence or disorder such that the conferral of public-place search powers is necessary to prevent or deter that threat. Offending in private places may rationally inform that assessment, including by revealing patterns of weapon possession, escalation, transport of weapons to, or spill-over risk into, public spaces. The mere fact that the search powers cannot be exercised in private places does not sever the logical relevance of that material to the

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17 *DCP16* [2019] FCAFC 91 at [83] (Beach, O'Callaghan and Anastassiou JJ), referring to *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [40] (Gleeson CJ and McHugh J).

18 Curran Affidavit at [44] to [49].

antecedent evaluative judgment required by s 10D(1)(b)(ii). To exclude such material would be to misconceive the nature of the statutory inquiry and to artificially confine the evidentiary base upon which the Commissioner is entitled — and required — to assess necessity. Accordingly, [24.2] overstates the legal irrelevance of that data and does not undermine the formation of the Necessity Satisfaction.

(c) **AS [24.3]** assumes a requirement that the Brief positively identify and evaluate alternative powers or strategies. No such requirement appears in s 10D(1)(b)(ii). The statute requires the Commissioner to be satisfied that designation is necessary; it does not require a comparative analysis of every other available policing power, nor a written exposition of why each alternative would be inadequate. If AS [24.3] were correct, s 10D(1)(b) would be effectively unworkable. Any declaration would require a detailed written comparison of all conceivable policing alternatives before necessity could be established. Nothing in the text, structure or purpose of the Act supports such a construction.

(d) Similarly, **AS [24.4]** assumes that the size of a designated area must be confined to historical "hotspots" of offending. That assumption is incorrect. Section 10D(1)(b)(ii) is concerned with preventing or deterring likely violence or disorder, not with mirroring the spatial distribution of past incidents. The statute does not require the boundaries of a designated area to correspond to historical offence concentrations. More generally, the "necessity" to declare an area may legitimately take account of operational coherence and administrability, particularly given the clear legislative emphasis on identifying clearly the boundaries of the designated area (see, eg, ss 10D(5)(a) and (5A)). A single, contiguous area with intelligible boundaries may be necessary even if offending is unevenly distributed within it. The Act does not require the designation of fragmented or irregularly shaped zones tracking offence density, street by street.

(e) **AS [24.5]** similarly proceeds on the erroneous premise that the Commissioner was required to justify the selected six-month duration by

reference to, and rejection of, shorter hypothetical periods. Section 10D(1)(b)(ii) imposes no such obligation. The assessment of necessity is forward-looking and predictive, and may legitimately account for the anticipated persistence of risk and the need for continuity and operational certainty. The identification of particular events or seasonal factors does not confine the permissible duration to those events.

27 ***Third***, as to **AS [25]**, and the reference to "intelligible reasoning", it is incorrect as a matter of law to impugn the lawfulness of the Assistant Commissioner's Declaration decision by asking whether the briefing material actively and positively displays a path of "intelligible reasoning". There is no obligation on the Respondents to adduce evidence to positively demonstrate the rationality or logicality of the Assistant Commissioner's reasoning.[19] Axiomatically, it is for the Applicants to demonstrate jurisdictional error.[20] The need for "intelligible reasoning" arises when an applicant challenges the actual path of logic pursued by the decision-maker evidenced, for instance, in the giving of reasons for the decision; such that a decision-maker cannot defend a conclusion that was reached by a path of reasoning that is, effectively, unintelligible.[21] That is not the case here. The Assistant Commissioner having marked the briefing note in a way that indicates his approval is not to be conflated with the Assistant Commissioner's actual reasoning process,[22] which is the subject of his affidavit evidence.

28 ***Fourth,*** and more generally, by ground 3 the Applicants do not truly impugn the veracity of the Assistant Commissioner's reasoning on the "threat satisfaction" or "necessity satisfaction". Rather, they seek to "shoehorn arguments about the merits of the [Assistant Commissioner's] conclusion into the category of

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19 *Deripaska v Minister for Foreign Affairs* [2024] FCA 62 at [127] (Kennett J).

20 *Minister for Immigration & Citizenship v SZGUR* (2011) 241 CLR 594 at [67] (Gummow J).

21 See, eg, *Minister for Immigration and Border Protection v Haq* (2019) 267 FCR 513 at [32]–[35] (Griffiths J, Gleeson J agreeing).

22 See, eg, *Deripaska v Minister for Foreign Affairs* [2024] FCA 62 at [126] (Kennett J) ("The Minister recorded that she agreed with the draft Explanatory Statement, but that does not purport to be a comprehensive account of the issues considered…").

jurisdictional error", in a manner that "descend[s] into impermissible merits review".[23]

Grounds 4 and 5 — "Breach of statutory conditions"

29 The Applicants construe ss 10D(2) and (3)(a) as requiring this Court to itself assess whether the area and duration of the Declaration are "reasonably necessary" within the meaning of those provisions: **AS [26]–[31]**. The approach is incorrect.

30 The Applicants rely on *Thomas v Mowbray*[24] in support of this construction. Whilst the Court applied the statutory criterion of "reasonable necessity" in that case, there the statute specifically reposes an assessment of "reasonably necessary" in a Court. The legislation in this case is different and does not ask the Court to perform that task: contra **AS [31]**.

31 Properly construed, ss 10D(2) and (3)(a) of the Act operate as conditions on the exercise of the discretion by the decision-maker under s 10D(1). That is, ss 10D(2) and (3)(a) require the decision-maker to form the view that the area and duration of the declaration are reasonably necessary, and not larger or longer than reasonably necessary. Such judgment is open to judicial review, including on the basis of whether the decision-maker erred in that assessment of "reasonable necessity" (which, it would appear, is the substance of much of the Applicants' complaints in ground 3, particularly at **AS [24.4] and [24.5]**). However, ss 10D(2) and (3)(a) do not establish "objective" matters to be determined, separately, by a Court.

32 The criteria of "reasonably necessary" are deployed in s 10D as part of an analysis of whether the area declared is larger (sub-s 10D(2)), or the duration of the declaration is longer (sub-s 10D(3)(a)), than what is "reasonably necessary" to permit officers to "effectively respond to the threat of violence or disorder". That assessment, by its nature, requires an *ex ante* assessment of matters that are

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23 *DCP16* [2019] FCAFC 91 at [84] (Beach, O'Callaghan and Anastassiou JJ).

24 *Thomas v Mowbray* (2007) 233 CLR 307.

informed by a range of complex operational and risk-based factors.[25] Accordingly, the applicants' construction would serve to impermissibly draw courts into consideration, with the benefit of hindsight, of the merits of a designation: **AS [26].**

33 The Applicants' analogy to *Gedeon* at **AS [28]** is misplaced. There, the language of "must not" attached to circumstances in which the relevant statutory power could not be exercised, *at all* — the imperative language attached to binaries, that were objectively discernible.[26] In contrast, here, "must not" attaches to an assessment of whether a feature or element of the decision (ie its area or duration) is "reasonably necessary", …which is an assessment inherently open to reasonable evaluative judgment, involving matters of degree, prediction and operational discretion, rather than the ascertainment of objective, binary facts capable of independent determination by a court. *Gedeon* is plainly a different case. The imperative language of "must not", as it appears in s 10D(2) and (3)(a), does not compel the Applicants' preferred construction.[27]

34 Once the Applicants' construction of ss 10D(2) and (3)(a) as "objective conditions" is rejected, grounds 4 and 5 must fail. Those sections do not set "objective conditions" for this Court's assessment.

35 Alternatively, even if it is accepted that it is for a court to determine what is "reasonably necessary", it does not follow that the Court should accept the applicants' submissions on the content of that test: cf **AS [33]-[34].**

36 The Respondents accept that the words "reasonably necessary" import some requirement of proportionality, in the sense that there must be rational relationship between the means employed and the ends sought to be achieved. That does not mean, however, that s 10D(2) and (3)(a) require the Court to consider whether the designation "imposes a greater degree of restraint than the

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25 *Environment Centre NT Inc v Minister for Resources and Water (No 2)* (2021) 399 ALR 68, [74] (Griffiths J).

26 Section 7(1) of the impugned Act considered in *Gedeon* provided that a certain authority "must not be granted" unless certain conditions were met.

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

reasonable protection of the public requires", such restraints presumably referring to those on "common law rights": **AS [34].** That formulation, stemming from *Thomas v Mowbray*,[28] incorporated the particular words of the statute in question which required consideration of the protection of the public in formulating certain control orders.

37 In contrast, here, the fundamental consideration in the Act is whether the area and duration of the designation are not larger or longer than is reasonably necessary *for officers to effectively respond to threats of violence or disorder*. Whether a course of action is "reasonably necessary" can be answered in the context of s 10D(2) and (3)(a), by asking whether the means chosen by the Chief Commissioner represent a "reasonable choice" within the latitude of discretion afforded by the provisions.[29]

38 In coming to that view, the Court may, of course, consider whether the area or duration is too large or long, but it must only do so in the context of asking whether the area or duration is too large or too long so as to be reasonably necessary for enabling officers to effectively respond to threats of violence or disorder. That does not require, as the applicants assert, a free ranging inquiry into whether the Chief Commissioner should have made different policy choices,[30] or require the court to assess the relative merits of competing areas or durations that might have sufficed for the designation,[31] or even to assess whether the designation sufficiently preserves certain rights: cf **AS [33]-[34]**. Rather, it is solely focused on whether the area or duration is greater than reasonably necessary to enable officers to effectively respond to certain threats.

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28 *Thomas v Mowbray* (2007) 233 CLR 307, [22] (Gleeson CJ).

29 *Farm Transparency International v New South Wales* (2022) 277 CLR 537, [253] (Edelman J), see also [182] (Gordon J).

30 *Brown v Tasmania* (2017) 261 CLR 328, [139] (Kiefel CJ, Bell and Keane JJ).

31 Cf *Clubb v Edwards* (2019) 267 CLR 171, [267], [269] (Nettle J).

Ground 6 — "Improper purpose"

39 A party alleging an improper purpose bears the onus of proof.[32] The alleged improper purpose must be "substantial", in the sense that ***no*** attempt would have been made to exercise the power if it had not been for that purpose.[33] That is, the purpose must be the "operative subjective purpose" of the decision-maker.[34] In the absence of evidence establishing improper purpose or displacing all possible legitimate purposes, it will be presumed that the power was exercised for a purpose falling within the scope of the purposes for which the power was conferred, and an improper purpose will not lightly be inferred.[35]

40 In no way are the foregoing principles met in the present case.

41 Crucially, for the ground to be made out, the improper purpose said to vitiate the decision must be an "unauthorised purpose, or one which is extraneous to the statute".[36] Identifying which purposes are authorised by, and which purposes are foreign to, a statute is a question of statutory construction.

42 ***First***, the power in s 10D(1)(b) is conferred for a specific and confined statutory purpose: namely, to enable police officers and protective services officers to exercise the search powers in order to prevent or deter violence or disorder that the decision-maker is satisfied is likely to occur. The Declaration made in this case falls squarely within that statutory purpose. Where a power is exercised for the very end for which it was conferred, it cannot be vitiated by improper purpose.

43 ***Second***, the Applicants do not clearly articulate the alleged improper purpose said to have motivated the Declaration. At different points, they refer to "convenience", "operational efficiency", "general crime reduction", and "visible policing". Each of the descriptions are imprecise and shifting, but are

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32 *Industrial Equity Ltd v Deputy Commissioner of Taxation* (1990) 170 CLR 649, 671-672 (Gaudron J).

33 *Thompson v Council of Municipality of Randwick* (1950) 81 CLR 87 at 105-106 (the Court).

34 *Re MacTiernan; Ex parte Coogee Coastal Action Coalition Incorporated* [2004] WASC 264, [51] (McLure J).

35 *Industrial Equity Ltd v Deputy Commissioner of Taxation* (1990) 170 CLR 649, 671-672 (Gaudron J); *W Everton Park Pty Ltd v Minister for Planning* [2022] VSCA 243, [95].

36 *McCabe v Westin* [2024] VSC 145 at [179] (Harris J).

nevertheless consistent with the statutory purposes of control of weapons, prevention and deterrence of violence or disorder involving use of weapons and enabling a police or protective service officer to effectively respond to the threat of such violence or disorder. The failure to identify with clarity the alleged improper purpose tells against the Applicants' case, particularly given the presumption that statutory powers are exercised for proper purposes unless the contrary is clearly established.

44 ***Third****,* the matters relied upon by the Applicants as indicia of improper purpose are, in substance, descriptions of how the exercise of the power aligns with ordinary policing objectives and values. References in the material to operational planning, deployment of resources, visibility of police, or responsiveness to events and intelligence do not disclose a purpose foreign to the Act. They describe the manner in which the statutory purposes — of control of weapons, prevention and deterrence of violence or disorder involving use of weapons and enabling the effective police response — is to be achieved, not a purpose extraneous to it.

45 ***Fourth****,* and similarly, the specific matters relied upon by the Applicants do not support the inference of an improper purpose, but rather support the proper purposes for making a Declaration under the Act. For example, references in the briefing material to deployment "based on events, incidents and contemporary intelligence" (**AS [39]**) describe the controlled and targeted exercise of the powers under the Declaration, not a purpose unconnected with preventing or deterring violence or disorder. Similarly, references to "high visible presence" (**AS [40.1]**) are not foreign to the Act: visible policing may itself deter violence or disorder and is consistent with the statutory objective.

46 ***Fifth,*** even taking the Applicants' case at its highest, they do not demonstrate how the matters they identify are "extraneous" to the Act. Assertions that a measure promotes "convenience" or "efficiency" do not, without more, establish an improper purpose. A measure that enhances the efficient or convenient prevention or deterrence of violence or disorder may, for that very reason, and in combination with other reasons, satisfy the statutory criterion of necessity. The

Applicants' submissions on improper purpose largely collapse into a disagreement with the Assistant Commissioner's assessment of necessity on its merits, rather than identifying any extraneous end.

47 ***Sixth,*** and ultimately, the Applicants have not discharged their onus of proving that the alleged improper purpose was a substantial or operative purpose of the decision, in the sense that the power would not have been exercised but for that purpose. In the absence of evidence excluding all proper purposes and establishing that the Declaration would not have been made absent the alleged improper purpose, the ground must fail.

48 For all those reasons, ground 6 should be dismissed.

Ground 7 — "Unreasonableness"

49 The threshold for establishing unreasonableness is "stringent".[37] By ground 7, the Applicants allege unreasonableness of a particular kind — one to be inferred from the "outcome" of the decision itself: AS [42]. Unreasonableness can only be inferred in that way where the result itself bespeaks error.[38] The same cannot be said of the Declaration in this case. It is "within the range of possible lawful outcomes" of an exercise of the power under s 10D(1)(b).[39] No inference of unreasonableness arises. Ground 7 must fail.

Grounds 8 & 9 — Charter

50 By Grounds 8 and 9, the Applicants allege non-compliance with the substantive and procedural limbs of s 38(1) of the Charter, respectively. Both grounds should be rejected.

51 As to **Ground 8,** an act of a public authority — including a decision — will be "incompatible with a human right" if it limits the relevant human right in a manner

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37 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 551 [11] (Kiefel CJ).

38 See, eg, *Minister for Immigration & Citizenship v Li* (2013) 249 CLR 332; *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656, 663-4 (Gibbs CJ, Brennan and Dawson JJ agreeing); cf *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 551 [10] (Kiefel CJ).

39 *Minister for Immigration and Border Protection v Stretton* (2016) 273 FCR 1, 5-6 [11] (Allsop CJ).

which is not reasonable and demonstrably justified as set out in s 7(2) of the Charter.[40]

52 It is without doubt that the Declaration has the potential to limit Charter rights. In particular, the exercise of search powers pursuant to a Declaration are, by their nature, will limit the right to privacy in s 13(a); the right to liberty and security of the person in s 21; and the rights of children under s 17(2) insofar as the search powers might be exercised with respect to children. However, that propensity for limitation does not equate to unlawfulness.

53 ***First****,* at the outset, it is necessary to identify the relevant "act" for the purposes of s 38(1). The act under challenge is the making of the Declaration under s 10D(1)(b). That act is analytically distinct from any future exercise of powers pursuant to the Declaration. The Declaration creates the legal condition in which specified statutory powers may be exercised. Whether, and how, those powers are exercised depends on subsequent, discrete decisions by individual officers. Each such decision constitutes a separate "act" for the purposes of s 38(1) and must itself be undertaken compatibly with the Charter. The Applicants' attempt to characterise the Declaration as itself effecting arbitrary or unlawful interferences with Charter rights therefore misconceives the operation of the statutory scheme. The possibility that a power might be exercised in a manner incompatible with human rights does not render the antecedent Declaration automatically incompatible with the Charter.

54 ***Second,*** to the extent that the Declaration itself can be said to limit Charter rights, including by creating the potential for the exercise of powers that are incompatible with those rights, any such limitation is reasonable and demonstrably justified within the meaning of s 7(2) of the Charter.

55 In determining whether a public authority has acted incompatibly with human rights, the court undertakes an objective assessment of the public authority's conduct, the factual and evidentiary basis for it, and the competing considerations

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40 *PJB v Melbourne Health* (2011) 39 VR 373 at [310] per Bell J; *R v Momcilovic* (2010) 25 VR 436 at [144] per Maxwell P, Ashley and Neave JJA.

that were brought to bear.[41] In undertaking that assessment, the court may give the expertise and experience of the public authority such weight as is warranted in the circumstances of the case.[42] And importantly, in relation to s 7(2)(e) of the Charter, a decision-maker is not required to adopt the least restrictive option. Rather the chosen means must fall within the range of reasonable options available. The onus does not require the decision-maker to exclude the universe of potential alternatives.[43]

56 The Declaration pursues an important and legitimate purpose — the prevention and deterrence of violence or disorder involving the use of weapons, and the protection of public safety by doing so — and is rationally connected to that purpose. The Respondents rely on the evidence of the Assistant Commissioner in the Curran affidavit, which deposes to the necessity of the Declaration, and the rationale for its geographic scope and its duration. Further, the powers exercisable within the designated area are subject to express statutory safeguards and ongoing Charter obligations.

57 Accordingly, Ground 8 should be dismissed.

58 **Ground 9** alleges a failure to give "proper consideration" to relevant human rights. The Assistant Commissioner considered a Charter assessment (the Human Rights Risk Assessment) in making the designated area decision. It is therefore evident that he considered how the decision affected human rights.[44] That is further supported by the Assistant Commissioner's evidence. However, the Applicants' argument is that the Assistant Commissioner nevertheless failed the procedural limb of s 38(1), because the Human Rights Risk Assessment in the briefing material: (a) did not identify <u>all</u> relevant rights (in particular, by not identifying the rights to freedom of expression under s 15 and freedom of

41 ***Thompson*** *v Minogue* (2021) 67 VR 301 at [97].

42 *Thompson* (2021) 67 VR 301 at [100]; ***Mallard*** *v Homes Victoria* [2025] VSCA 339 at [191].

43 *Thompson* (2021) 67 VR 301 at [76]; *Mallard* [2025] VSCA 339 at [190].

44 *Berih v Homes Victoria (No 4)* [2025] VSC 169, [139] citing *Antunovic v Dawson* (2010) 50 VR 355, [70]; *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647, [102].

assembly under s 16); (b) did not to explain how rights were limited; and (c) did not justify limitations on rights.

59 ***First,*** the Applicants' argument proceeds on the premise that the Human Rights Assessment included in the briefing material itself constitutes a record of the Assistant Commissioner's consideration of Charter rights. That premise is incorrect. The Assessment formed a component of the material placed before the Assistant Commissioner; it does not purport to be, and should not be treated as, a transcript of his reasoning.

60 ***Second,*** the obligation in s 38(1) of the Charter to give proper consideration does not require a decision-maker to undertake a detailed legal analysis of each potentially affected right, nor to produce reasons in any particular form. What is required is a broad, good-faith consideration of the rights that are relevant in the circumstances, having regard to the practical context in which the decision is made.[45] There is no particular formula for giving such proper consideration, and s 38(1) does not require a "sophisticated legal exercise".[46] Further, as to justifying limitations on rights under s 7(2), s 38(1) does not require a decision-maker to consider all the criteria listed in s 7(2) of the Charter; those factors do not operate as mandatory considerations.[47] As Emerton J (as her Honour then was) explained of the procedural limb in s 38(1) in *Castles*:[48]

> The requirement in s 38(1) to give proper consideration to human rights must be read in the context of the Charter as a whole, and its purposes. The Charter is intended to apply to the plethora of decisions made by public authorities of all kinds. The consideration of human rights is intended to become part of decision-making processes at all levels of government. It is therefore intended to become a 'common or garden' activity for persons working in the public sector, both senior and junior. In these circumstances, proper consideration of human rights should not be a sophisticated legal exercise. Proper consideration need not involve formally identifying the 'correct' rights or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration will involve understanding 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 that is made. As part of the exercise of justification, proper consideration will involve balancing competing private and public interests.

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45 *Thompson v Minogue* (2021) 67 VR 301 at [89].

46 ***Castles*** *v Secretary to the Department of Justice* (2010) 28 VR 141 at [185] (Emerton J).

47 *Thompson v Minogue* (2021) 67 VR 301 at [89] (Kyrou, McLeish, Niall JA).

48 *Castles* (2010) 28 VR 141 at [185] (Emerton J).

> There is no formula for such an exercise, and it should not be scrutinised overzealously by the courts.

61 Having regard to the nature of the decision, the statutory framework, and the evidence before the Court, the Assistant Commissioner's consideration of human rights was sufficient to meet the procedural obligation in s 38(1): see Curran Affidavit at [66]–[69]. If the Applicants' complaint is, in substance, that greater weight should have been given to particular rights or that different conclusions should have been reached — that is not a failure of "proper consideration".

62 Finally, even if either Ground 8 or Ground 9 were made out — which is denied — that would not, of itself, establish jurisdictional error or warrant the declaratory relief sought.[49] The Applicants' assumption that non-compliance with s 38(1) necessarily renders the Declaration invalid is incorrect.

63 For those reasons, Grounds 8 and 9 should be dismissed.

C CONSTITUTIONAL VALIDITY OF S 10KA(1)

64 Section 10KA(1) is consistent with the implied freedom of political communication and is therefore valid in its entirety. The questions for the Court, as the Applicants identify, are: (1) whether s 10KA(1) may be exercised to impose an "effective burden" upon political communication; (2) whether any such burden is in pursuit of a "legitimate purpose"; and (3) whether any such burden is "justified", in the sense that it is "reasonably appropriate and adapted" to its pursuit of that legitimate purpose.[50]

Burden

65 The Respondents accept that at least some exercises of the power conferred by s 10KA(1) have the capacity to impose a burden on political communication. However, the burden is indirect and not significant. The "nature and extent" of the

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49 Charter, s 39(1); *Bare v IBAC* (2015) 48 VR 129 at [139]-[153] (Warren CJ); and see further at [380]-[390] (Tate JA), [600], [617]-[626] (Santamaria JA).

50 ***Farmer*** *v Minister for Home Affairs* (2025) 99 ALJR 1408 at [39] (Gageler CJ, Gordon and Beech-Jones JJ), [165] (Gleeson J).

burden imposed is relevant to the question of whether a law is reasonably appropriate and adapted to the pursuit of its legitimate purpose.[51]

66 The burden is indirect because s 10KA(1) is not directed to any form of political communication.[52] It is directed to the use of face coverings to conceal a person's identity or to avoid the effects of crowd-controlling substances. A direction can only be issued in limited circumstances: if a police officer forms a reasonable belief that a person is using a face covering primarily for one of those two purposes, and where a person has refused to comply with a request to remove the face covering.[53] Any burden imposed on political communication is incidental to the operation of s 10KA(1),[54] and thereby indirect.

67 Accepting that the issuance of a direction may impose a burden in the scenarios identified at **AS [57]–[58]**, in neither scenario would the burden be significant.

(a) While participating in a protest can be an act of political communication in itself, s 10KA is not directed at that, nor would the potential for the power to be exercised impede the participation in that act. The burden is slight as the person receiving the direction will have first been given a choice to remove their face covering (and to continue engaging in political communication, for example by remaining at a protest in a designated area), or leave the designated area.

(b) In the rare circumstances where the wearing of a face covering is itself an act of political communication, the extent of the burden is requiring that individual to stop engaging in that particular form of political communication in that location and on that occasion. The implied freedom is not a personal

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51 *Farmer* at [57] (Gageler CJ, Gordon and Beech-Jones JJ), [165] (Gleeson J).

52 Cf ***Brown*** *v Tasmania* (2017) 261 CLR 328.

53 Section 10KA(1)(b).

54 See ***Wotton*** *v Queensland* (2012) 246 CLR 1 at [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Hogan v Hinch* (2011) 243 CLR 506 at [95] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). See also ***McCloy*** *v New South Wales* (2015) 257 CLR 178 at [252] (Nettle J).

right for an individual to engage in a particular preferred form of political expression.[55]

68 The burden is not significant for two reasons. The first is because a direction can only be issued in limited circumstances — namely, where a "designated area" declaration is in effect. For a designated area to be declared, the Chief Commissioner must be satisfied of the matters specified at s 10D(1) of the Act. Further, the designated area must conform to the additional statutory limitations in s 10D. The statutory preconditions to the declaration of a designated area confine the circumstances in which a direction may be issued under s 10KA(1). It is not a power that can be exercised at large.

69 The second reason why the burden is not significant is because it is limited in its effect. Where an exercise of the s 10KA(1) power burdens political communication, it would do so by requiring an individual to stop engaging in a particular form of political communication on that occasion. That is the extent of the burden. The provisions may be distinguished from those at issue in *Brown v Tasmania*,[56] in which a majority of the High Court held that the impugned statutory scheme as a whole (which applied to "protesters", directly regulated protest activity, and was therefore directed expressly to political communication) imposed a substantial burden on political communication due the combined effect of the relevant provisions — which included but went well beyond a police power to direct protesters to leave a specific area.[57] Any burden in this case is considerably more limited.

Legitimate purpose

70 The Applicants accept that the two purposes at paragraph [19] of the Respondents' Concise Statement are "legitimate" and "plausible" and that the analysis can proceed directly to the third stage (**AS [60]**). Those purposes are:

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55 *Wotton* at [80] (Kiefel J); *Unions NSW v New South Wales* (2013) 252 CLR 530 at [35]-[36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

56 (2017) 261 CLR 328.

57 *Brown* at [84]–[86] (Kiefel CJ, Bell and Keane JJ); [195]–[199] (Gageler J); [257], [291]–[292] (Nettle J).

(a) to protect the safety of people in a designated area from violence or disorder; and/or

(b) to assist police to protect the safety of people in a designated area from violence or disorder.

71 The Court should be satisfied that these are the relevant legislative purposes, having regard to the text and context of the provision, including its legislative history and extrinsic materials.[58] Section 10KA(1) is part of a suite of provisions in the Act that confers powers on police and protective services officers in circumstances where the Chief Commissioner apprehends that there is a likelihood of violence or disorder [involving weapons] in a specific area. The provisions were introduced with the stated purpose of "provid[ing] police with enhanced powers to address violence and disorder …".[59] When s 10KA was introduced,[60] the Minister said of the amending law that it "contain[ed] a range of new measures to prevent serious disturbances of public order, including outbreaks of violence at protests, demonstrations and other public events".[61]

72 The "mischief"[62] at which s 10KA(1) is addressed is therefore the risk of public violence and disorder, particularly that involving weapons, in a designated area. The purpose of the provision — what "the law is designed to achieve in fact", being the inverse of that mischief[63] — is to protect the safety of people in such an area from violence and disorder, and to provide the police with powers to bring about such protection.

73 The identified purposes are compatible with the constitutionally prescribed system of representative and responsible government because they do not

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58 *Farmer* at [54] (Gageler CJ, Gordon and Beech-Jones JJ).

59 Explanatory Memorandum, Summary Offences and Control of Weapons Acts Amendment Bill 2009 (Vic) at 1.

60 *Crimes Legislation Amendment (Public Order) Act 2017* (Vic) s 6.

61 Victoria, *Parliamentary Debates*, Legislative Assembly, 23 March 2017 at 924.

62 *Farmer* at [54] (Gageler CJ, Gordon and Beech-Jones JJ); *Brown* at [101] (Kiefel CJ, Bell and Keane JJ), [208] (Gageler J), [321] (Gordon J).

63 ***Ravbar*** *v Commonwealth* (2025) 99 ALJR 1000 at [41] (Gageler CJ).

impede the functioning of that system.[64] In fact, they advance that system.[65] The protection of those in designated areas from those who seek to do harm, or to frustrate the effectiveness of police efforts to prevent harm, helps to ensure that others in those public spaces are able to conduct themselves freely, including by participating in political communication (such as attending a protest) without threat to their safety. The protection of the safety of the people in Victoria is a legitimate concern of any elected State government.[66]

Reasonably appropriate and adapted

74 Section 10KA(1) is reasonably appropriate and adapted to its pursuit of one or both of the legitimate purposes identified above for the following reasons.

75 *First*, there is a "rational connection" between s 10KA(1) and its purpose, in the sense that "the means for which it provides are capable of realising [its] purpose".[67] The test of "rational connection" asks no more than whether the measure can contribute to the realisation of the statute's legitimate purpose. It "does not involve a value judgment about whether the legislature could have approached the matter in a different way".[68]

76 The connection between public safety and s 10KA(1) in its application to the wearing of a face covering to conceal a person's identity was explained in the Second Reading Speech as follows:[69]

> We have also seen an increase in the use of balaclavas and other makeshift face coverings by those who intend violence at public events. … Face coverings prevent police from identifying troublemakers, and the anonymity they provide can lead the wearer to think that they can act without consequence. …

77 The connection is therefore twofold: first, people are or may be more likely to engage in acts of violence while their identity is concealed; and, second, the wearing of a face covering makes it more difficult for police to identify people who

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64 *McCloy* at [31] (French CJ, Kiefel, Bell and Keane JJ).

65 See *Babet v Commonwealth* (2025) 99 ALJR 883 at [34] (Gageler CJ and Jagot J).

66 See ***Clubb*** *v Edwards* (2019) 267 CLR 171 at [196] (Gageler J), [258] (Nettle J).

67 *Comcare v Banerji* (2019) 267 CLR 373 at [33] (Kiefel CJ, Bell and Keane JJ); *Clubb* at [56] (Kiefel CJ, Bell and Keane JJ), [257] (Nettle J), [496] (Edelman J).

68 *McCloy* at [80] (French CJ, Kiefel, Bell and Keane JJ).

69 Victoria, *Parliamentary Debates*, Legislative Assembly, 23 March 2017 at 924.

commit offences. For example, there have been recent instances of people concealing their identity in order to take part in behaviour that is threatening or denies others their capacity to engage in public life or engage in political communication.[70]

78 The connection between public safety and s 10KA(1) in its application to the wearing of a face covering to avoid the use of crowd-controlling substances is its function in ensuring the availability of lawful means of police response to violence or disorder.[71] Police officers are authorised to use capsicum spray when legally permitted to use force, including in the exercise of lawful self-defence and to prevent the commission of offences.[72] Violence or disorder may involve conduct that justifies or requires the lawful use of force by police officers. A "designated area" is an area in which the Chief Commissioner has determined there is a likelihood of violence or disorder. A power to direct a person who is wearing a face covering to avoid the effects of such substances to leave a designated area is capable of ensuring officers' ability to protect others and themselves from violence or disorder, and is therefore capable of realising the purpose of protecting public safety in that area.

79 The Applicants point to hypothetical instances in which they allege that the s 10KA(1) power might lack a "rational connection" to the provision's purposes **(AS [62]).** Even were this correct, that is not the right inquiry. The analysis should be conducted, in the first instance, at the level of the statute.[73] The question is

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70 The Age, '"Unmask them now": Police powers questioned as neo-Nazis flex their muscles' (9 August 2025), https://www.theage.com.au/national/victoria/no-place-for-hate-as-police-escort-neo-nazis-in-early-morning-march-20250809-p5mlmr.html; The Age, 'Coalition senator dismisses neo-Nazis outside office as "cosplaying losers"' (13 April 2025) https://www.theage.com.au/politics/federal/coalition-senator-dismisses-neo-nazis-outside-office-as-cosplaying-losers-20250413-p5lrfl.html; ABC News, 'Police use capsicum spray on neo-Nazis after clash at Melbourne asylum seeker rally' (23 October 2024) https://www.abc.net.au/news/2024-10-23/refugee-rally-disrupted-by-far-right-protesters/104504672; Australian Broadcasting Corporation, 'Outrage in Ballarat at white supremacist march, 15yo questioned over banned Nazi salute' (4 December 2023), https://www.abc.net.au/news/2023-12-04/ballarat-white-supremacy-march-investigated/103183616.

71 The term "crowd-controlling" substances is not defined in the Act. As the Applicants identify (**AS [62]**), the Parliament was primarily concerned with capsicum spray.

72 *Brown v Victoria (No 3)* [2025] VSC 765 at [147], [175] (Harris J).

73 ***Cotterill** v Romanes* (2023) 374 FLR 469 at [62] (the Court). See also *Wotton* at [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

whether the relevant provision falls within the legislative power of the Parliament.[74] This is not a case in which it is appropriate to proceed directly to an analysis of a particular impugned exercise of that power (particularly because there is no impugned exercise of that power).[75] The validity of the provision is to be tested across the "range of potential outcomes" of the exercise of the power.[76] The test of rational connection between a law and its purpose asks whether the law (the means) is directed toward the object (or end), put forward as its rationale.[77] To allege that a purported operation of a provision lacks a "rational connection" to its purpose because of its effect on participation in political communication does not deny the suitability of the provision to achieve the purpose, but instead is to point to a burden that is capable of being justified by that rational connection.[78]

80 *Second*, the terms of s 10KA(1) and of other relevant provisions of the Act ensure that there is sufficient proportionality between the exercise of the power and its purpose. Most significantly, the power conferred by s 10KA(1) is only exercisable in a designated area. The statutory preconditions to the declaration of a designated area ensure that the s 10KA(1) power can only be exercised in a narrow set of circumstances. Additionally, before being directed to leave a designated area, the person must be given an opportunity to remove their mask. The burden does not flow immediately from the officer's formation of their reasonable belief.[79]

81 Further, contrary to the Applicants' submissions (**AS [63]**), the fact that the power in s 10KA(1) can only be exercised on the basis of a reasonable belief that a person is wearing a mask primarily for one of the two identified reasons does constrain the exercise of the power. The police officer's animating belief must be "reasonable", in the sense that there exist objective circumstances that could

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74 ***Palmer*** *v Western Australia* (2021) 272 CLR 505 at [64]–[67] (Kiefel CJ and Keane J), [119] (Gageler J), [201]–[202] (Gordon J).

75 See *Palmer* at [65], [68] (Kiefel CJ and Keane J), [122]–[124], [126] (Gageler J); *Cotterill* at [66] (the Court).

76 *Palmer* at [127] (Gageler J).

77 *Ravbar* at [311] (Gleeson J).

78 *Ravbar* at [311] (Gleeson J).

79 *Control of Weapons Act* s 10KA(1)(b).

induce the same state of mind in a reasonable person.[80] Directions issued on an arbitrary basis or for an ulterior purpose (see **AS [63.2]**) will be beyond power.[81]

82 In any event, the criterion of "reasonable belief" is appropriate in the circumstances. The s 10KA(1) power is to be exercised in situations that may be volatile and involve the use of weapons, in a clearly defined area. The provision can be distinguished in this respect from *Brown v Tasmania*, on which the Applicants rely. Similarly, the requirement that an officer believe that a person is wearing the face covering "primarily" for one of the two reasons reflects the factual circumstances in which the power is to be used. The Respondents accept the possibility of a direction issued on the basis of a mistaken but reasonable belief (see **AS [63]**). Nonetheless the terms of s 10KA(1) and the confined nature of the "designated area" scheme as a whole, when considered in light of the purpose at which the law is directed, impose sufficient constraints on the exercise of the power.

83 *Third*, the justification for any burden imposed must be assessed in light of the purpose at which the law is directed.[82] The purpose at which this law is directed — the protection of public safety— is critically important.[83] The Respondents' primary position is that any burden on political communication is indirect and insubstantial, but even were the Court to find a substantial burden, that burden would be justified by the purpose at which it is directed — it is a "compelling justification".[84] The power conferred by s 10KA(1) can only be exercised in an area in which the Chief Commissioner has determined there is a likelihood of violence or disorder, including violence or disorder involving the use of weapons. In that context, a burden which constitutes the indirect limitation of an individual's ability to engage in a form of political communication on a particular occasion on

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80 *George v Rockett* (1990) 170 CLR 104, 112 (the Court).

81 *R v Connell; Ex parte Hetton Bellbird Collieries (No 2)* (1944) 69 CLR 407 at 432 (Latham CJ). See also *Ravbar* at [358] (Jagot J).

82 *McCloy* at [86] (French CJ, Kiefel, Bell and Keane JJ); *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1 at [85] (Kiefel CJ, Keane and Gleeson JJ) referring to the special importance of a "powerful public, protective purpose".

83 See *Levy v Victoria* (1997) 189 CLR 579 at 620 (Gaudron J). See also *Cotterill* at [116] (the Court); *Cotterill v Romanes* (2021) 68 VR 433 at [301] (Niall JA) in the context of the protection of public health.

84 See **AS** at **[61].**

the basis of the reasonable belief of a police officer as to unrelated matters is not "undue".[85]

84 *Fourth*, there are no "obvious and compelling, reasonably practicable means" of achieving the purpose that impose a lesser burden on political communication.[86] The Applicants point to laws that confer powers to direct the removal of a face covering on the basis of a reasonable belief or suspicion that a person has or will commit an offence. These laws apply in different situations. The mooted alternatives apply specifically in situations of "public protest" or "assembly".[87] Section 10KA(1) applies in "designated areas", where there is a likelihood of violence of disorder, including that involving the use of weapons, and may therefore need to be used for purposes of deterrence and prevention of violence. The nature of the threat to public safety, and of the powers that police may need to exercise in response, is different in either case. Further, that the Parliament considered it necessary and appropriate to introduce s 10KA(1) in addition to s 10KA(2) demonstrates that the Parliament did not consider a direction power enlivened only by the commission or intended commission of an offence to be sufficient (cf **AS [64]**). Parliament's judgment should not be second-guessed. The question whether reasonable alternatives are available is not a "free-ranging inquiry" into the Parliament's policy choices.[88]

Conclusion and relief

85 For these reasons, s 10KA(1) is reasonably appropriate and adapted to the pursuit of the legitimate purpose of protecting the safety of people in a designated area from violence or disorder, and is therefore valid in its entirety and all of its applications. Alternatively, if the Court determines that s 10KA(1) is not valid in its entirety, it may be appropriate to "read down" or "disapply" s 10KA(1) in some way. The provision does not demonstrate any "contrary intention":[89] there is no

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85 *McCloy* at [86] (French CJ, Kiefel, Bell and Keane JJ).

86 *Farmer* at [60] (Gageler CJ, Gordon and Beech-Jones JJ).

87 *Justice Legislation Amendment (Police and Other Matters) Act 2025* (Vic) s 80; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 19A(1)(c)

88 *Brown* at [139] (Kiefel CJ, Bell and Keane JJ).

89 *Interpretation of Legislation Act 1984* (Vic) s 6(1).

"positive indication" in the enactment that the legislature intended the provision to have full operation or none at all.[90] Section 10KA(1) will apply in a range of situations that have nothing to do with political communication.

86 However, the Court should decline to read down s 10KA(1) in the way contended for by the Applicants. That "reading down" is not specific to any relevant "constitutional facts" about an exercise of the s 10KA(1) power. Instead, that "reading down" is to the effect that a direction cannot be issued pursuant to s 10KA(1) where a person is engaging in political communication. That is overbroad. There is a range of political communication to which s 10KA(1) may apply (see paragraph [67] above). The question of justification will be different across that range. The Court should only grant declaratory relief by reference to the circumstances of the case.[91] Engaging in constitutional adjudication in a "factual vacuum" risks "premature interpretation of statutes on the basis of inadequate appreciation of their practical operation".[92] This is especially problematic in this case given the potential impracticalities of such an outcome.[93]

87 If the Court considers it necessary and appropriate to issue declaratory relief in respect of s 10KA(1), that relief must be informed by the constitutional facts before it. In this case, the only relevant constitutional facts are those concerning a prior request for the Second Applicant to remove a face covering in a designated area.

D DISPOSITION

88 For the reasons set out above, the Court should not grant the relief sought by the Applicants. The proceeding should be dismissed.

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90 *Clubb* at [235] (Nettle J).

91 See *EHT v Melbourne IVF* (2018) 263 FCR 376 at [126], [132], [134] (Griffiths J). See also *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at [103] (the Court).

92 *Tajjour v New South Wales* (2014) 254 CLR 508 at [174]-[175] (Gageler J).

93 *Clubb* at [235] (Nettle J).

Date: 14 January 2026

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