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

SUBMISSIONS IN SUPPORT OF APPLICANTS' PROPOSED ORDERS TO BE SOUGHT AT CASE MANAGEMENT HEARING ON 12 JANUARY 2026

A INTRODUCTION

1 The proceeding is listed for final hearing on 15-16 January 2026. The Applicants' **Proposed Orders** are designed to ensure there is no disruption to that hearing, consistent with the overarching purpose of facilitating the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.[1]

B CHRONOLOGY

2 On 30 November 2025, the Declaration commenced, with an end-date of 29 May 2026.[2]

3 On 2 December 2025, in an attempt to avoid commencing this proceeding, the Applicants requested that the First Respondent revoke the Declaration, on the basis it was invalid for the reasons set out in a draft of the Concise Statement.[3]

4 At the request of the Respondents, the Applicants delayed commencing the proceeding until 8 December 2025, including after being told on 5 December 2025 that Victoria Police was "carefully considering the issues raised by the Applicants' Draft Originating Application and Draft Concise Statement" and was doing so "in good faith".[4]

5 At a case management hearing on 16 December 2025, Dowling J made orders listing a hearing for 15 and 16 January 2026. At that hearing, the First Respondent raised the possibility that the First Respondent would revoke the Declaration before the final hearing.

6 At 4:18pm on 31 December 2025, the solicitors for the Respondents wrote to the Applicants, indicating that they were "currently obtaining instructions in relation to the proceeding, *including as to the prospect of the Assistant Commissioner making a new designated area declaration under s 10D of the Control of Weapons Act 1990*".[5] That was part of the context in which the Respondents sought additional time to file their Concise Response.[6]

7 On 2 January 2026, the Applicants emailed the Respondents, stating that "[a]s a matter of transparency, and to ensure things proceed efficiently" if a new declaration was made, "the Applicants will oppose any application by the Respondents to vacate the hearing dates on 15-16 January, which at the very least can be used to hear argument on the current declaration and the constitutional issue".[7]

8 On 5 January 2026, the Respondents filed their Concise Response. It did not mention any continuing prospect of the "making of a new designated area declaration", but did raise issues of standing, "matter" and jurisdiction in relation to the existing declaration and the

1 *Federal Court of Australia Act 1976* (Cth), s 37M.
2 See Applicants' Submissions (**AS**) filed 7 January 2026 at [1]-[2].
3 See Genuine Steps Statement filed 10 December 2025, Annexure A.
4 See Genuine Steps Statement, Annexure D, see also Annexure B.
5 Affidavit of Sarah Schwartz (11 January 2026), **Exhibit SS-1** at 5. Emphasis added.
6 The Respondents sought an extension until 4pm on 5 January 2025 (rather than midday, which the Applicants consented to in light of their delay in service) "to enable us sufficient time to obtain the instructions detailed in our email": Exhibit SS-1 at 7.
7 Exhibit SS-1 at 9.

constitutional issue: **CR [2]-[4]**. It also robustly defended the validity of the Declaration, labelling various arguments of the Applicants as "misplaced", "without foundation", lacking a "proper basis", "embarrassing", confounding "proper analysis" and "misconceived": **CR [5]-[6], [8]-[9], [12], [16]**.

9 At 2:10pm on 7 January 2026 (less than 2 hours before the Applicants were due to file their material), the solicitors for the Respondents wrote to the Applicants, noting that they had been "instructed that the following *is to occur*: (1) the Declaration the subject of this proceeding *will end* – at this stage we do not have a specific date for this, but it will occur before 15 January 2026; and (2) *a new decision will be made*".[8] The terms in which those instructions were conveyed to the Applicants left some ambiguity as to whether those two things were to occur contemporaneously or in stages.

10 At 6:43pm that day, the solicitors for the Applicants wrote to the Respondents stating that, if the Respondents applied to vary the timetable or vacate the hearing dates, the solicitors for the Applicants expect to receive instructions to oppose that application and to press for the 15 and 16 January 2026 hearing regardless, to hear at least the challenge to the Declaration and the constitutional issue.[9]

11 At 11:36am on 8 January 2026, the solicitors for the Respondents again stated in an email to the Applicants that "a new decision will be made".[10]

12 At 2:29pm on 8 January 2026, the solicitors for the Respondents informed the Applicants that, earlier that day, "the First Respondent made a decision to end the Declaration the subject of this proceeding" and that "consideration is being given to a new Declaration being made by the First Respondent" but they did not have "any firm instructions on the timing of any such new Declaration".[11] The email did not state when the Declaration would come to an end. Nor did it provide any explanation for why the First Respondent had made the decision to end the Declaration. It also did not explain why there appears to have been a reversal from the earlier instructions (that a new decision "will be made") to something less committed ("consideration is being given").

13 At 3:13pm on 9 January 2026, an article was published in *The Guardian* about the decision to end the Declaration.[12] The article states that Victoria Police had, on Friday morning, "updated their website" to indicate the Declaration would end at 11:59pm on 9 January 2026. The article also states that a spokesperson for Victoria Police said that "[a]ll searches and seizures conducted under the declaration between 30 November 2025 and 9 January 2026 remain

[8] Exhibit SS-1 at 10. Emphasis added.
[9] Exhibit SS-1 at 11.
[10] Exhibit SS-1 at 12.
[11] Exhibit SS-1 at 13.
[12] See Affidavit of David Hack, Annexure DH-2. Also accessible at: https://www.theguardian.com/australia-news/2026/jan/09/victoria-police-revokes-powers-to-allow-warrantless-pat-downs-across-inner-melbourne.

valid" and that "Victoria police is considering making a new declaration with the duration and size yet to be determined". The framing of that statement may be read as suggesting there *will* be a new declaration (consistent with the earlier instructions), with all that is yet to be resolved being the size of the area and the period for which the declaration will operate.

14 At 4:36pm on 9 January 2026, the solicitors for the Respondents informed the Applicants that "a Notice has been published in the Victorian Government Gazette this morning that the Declaration will end tonight at 11.59 pm".[13] The same email stated that, at the case management hearing on 12 January 2026, the Respondents "intend to propose orders to the following effect":

- Timetabling and consequential orders for the filing of an application by the Respondents to summarily dismiss the proceeding, including an exchange of submissions in that regard and a date for the hearing of the application.
- Orders varying to the current timetable in the substantive proceeding, as is necessary, to accommodate the hearing of application for summary dismissal in circumstances where the Declaration has ended and there remains no basis for the proceeding to continue on an expedited basis.
- If necessary, orders for the Respondent to put on a written application in respect of vacating the current timetable, which would take further time.
- Any other orders that the Court considers to be appropriate.

15 At 8:13pm on the same date, the Applicants responded to the Respondents, requesting the precise terms of the orders the Respondents' proposed to seek by 9:30am on 11 January 2026 to enable the Applicants to "consider [their] position, seek instructions and formulate [their] own proposed orders if necessary".[14]

16 The Respondents did not respond to that request by 9:30am on 11 January 2026. At 12:12pm on that day, the instructors for the Applicants sent to the instructors for the Respondents a copy of the Proposed Orders and the affidavit of Mr David Hack, dated 11 January 2026.

C APPLICANTS' PROPOSED ORDERS

17 Two matters of context are important for the Proposed Orders.

18 *First*, based on the chronology set out above, there is a real prospect (perhaps even close to a certainty) that the Assistant Commissioner will again exercise the power under s 10D(1)(b) of the Weapons Act to make a declaration over at least some part of the "Melbourne CBD and Vicinity" in the reasonably foreseeable future. There is also at least a real prospect that will occur before 26 January 2026. More generally, since current s 10D(1)(b) commenced on 26 March 2025, the power in s 10D(1)(b) has been exercised on at least 10 occasions.[15] The

[13] Exhibit SS-1 at 14 and see https://www.gazette.vic.gov.au/gazette/Gazettes2026/GG2026S009.pdf.
[14] Exhibit SS-1 at 12.
[15] In addition to the Declaration in issue, see Gazette S6 and S7 (8 January 2026), declaring designated areas in relation to Pacific Werribee Hoppers Crossing and Bayside Centre Frankston (for 47 days); Gazette S665 (1 December 2025), declaring designated areas in relation to Eastland Shopping Centre, Fountain Gate Shopping Precinct, Highpoint Shopping Centre and Northland Shopping Centre (for 3 months); and Gazettes S466, S467 and S468 (28

exercise of the power has the capacity to affect the common law and human rights of a very substantial number of individuals (as the Declaration, in fact, did). Therefore, it is not correct for the Respondents to say that "there remains no basis for the proceeding to continue on an expedited basis": paragraph 14 above.

19 *Second*, the Applicants acknowledge that, because the Declaration is no longer in force, an order in the nature of certiorari is no longer "available" in relation to the Declaration.[16] To make that clear, the Proposed Orders annex a draft of a further amended originating application, which the Applicants seek leave to file and which removes that claim: Proposed Order 2.

20 However, the Applicants continue to have standing to seek the declaratory relief sought in prayers 2 to 4 of the Amended Originating Application.[17] Building on what is set out in **AS [5]-[8]**:

20.1 Because there is a real prospect that a new declaration will be made under s 10D(1)(b), there is a real prospect that the search powers and the face-covering power will again become available to be exercised, including against the Applicants. That is enough for a person to maintain standing to seek a declaration in relation to a past exercise of administrative power that has been revoked.[18] "[R]eally what is at issue is whether what has been done can be repeated".[19] It is also enough for the Applicants to maintain standing in relation to the constitutional issue.[20]

20.2 Relatedly, the declarations sought in the Amended Originating Application will have foreseeable consequences for the parties (and there is thus a "matter" to be determined).[21] The resolution of the challenge to the validity of the Declaration will necessarily require the Court to determine the proper construction of s 10D(1)(b), being a preliminary issue to Grounds 1 to 3 (which grounds are preliminary to Grounds 4 to 7). There is a real controversy about that question: see **CR [5];** cf **AS [9]-[12]**. Further,

August 2025) declaring designated areas in relation to Southern Cross Railway Station, Melbourne Central Railway Station and Flinders Street Railway Station (for 40 days). Section 10D(1)(b) may have been exercised on other occasions to make declarations for less than 24 hours, but that cannot be determined from publicly available information as, until 2026, the Gazettes did not specify the subsection under s 10D.

16 See *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 at [25] (the Court).

17 See ***Unions NSW*** *v NSW* (2023) 277 CLR 627 at [18] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ): "The nature of a party's interest may change [during a proceeding due to intervening circumstances] but still remain sufficient".

18 *Unions NSW* (2023) 277 CLR 627 at [27] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ). See also *Loielo v Giles* (2020) 63 VR 1 at [134]-[146] (Ginnane J).

19 *Wragg v NSW* (1953) 88 CLR 353 at 371 (Dixon CJ); *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at [235] (Keane J), see also at [23] (French CJ, Kiefel and Nettle JJ).

20 ***Brown*** *v Tasmania* (2017) 261 CLR 328 at [17] (Kiefel CJ, Bell and Keane JJ).

21 See *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at [103]-[104] (the Court); *Unions NSW* (2023) 277 CLR 627 at [17], [27] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ).

the resolution of the constitutional issue may confine the circumstances in which the face covering power is exercisable, including against the Applicants.[22]

20.3 The practical consequences of a declaration can be illustrated in this way: in light of **CR [5]**, it can be inferred that any new declaration that the First Respondent proposes to make under s 10D(1)(b) will be made on an incorrect understanding of the law: see **AS [9]-[12]**. Accordingly, it can be inferred that the any new declaration will necessarily be made in excess of jurisdiction and therefore be invalid: **AS [19]**.[23] That outcome may be avoided if the Court hears and determines the validity of the Declaration that is currently under challenge on an expedited basis, because that declaration would be founded a judgment that explained the proper construction of s 10D(1)(b). If that occurred, it would be unnecessary, for example, for the Applicants to seek an order in the nature of prohibition or an injunction, and an associated interlocutory injunction, to restrain the First Respondent from making a decision under s 10D(1)(b) on an incorrect understanding of the law,[24] because it can be expected he would respect the Court's judgment on that question.

21 **Joinder:** The Applicants seek an order that David Hack be joined as the Third Applicant to the proceeding: Proposed Order 1. On 7 December 2025 (two days after Victoria Police indicated they were "carefully considering", in "good faith", the matters raised by the Applicants about the validity of the Declaration),[25] Mr Hack was searched under the Declaration, along with a bag he was carrying.[26] That interference with his personal rights and interests (namely, liberty, bodily integrity and personal property) was only possible because the Declaration had been made. Accordingly, in addition to the matters giving rise to standing that he has in common with the Applicants,[27] there can be no doubt that Mr Hack has standing to seek the declaration in paragraph 2 of the Amended Originating Application.[28]

22 Rule 9.05 of the *Federal Court Rules 2011* permits a party to extant proceedings to make an application to join a person who is a non-party to the proceedings.[29] Mr Hack should be joined pursuant to r 9.05(1)(b)(iii), "in order to enable determination of a related dispute and, as a result, avoid multiplicity of proceedings". Two requirements must be met: the dispute must

22 *Brown* (2017) 261 CLR 328 at [17] (Kiefel CJ, Bell and Keane JJ).
23 cf *KVO25 v Secretary of the Department of Home Affairs* [2025] FCA 1584 at [54]-[58] (Hill J).
24 See *R v Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 117-118 (Dixon CJ, Williams, Webb and Fullager JJ); *FUD18 v Minister for Home Affairs* (2021) 285 FCR 505 at [123] (Lee and Wheelahan JJ).
25 See Genuine Steps Statement, Annexure D.
26 See Affidavit of David Hack at [6]-[14].
27 In relation to the validity of s 10KA(1), he is proposing to attend the Invasion Day Rally and may wear sunglasses (i.e. a face covering) if it is sunny: Affidavit of David Hack at [18]-[19].
28 See also *Unions NSW* (2023) 277 CLR 627 at [21], [25] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ).
29 See *McAlister v NSW* (2014) 223 FCR 1 at [14] (Edmonds J).

be "related to the proceedings" and is "sufficiently arguable".[30] Discretionary considerations may then guide the Court in deciding whether or not to so join the person.

22.1 *Related dispute:* Mr Hack's claims arise from the same facts as the existing proceeding — the making of the Declaration by the First Respondent and the prospect of a new declaration (and the exercise of powers enlivened by a declaration).

22.2 *Sufficiently arguable:* If joined, Mr Hack would adopt the written submissions of the Applicants and otherwise make the same arguments as the Applicants. The written submissions more than establish that Mr Hack's claims are sufficiently arguable.

22.3 *Discretion:* Joinder would promote the efficient use of the Court's resources and limit costs and delay for all parties.[31] Most significantly, Mr Hack's joinder has the capacity to simplify matters of standing, utility and jurisdiction in relation to the Declaration. The late addition of a new Plaintiff in that context has been permitted by the High Court — for example, in *Murphy v Electoral Commissioner*, a second plaintiff was added *at the final hearing* before the Full Court of the High Court with the support of the opposing parties,[32] and as a result the Commonwealth's challenge to the first plaintiff's standing did not need to be determined.[33] And there is no prejudice or inconvenience to the Respondents, who must address the same arguments in any event.

23 The Proposed Orders also contain a draft of a further amended originating application, to include Mr Hack as the Third Applicant (and to remove the claim for certiorari): see Proposed Order 2. There is also a Proposed Order to ensure there is no ambiguity about the costs position of Mr Hack: Proposed Order 3.

24 **Section 78B:** The Concise Response raises issues that may be understood as involving the interpretation or arising under the Constitution, not covered by the existing s 78B notice: **CR [3]-[4]**. The Applicants anticipate that the Respondents may also be proposing to raise other issues within the scope of s 78B in their written submissions. That is the reason for seeking Order 5 of the Proposed Orders. The deadline imposed by that order will ensure a "reasonable time" will have elapsed by the time the hearing is to commence.[34]

[30] *Fewin Pty Ltd v Burke* [2016] FCA 503 at [48(2)], [56] (Markovic J). See also *Murdoch v Private Media Pty Ltd (No 4)* [2023] FCA 114 at [32] (Wigney J).

[31] See *Australian Consumer and Competition Commission v Launceston Superstore Pty Ltd* [2013] FCA 297 at [32]-[35] (Edmonds J); *Lifeplan Australia Friendly Society Ltd v Woff* [2013] FCA 613 at [16] (Besanko J).

[32] Indeed, at the commencement of the hearing, the opposing parties both made arguments *in favour* of the standing of the second plaintiff and the Court briefly adjourned to consider the issue, after which the hearing continued in full: see [2016] HCATrans 108 at lines 20-433 (Mr Merkel QC for the plaintiffs; Mr Owens for the active defendant).

[33] (2016) 261 CLR 28 at 30 (headnote), [2] (French CJ and Bell J), [49] (Kiefel J), [171]-[175] (Keane J), [229] (Nettle J), [334] (Gordon J). See also *Williams v Commonwealth* (2012) 248 CLR 156 at [9] (French CJ), [112] (Gummow and Bell JJ), [168] (Hayne J), [475] (Crennan J), [557] (Kiefel J), where standing was "put to one side" once there was an intervener with sufficient interest; and, to the same effect, *Bell Group NV (in liq) v Western Australia* (2016) 260 CLR 500 at [7] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

[34] See, eg, *Commissioner of Police (NSW Police Force) v Naser* [2025] NSWCA 224 at [21] (the Court), where the constitutional issue was raised (and notices issued) on 6 October 2025 and the matter was heard on 8 October 2025.

25 **Production:** As explained at **AS [18]**, since 30 December 2025, the Applicants have been seeking production of a document to assist in identifying the time at which the First Respondent signed the documents in the Brief. On 9 January 2026, the Respondents again refused the Applicants request, noting that "it is open" for the Applicants "to press for an order for production". The Applicants now do so: Proposed Order 4.

26 **Timetabling:** The Applicants have proposed a short extension of the timetable to better accommodate the Respondents' filing of evidence (until 10:00am on 13 January 2026) and submissions (until 10:00am on 14 January 2026): Proposed Orders 6 to 8. The Applicants propose a staggered approach, reflecting the fact that the Applicants will require more time to consider the evidence than they will need for submissions and, in particular, time to prepare for the cross-examination of the First Respondent (assuming the Respondents still propose to file an affidavit from him, that being the position conveyed to the Court on 16 December 2025).

D THE RESPONDENTS' PROPOSAL

27 The proposal of the Respondent, as conveyed to the Applicants on 9 January 2026, appears to assume that, because the Respondents have decided that they would like to make a summary judgment application, that alone is enough for the present timetable to be adjourned or vacated. Even if it were not less than one week out from a listed trial, that assumption is incorrect, including because "the Court retains some discretion in relation to whether or not it is appropriate to determine the proceedings by way of an application for summary judgment rather than allowing disputed matters of fact and law to proceed to trial".[35] Further, to the extent that the Respondents are, in substance, seeking a preliminary ruling on questions of standing, that is also a matter within the discretion of the Court.[36] Standing need not be treated as a "threshold issue".[37]

28 In the circumstances, the Respondents bear a "heavy burden" to persuade the Court that the hearing should be vacated or adjourned.[38] In exercising its discretion, the Court is to consider the Respondents' explanation and evidence of the need for the adjournment, balanced with the potential prejudice and harm to the Applicants (and to other litigants and the Court more broadly).[39] But, at least on the information currently known to the Applicants, there is no justification at all:

35 *Haire v WorkCo Australia Pty Ltd (No 2)* [2024] FCA 1266 at [20] (Horan J).
36 See, eg, *VicForests v Warburton Environment Inc* [2021] VSCA 194 at [124]-[135] (Niall, Emerton and Kennedy JJA).
37 See *Wilkie v Commonwealth* (2017) 263 CLR 487 at [56]-[57] (the Court); *Babet v Electoral Commissioner* (2023) 300 FCR 81 at [59]-[75] (Besanko, Wheelahan and Stewart JJ).
38 See ***Aon Risk*** *Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [4] (French CJ).
39 See *Aon Risk* (2009) 239 CLR 175 at [93], [95], [108], [113]-[114] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); ***Snow*** *v Secretary, Department of Social Security* [2025] FCAFC 98 at [9] (the Court).

28.1 the Respondents are yet to make any application for summary judgment and propose to do no more than seek "timetabling and consequential orders" for the filing of such an application;

28.2 the timing of the variation of the Declaration, and the making of any related summary judgment application, has always been wholly within the control of the First Respondent;

28.3 the Respondents have not provided any explanation for why the First Respondent did not decide to vary the Declaration until 8 January 2026 (less than a week before the hearing is due to commence), or for why he decided to do so at all;

28.4 the Respondents have not articulated the basis on which they will apply for summary judgment;

28.5 assuming the proposed basis for summary judgment involves the question of standing, there is no reason why the Respondents cannot address those issues in their written and oral submissions for the hearing on 15-16 January, taking account of the changed circumstances (especially because those circumstances were created by the First Respondent, and questions of standing, jurisdiction and utility have already been ventilated by both parties: **CR [2]-[4]**, **AS [5]-[8]**); [40]

28.6 in any event, any summary dismissal application would be doomed to fail — the notion that the Applicants have lost standing because the Declaration has been revoked (and, therefore, the Applicants have "no reasonable prospect of successfully prosecuting the proceeding or part of the proceeding"[41]) is contrary to authority (see paragraph 20 above);

28.7 any summary judgment application would unnecessarily protract the proceeding: if the application failed, the same issues would then need to be considered and resolved on a final basis at some later point (applying a different standard);[42] and

28.8 the Applicants would be prejudiced if the hearing were vacated or adjourned – in time lost, duplication incurred and due to the real prospect that during the delay the First Respondent will make (or purport to make) a new declaration affecting their interests.

Thomas Wood **Rohan Nanthakumar** **Margie Brown**
Dated: 11 January 2026

[40] *Snow* [2025] FCAFC 98 at [23] (the Court).

[41] *Federal Court of Australia 1976* (Cth), s 31A; *Federal Court Rules 2011* (Cth), r 26.01. The power "should not be exercised lightly": see *Trkulja v Google Inc* (2018) 263 CLR 149 at [22] (the Court), citing *Spencer v Commonwealth* (2010) 241 CLR 118 at [24] (French CJ and Gummow J), [60] (Hayne, Crennan, Kiefel and Bell JJ).

[42] Delay in the resolution of disputes and the waste of court and judicial resources is not in the parties' or the public interest: *Aon Risk* (2009) 239 CLR 175 at [113] (Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also *Monks v Pieman Resources Pty Ltd* [2025] FCAFC 121 at [83] (the Court).