IN THE SUPREME COURT OF VICTORIA
COMMON LAW DIVISION
GROUP PROCEEDINGS LIST

Not Restricted

S ECI 2022 03440

JORDAN BROWN — Plaintiff

v

STATE OF VICTORIA — Defendant

JUDGE:	Harris J
WHERE HELD:	Melbourne
DATE OF HEARING:	17, 18, 19, 20, 21, 24, 26, 28 February 2025, 3, 4, 5, 6, 7, 13 March 2025 and 11, 12 June 2025
DATE OF JUDGMENT:	12 December 2025
CASE MAY BE CITED AS:	Brown v State of Victoria (No 3)
MEDIUM NEUTRAL CITATION:	[2025] VSC 765

POLICE TORTS – Protest at Melbourne Convention and Exhibition Centre – Protest against mining and resource conference – Two protesters climbing poles at the Melbourne Convention and Exhibition Centre to erect a protest banner – Use of OC foam in context of attempts to arrest the climbers - Claim of battery by reason of use of OC foam on the plaintiff – Whether a lawful use of force – Whether a use of force in self-defence - Self-defence at common law and under s 322K of the *Crimes Act 1958* (Vic) – Whether a use of force to effect or assist in effecting an arrest pursuant to s 462A of the *Crimes Act 1958* (Vic) – *Crimes Act 1958* (Vic), ss 322K, 322N, 458, 459, 462A; *Summary Offences Act 1966* (Vic) s 6.

GROUP PROCEEDING – Conduct of Victoria Police officers at a protest – Common questions regarding decisions to arrest persons climbing poles and to direct advance by police on protesters – Common questions regarding laws and standards applicable to police in protests - Status of Victoria Police Manuals.

HUMAN RIGHTS – Whether police officers' acts deploying OC foam on the plaintiff were act incompatible with human rights – whether open to consider other acts and decisions of police for compliance with s 38(1) of *Charter* - Whether declarations relating to Charter breaches available - *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 10(b), 12, 16(1), 38(1).

INJURY – Whether injury suffered by plaintiff subject to the *Wrongs Act 1958* (Vic) – temporary physical injury - Psychiatric injury - Intentional torts - Intent to cause death or

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injury – *Wrongs Act 1958* (Vic), ss 28LB, 28LC, 28LC(2)(a).

DAMAGES – General damages – Special damages – Aggravated damages – Exemplary damages.

DECLARATIONS – Police torts - Availability of declarations that specific officers of Victoria Police committed battery –*Victoria Police Act 2013* (Vic), ss 61, 73, 74, 75 - *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 39(1).

EVIDENCE – Admissibility and weight of evidence – Opinion evidence involving interpretation and application of the law – *Evidence Act 2008* (Vic), ss 56, 76, 79.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	F Forsyth KC with S Gold and P Hamilton	Phi Finney McDonald
For the Defendant	S Hay KC with S Fitzgerald, R Ellyard, M Pekevska and B King	Victorian Government Solicitor's Office

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GLOSSARY

HRIA	Human Rights Impact Assessment
HRRR	Human Rights-Ready Reckoner
HRRA	Human Rights Risk Assessment
ICCS	Incident Command and Control System
IMARC	International Mining and Resources Conference
MCEC	Melbourne Convention and Exhibition Centre
OC	Oleoresin Capsicum
OC Manual	Oleoresin Capsicum Manual 2019
OSTT	Operational Safety and Tactics Training
ORU	Operations Response Unit
PFSU	Prosecutions Frontline Support Unit
PORT	Public Order Response Team
TOM	Tactical Options Model
VPMs	Victoria Police Manuals

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HER HONOUR:

Introduction

1 The sixth annual International Mining and Resources Conference (**IMARC**) 2019 was held in Melbourne at the Melbourne Convention and Exhibition Centre (**MCEC**) from 29 to 31 October 2019. IMARC is an annual global event for participants in the mining industry and associated technology, finance and other sectors, and was attended by thousands of delegates. The MCEC, as the conference venue, was also attended by protesters who were protesting on environmental and climate related issues (the **IMARC Protest**). Victoria Police officers, including the Public Order Response Team (**PORT**), were present to police the event.

2 On the morning of 30 October 2019, two protesters climbed two poles which support the angled roof of the MCEC over its forecourt opening out to the Yarra River and Clarendon Street. On reaching the top of the poles, the Climbers hung a banner between the poles, which read 'Blockade IMARC for Climate Justice'.[1] The Climbers remained at the top of the poles for a period of time while other protesters gathered below at the forecourt of the MCEC. A decision was made by the Police Forward Commander, who had responsibility for operations on the ground at the event, that the Climbers be arrested for trespass. The PORT Tactical Commander at the site ordered police officers to implement the direction by moving around the poles to arrest the Climbers as they descended.

3 As police officers moved towards the poles, protesters also surrounded each pole. The Climber on the pole closer to Clarendon Street (the **East Pole**) descended and ran away without being arrested. Jordan Brown (the **plaintiff**) was among protesters who gathered around the pole further from Clarendon Street (the **West Pole**). In the events which followed the direction to arrest the Climbers, Oleoresin Capsicum (**OC**) foam was sprayed by Victoria Police officers towards protesters, including on two occasions directly at the plaintiff.

4 This is a group proceeding brought by Mr Brown on behalf of himself and group

[1] Statement of Agreed Facts, [11].

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members, who are defined as those who were present at the IMARC Protest, between 11.44am to 12.35pm at the MCEC on 30 October 2019, and had suffered harm as a result of being sprayed with OC foam between 12.10pm to 12.35pm.[2] The group is defined to exclude the two Climbers. The proceeding is brought against the **State** of Victoria pursuant to s 74 of the ***Victoria Police Act*** *2013* (Vic), which provides that the State is liable for the commission of a 'police tort'. The State contends that although the plaintiff was not suspected of any offence, the deployment of the OC foam at him by police officers was a lawful measure used to assist in effecting the arrests of the Climbers, or in defence of police officers, in circumstances of a protest environment that included protesters behaving in an unruly and unlawful manner.

5 The proceeding raises difficult questions about the extent to which police officers who are tasked with policing events, at which members of the public are exercising their right to protest, may lawfully use force in a dynamic and occasionally chaotic crowd environment. The plaintiff's claims necessitate determination of issues relating to the necessity for and proportionality of the use of OC foam. I have found in this case that the specific deployments of OC foam against the plaintiff were not lawful, as the evidence does not establish that they were proportionate responses to an objective of effecting arrest or to circumstances said to have been perceived by the relevant police to warrant self-defence measures. It is important to appreciate that these conclusions made are necessarily limited in their effect to the use of OC aerosols as relevant to the plaintiff's claims, in the circumstances of this specific proceeding.

The issues in this proceeding

6 This proceeding, as a group proceeding conducted by the plaintiff on his own behalf and on behalf of other persons sprayed by OC foam at the IMARC Protest, involves both the determination of the plaintiff's own claims, and the determination of numerous questions common to the group members and the plaintiff. On the plaintiff's individual claims, I have determined that:

(a) The two separate deployments of OC foam on him by two different police

[2] **Further Amended Statement of Claim** dated 21 March 2025, [1].

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officers constituted the conscious use of force against him.

(b) The defences put forward by the State for the deployments of foam, being in both cases self-defence or defence of another; and in one case, the use of force to assist in effecting an arrest, have not been established by the State.

(c) The torts of battery were committed intentionally by each police officer, so that damages for personal injury are available to the plaintiff.

(d) The plaintiff will be awarded $54,000 in damages, comprising $40,000 general damages, $4,000 special damages and $10,000 in aggravated damages.

(e) A declaration will be made to the effect that the deployments of OC foam were each a battery of the plaintiff.

(f) The common questions include factual questions as to what occurred at the IMARC Protest, as well various legal questions about the laws and legally imposed standards applicable to police, and questions relating to the availability of damages for personal injury and declaratory relief. Given the complexity and detail of the common questions, the outcome of them is not summarised here. The Common Questions are set out in Annexure 1, with a reference to the paragraph numbers of these reasons in which they are addressed.

The plaintiff's claims and the Common Questions in the initial trial

7 The plaintiff is an artist, musician and filmmaker who has worked as a freelance journalist. His filmmaking has been recognised with industry awards, particularly in the field of ecological issues. He works as a freelance full stack developer, work which involves making and maintaining websites; and as a volunteer at an artist workspace in Brunswick, and at Melbourne Activist Legal Support, which he described as a human rights organisation.[3]

[3] Transcript 18/02/25, T139.09-T140.03; T162.24-28; T164.26-T165.01 (Plaintiff XN). T193.13-16; T204.13-31 (Plaintiff XXN).

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The pleadings

8 The plaintiff pleads that the use of force by police officers on group members at the IMARC Protest, including by the use of OC foam, constituted a series of batteries and assaults for which the State is liable pursuant to the police tort claims provisions of the *Victoria Police Act*. Those provisions require police tort claims to be brought against the State rather than against the specific police officers alleged to be responsible for the tort.[4]

9 It is alleged that during the IMARC Protest, two protesters climbed up the East and West Poles to unfurl a banner in respect of the protest. The plaintiff alleges that the plaintiff and group members were at the base of the poles, and the PORT Tactical Commander directed the arrest of the Climbers for the summary offence of trespass under s 9 of the ***Summary Offences Act*** *1966* (Vic). The plaintiff pleads that in response to this direction and while the Climbers were descending, police officers around the poles pushed, crushed, grabbed and deployed OC foam on protesters, including group members and the plaintiff who was at the base of the West Pole. It was also pleaded that OC foam was deployed on protesters at the base of the West Pole following the apprehension of the climber on that pole. It is alleged that the deployment of OC foam was a use of force without lawful justification and involved unreasonable and disproportionate force, which constituted assault and battery.[5] The plaintiff alleges that he suffered physical and psychological injury from the batteries and seeks damages, including for non-economic loss, and aggravated and exemplary damages.[6]

10 The plaintiff also alleges that Victoria Police officers failed to give proper consideration to the human rights of protesters, including group members and the plaintiff, when making certain decisions. These include decisions made in planning the response to the IMARC Protest, directing the arrest of the Climbers, physically advancing on the protesters to effect the arrest direction, deploying OC foam and the pushing, crushing and grabbing of the protesters. The plaintiff seeks declarations that

4 *Victoria Police Act*, Division 8 of Part 4.
5 Further Amended Statement of Claim, [35].
6 Further Amended Statement of Claim, Prayer for Relief A.

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these actions and decisions of various police officers during the IMARC Protest were not lawfully justified and constituted police torts within the meaning of s 74 of the *Victoria Police Act* and were in breach of the ***Charter*** *of Human Rights and Responsibilities Act 2006* (Vic).

11 The State admits that two officers, Sergeant Larissa Guthrie[7] and A/Sergeant Nicholas Bolzonello, deployed OC foam against the plaintiff.[8] However, the State pleads that the uses of OC foam were authorised under s 322K and/or s 462A of the *Crimes Act 1958* (Vic), or the common law of self-defence,[9] as the deployments were informed by the need to use it in defence of other police officers and in response to the plaintiff hindering police officers in the execution of their duties, including the safe arrest of the West Pole Climber.[10] The State also admits that s 38(1) of the *Charter* makes it unlawful for officers of Victoria Police to act in a way that is incompatible with a human right, or to fail to give proper consideration to a human right, but denies that any police officer involved in the response to the IMARC Protest breached s 38.[11]

12 The plaintiff pleaded 28 questions of law or fact, many with multiple sub-questions, which were alleged to be common to the claims of the plaintiff and each of the group members (the **Common Questions**). In July 2024, the State applied to limit the issues to be determined at the initial trial of the proceeding, and the scope of the Common

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7 Sergeant Guthrie was an Acting Inspector at the time of giving evidence.

8 **Further Amended Defence** to Amended Statement of Claim dated 14 March 2025, [30(c), 3(c), 34(g), 34(i)]. The State originally pleaded that on the first occasion the plaintiff had been sprayed with OC foam, two officers had deployed the OC foam, Sergeant Saunders and Sergeant Guthrie: **Defence to Amended Statement of Claim** dated 23 January 2025, [30(c)-(d)]. In response to the plaintiff's allegation that the was sprayed on a second occasion, the State pleaded that the plaintiff was sprayed 'as he continued to hold on to the west pole' but did not make it clear whether the State acknowledged that the plaintiff had been sprayed with OC foam as he moved away from the West Pole: Defence to Amended Statement of Claim, [34(g)-(h)].
On 7 February 2025, at a mention prior to the commencement of trial, the State advised that it would be necessary to seek leave to amend its defence as it had ascertained that Sergeant Saunders had not sprayed the plaintiff on the first occasion. The plaintiff consented to an amendment to the defence to reflect this on the first day of trial, and I granted leave for the State to file the Amended Defence: Transcript 17/02/25 T48.21-24. The State's Amended Defence pleaded that Sergeant Guthrie's decision to use OC foam was a response to the plaintiff hindering her and other police officers in the execution of their duties, the plaintiff attempting to prevent the safe arrest of the West Pole Climber, and the plaintiff hindering and resisting police in the safe arrest of the West Pole Climber: Further Amended Defence, [30(e)(i)-(iii)].

9 A defence based on response to a breach of the peace was abandoned during trial.

10 Further Amended Defence, [30(f)].

11 Further Amended Defence, [40]-[43].

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Questions to be determined at the trial was the subject of submissions from the parties. That application was determined by Justice Keogh on 26 September 2024. His Honour ruled that a variation on the Common Questions proposed by the plaintiff should be heard at the trial, and gave reasons for his ruling.[12]

13 Prior to trial, the parties further addressed the scope of the issues at trial at a case management hearing. The parties disagreed on the extent to which findings should be made about the conduct of protesters other than the plaintiff, and police officers other than those who engaged with the plaintiff. The State sought findings that in the course of the IMARC Protest, not all the protesters were acting lawfully. The plaintiff resisted any such findings as the State had not provided particulars of protesters' conduct on which findings would be sought despite being requested to do so.[13] The State's position was that it did not seek findings about any individual person, but that certain Common Questions relating to what happened at IMARC required findings about the conduct of protesters, which would be contextually relevant to the conduct of the police officers who had deployed OC foam on the plaintiff. [14] Following the case management hearing, the parties conferred on the scope of the Common Questions which were, pursuant to Justice Keogh's orders, to be the subject of the initial trial and some refinements to those questions were agreed.[15]

14 The trial proceeded on the basis that closing submissions would be made as to the Common Questions which should be the subject of findings, by reference to the evidence, but that the Common Questions would be the starting point for evidentiary rulings on relevance.[16]

15 The State sought leave to amend its defence during the trial, primarily in relation to

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12 *Brown v State of Victoria* [2024] VSC 783. The Common Questions which his Honour determined were to be considered at trial were listed at Annexure A of those reasons.

13 Transcript 07/02/25, T26.06-T34.09.

14 Transcript 07/02/25, T40.20-T42.28.

15 See Orders of Justice Harris made on 25 March 2025, Other Matters. On 13 March 2025 during the course of the trial, the parties made submissions as to proposed amendments to the common questions determined in the Ruling of Justice Keogh made on 17 December 2024 (*Brown v State of Victoria* [2024] VSC 783). Following the hearing on 13 March 2025, the parties made further submissions on proposed amendments to the common questions by emails to the chambers of Justice Harris on 17 and 21 March 2025. The common questions as amended are in Annexure A of the 25 March 2025 orders.

16 Transcript 14/02/25, T24.26-T25.03; T33.08-T34.27.

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the reasons for which Sergeant Guthrie had deployed OC foam, and to identify A/Sergeant Bolzonello as the police officer who had deployed the OC foam on the plaintiff on the second occasion.[17] The State sought to plead that Sergeant Guthrie had deployed OC foam as a response to the presence of other protesters rendering unsafe an area where other police officers were attempting to effect the arrest of another, unidentified, protester.[18]

16 For reasons explained in detail in a ruling made 27 February 2025, I granted leave to amend the defence to identify A/Sergeant Bolzonello as the officer who had deployed OC foam on the second occasion, and to plead the reasons he was alleged to have done so.[19] I did not permit all of the proposed amendments relating to the matters informing Sergeant Guthrie's decision to deploy OC foam.[20] In particular, I did not permit the State to plead that Sergeant Guthrie's use of force was informed by her view that it was necessary to facilitate the arrest of a protester other than the Climbers or the plaintiff. There was insufficient explanation as to why the application to amend was made at such a late stage in the proceeding;[21] and the plaintiff would be prejudiced in having to meet an allegation, raised for the first time at trial, that unidentified police officers were seeking to arrest a third, unidentified protester. The plaintiff's evidence had concluded by the time of the application. It had not been put to him that police near him were attempting to arrest a protester other than the West Pole Climber, nor that he was doing anything to hinder that arrest.[22]

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17 The application was made on 24 February 2025, supported by an Affidavit of Sally Robertson affirmed 23 February 2025 (and filed 25 February 2025).

18 The State also sought leave to remove a pleading to the effect that Sergeant Guthrie's deployment of OC foam was 'informed by the need to restore the peace' and relied on the common law defence relating to the use of force to prevent a breach or threatened breach of the peace.

19 ***Brown v State of Victoria (No 2)*** [2025] VSC 59, [24]-[29].

20 *Brown v State of Victoria (No 2)*, [30]-[34].

21 Evidence established that there were reasons relating to Sergeant Guthrie's health as to why it was reasonable for the instructing solicitors to take the view that instructions could not be taken over a period from 12 February 2025 to 20 February 2025. It was not explained why instructions could not be taken prior to that time. See *Brown v State of Victoria (No 2)* [2025] VSC 59, [77]-[79]; [108]-[111].

22 *Brown v State of Victoria (No 2)* [2025] VSC 59, [89]-[97]. As a result, the State's additions to its defence in relation to Sergeant Guthrie were limited to pleading that her decision was a response to the presence of 'other protesters under the west pole encroaching and remaining on, and rendering unsafe, the area to her left', as well as the conduct of other protesters who were 'hindering police by refusing to move away from the area under the west pole' and her concern about 'the potential for a crowd crush which could cause injuries to protesters and police members'. See Further Amended Defence, [30(e)(iv)-(vi)].

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Evidence

17 The parties provided a Statement of Agreed Facts on a limited number of issues relevant to the Victoria Police resources involved in policing the IMARC event, and a description of particular events which occurred at the MCEC.[23]

Lay evidence

18 The plaintiff gave evidence at trial and was extensively cross-examined. The plaintiff also called Thomas Battersby, a barrister, who gave evidence of what he observed at the IMARC Protest, including events involving the plaintiff. At the time of IMARC in 2019, Mr Battersby provided volunteer legal support to Melbourne Activist Legal Support, an organisation which provides training and information on the right to protest in Victoria. During the IMARC Protest, Mr Battersby was a legal observer.[24] I accepted his evidence of what he saw as reliable and likely to be an accurate recollection. He was familiar with the plaintiff from meetings of the Melbourne Activist Legal Support, and was at the IMARC Protest for the specific purpose of observing police and protester interactions. This evidence was also consistent with available video footage.

19 The State called eight Victoria Police witnesses to give evidence.[25] Many of these witnesses were part of the specialist units known as PORT teams which were a component of the Operations Response Unit (**ORU**).[26] The ORU was renamed as PORT after IMARC, from 1 March 2020.[27] However, most witnesses referred to officers in this public order response function as being from 'PORT' and I do the same in this judgment.

20 In October 2019, Victoria Police was arranged into portfolios overseen by the Chief Commissioner of Victoria Police and Deputy and Assistant Commissioners, including

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23 The Statement of Agreed facts was revised and filed on 18 November 2024 (**Statement of Agreed Facts)**.
24 Transcript 18/02/25, T207.22-28, T208.08-09 (Battersby XN).
25 One of whom had retired by the time of the trial.
26 Statement of Agreed Facts, [1].
27 Statement of Agreed Facts, [1](f)(i). The evidence was that at the time of the IMARC Protest, the relevant unit was titled the Operations Response Unit which deployed officers by way of teams called Public Order Response Teams. However, as reference was made to the 'PORT teams', PORT Tactical Command and other PORT terminology, the acronym 'PORT' is used in this judgment to refer to the specialist response unit from which the PORT teams were comprised. See Statement of Agreed Facts dated 18 November 2024, [1](b), (f).

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a Regional Operations Portfolio. The Regional Operations Portfolio included the North West Metropolitan Region (**North West Metro Region**), which incorporates the central business district including the MCEC.[28] The North West Metro Region is overseen by an Assistant Commissioner, and includes general duty police officers from the region.[29] The Transit and Public Safety Portfolio included the ORU, which was a specialist support team for planned operations such as protests, demonstrations, sporting events and large gatherings involving a high demand for crowd management.[30] The police witnesses included officers from PORT and the North West Metro Region.

21 A/Commander Timothy Tully was, at the time of the IMARC operation, a Superintendent and performed the role of Commander in the North West Metro Region.[31] He had been a police member since 1989 and spent approximately 15 years in tactical policing at various ranks. A/Commander Tully was the Police Commander for the IMARC operation and had overall responsibility for the operation, including in the planning and strategic intent of the police response.[32] He was not present at the MCEC, but was on duty for the morning shift on 30 October 2019 for the IMARC operation. A/Commander Tully monitored the IMARC operation via CCTV at the MCEC and the video footage that was being streamed by police officers, and gave instructions from the Police Operations Centre in Spencer Street.[33] His primary point of contact was the Police Forward Commander of the IMARC operation, Superintendent Dan Trimble.

22 Superintendent Trimble[34] served 34 years with Victoria Police and had experience in working in Specialist Operations at the North West Metro Region of Victoria Police for over ten years, including the policing of events, protests and demonstrations. He

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28 Transcript 20/02/25, T424.02-08 (Tully XN).
29 Statement of Agreed Facts, [1](a)-(d).
30 Statement of Agreed Facts, [1](f)(ii).
31 Transcript 20/02/25, T423.06-T424.08 (Tully XN). A/Commander Tully held the role of Acting Assistant Commissioner of Northwest Victoria at the time of giving evidence.
32 Transcript 20/02/25, T424.29-T425.03; T425.05-07 (Tully XN).
33 Transcript 20/02/25, T429.02-11; T455.09-25 (Tully XN).
34 Although, as a retired officer, Mr Trimble no longer holds this rank, I use it in this judgment for convenience given that he held this title at the time of the relevant events and is referred to in this way in documentary records and by other witnesses.

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was the Police Forward Commander for the morning shift at IMARC. Police Forward Commander is the title of the officer in operational command of an operation with responsibility for events on the ground (as distinct to the strategic responsibility of the Police Commander). Superintendent Trimble reported to A/Commander Tully, the Police Commander who was offsite at the Police Operations Centre in Spencer Street.[35]

23 A/Inspector Graham Caldwell was the PORT Tactical Commander on the day of the IMARC Protest and reported to Superintendent Trimble. In that role, A/Inspector Caldwell had ultimate responsibility for PORT resources on duty at the event, and gave advice Superintendent Trimble. A/Inspector Caldwell gave evidence of his involvement in the planning of the PORT response to the anticipated protests at IMARC, including the command structure of the police on 30 October 2019.

24 Inspector Gregory Barras was the PORT Deputy Tactical Commander on the day of the IMARC Protest. He was responsible for specific PORT resources, including the protester extraction team, a team which has skills to deal with protesters who lock themselves on to equipment or premises or glue themselves to surfaces.[36] Inspector Barras had experience, as a member of ORU, in developing the PORT training course, and gave evidence of Victoria Police policies relevant to police tactical options.

25 Sergeant Guthrie and A/Sergeant Bolzonello were the officers who sprayed the plaintiff with OC foam. Sergeant Guthrie was a member of PORT, and on the day of the IMARC Protest she had a role in the protester extraction team. A/Sergeant Bolzonello was a member of PORT.

26 The State also called two police witnesses to give evidence of their opinions as to the police response and use of OC foam at the IMARC Protest, as well as of their observations while at the protest. These witnesses were:

(a) Commander Mark Galliott, who at the time of the trial, had worked as a police

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35 Transcript 28/02/25, T808.04-26 (Trimble XN); IMARC Demonstration – Incident Command and Control System AM 30 October 2019 dated 29 October 2019 (Exhibit P50) (**IMARC Demonstration Organisational Chart**).

36 Transcript 03/03/25, T888.04-24 (Barras XN); T947.16-24 (Caldwell XN); Exhibit P50 (IMARC Demonstration Organisational Chart).

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officer for over 36 years. He was the Commander of the North West Metro Region and had been in that role since October 2020.[37] He gave evidence as to police tactics, his experience of policing protests and training on policing protests, the use of force at protests and considering *Charter* rights in decision making.

(b) Sergeant Andrew Lahman, who had experience in working as a police officer since 2016, including as a member of the ORU and PORT, and as a PORT training instructor from October 2019 and October 2021, and again since June 2023. He was rostered on as a PORT member in the Blue 401 team at IMARC, and at the time, held the rank of First Constable.[38]

27 Commander Galliott and Sergeant Lahman both had experience working as a police officer, including in public order roles. Commander Galliott in particular had developed experience over a very long period. I accepted that both had specialised knowledge in police tactical responses and in training police in tactics, and that the opinions that they expressed were based on that specialised knowledge and therefore admissible. I accepted, as submitted by the plaintiff, that their position as officers of Victoria Police affected the independence of their evidence, but that this was a matter going to weight rather than admissibility.

Video evidence

28 Evidence of video footage taken on the day of the IMARC Protest was tendered by both parties. That evidence was from the following sources:

(a) Body worn cameras of police officers. The body worn camera footage also had some audio, but was not always completely synchronised with the video being shown, as there were gaps in the audio. The body worn camera footage was time stamped with 'Zulu time', which is Greenwich Mean Time. I take judicial notice of the fact that this was 11 hours behind the time in Melbourne during

37 Transcript 05/03/25, T1220.22-T1221.25 (Galliott XN).
38 Transcript 06/03/25, T1282.14-T1284.01; T1332.23-28 (Lahman XN).

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the IMARC event (Australian Eastern Daylight Time).

(b) CCTV video footage. The CCTV footage was taken from a MCEC CCTV camera that was located at the Clarendon Street end of the MCEC building, looking back towards the West and East Poles and the MCEC forecourt along the Yarra River. This footage had a time stamp running in the top left hand corner. There was no evidence about the extent to which the time stamp on this video correlated to the time on body worn cameras.

(c) Evidence gathering video recordings. The evidence gathering footage was taken from two police video operators who were recording the events for intelligence and evidentiary purposes,[39] and streaming it to police command at the Police Operations Centre in Spencer Street.

(d) A video taken by Mr Thomas Battersby, the plaintiff's witness. The video taken by Mr Battersby captured the events occurring around the West Pole on his mobile phone, while he was standing on the MCEC steps above the base of the West Pole.[40]

29 There was also an audio recording in evidence, which recorded the communications on two separate police radio channels.[41] Transcripts of these calls were also in evidence.[42]

The expert evidence relied on by the plaintiff

30 The plaintiff relied on the evidence of Professor Judith (Jude) McCulloch, the Emeritus Professor of Criminology at Monash University and, since 2020, a Fellow of the Academy of the Social Sciences in Australia. Her distinguished academic career of over 35 years includes research and publications on the legal and social analysis of policing, and leading a national and international program of family violence research as the inaugural Director of the Monash Gender and Family Violence Prevention

39 Transcript 03/03/25, T948.29-T949.05 (Caldwell XN).
40 Mobile phone video filmed by Thomas Battersby (Exhibit P18); Transcript 18/02/25, T209.19-29; T210.28-T212.09 (Battersby XN).
41 Audio of radio channel 0705 (Exhibit 23).
42 Transcript of radio channel 0705 (Exhibit P5); Transcript of radio channel 01.17 (Exhibit D22).

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Centre. Professor McCulloch described her qualifications and experience in her first expert report as including expertise in 'reviewing and understanding commonly used police tactics and alternatives.'[43] She also gave evidence that she had written numerous books addressing human rights and policing, and policing as it relates to the use of force and democracy.[44]

31 Professor McCulloch's evidence addressed three distinct areas of subject matter:

(a) the legal characterisation of conduct the subject of the proceeding, particularly by reference to the *Charter*, including whether it was lawful for protesters to attend, observe and protest at IMARC, what role police had in policing such protests[45] and the source of police powers to use force at the IMARC Protest and limits on those powers;[46]

(b) policing tactics, including the exercise of arrest powers,[47] and alternatives to use of OC foam and whether its use against the plaintiff was appropriate or justified;[48] police procedures and policies operational at the time of the IMARC Protest, what a police officer should consider before using OC foam at a protest, and the appropriateness of directions, orders and briefing materials provided to police,[49] and

(c) the effects of OC aerosols on people on whom it is used.[50]

32 The State originally objected to parts of Professor McCulloch's reports.[51] The parties subsequently agreed that the objection would not be pressed, and the evidence would

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43 Expert Report of Jude McCulloch dated 29 October 2024 (Exhibit P21) (**First McCulloch Report**), [1]; Expert Report of Jude McCulloch dated 24 January 2025 (Exhibit P22) (**Second McCulloch Report**).
44 Transcript 19/02/25, T243.17-26 (McCulloch XN).
45 First McCulloch Report (Exhibit P21), Questions 2 and 3.
46 First McCulloch Report (Exhibit P21), Questions 5 and 7.
47 First McCulloch Report (Exhibit P21), Questions 12 and 13.
48 First McCulloch Report (Exhibit P21), Questions 11, 16 and 17.
49 First McCulloch Report (Exhibit P21), Questions 4, 6, 8, 9, 10, 14 and 15.
50 First McCulloch Report, (Exhibit P21), Question 4; Second McCulloch Report (Exhibit P22), [25]-[39].
51 **Defendant's List of Objections to the Plaintiff's Evidence** filed on 6 February 2025.

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be admitted subject to weight, which I accepted.[52] However, it would have been more appropriate for me to rule on these admissibility questions during the proceeding.[53] I have concluded that some of the evidence of Professor McCulloch on which the plaintiff seeks to rely is not admissible, having regard to the requirements of the *Evidence Act 2008* (Vic), so that the question of weight does not arise.[54] My conclusions on Professor McCulloch's evidence are contained in Annexure 2. In summary, I conclude that:

(a) Professor McCulloch's opinion evidence as to the law and its application to police and protester conduct is inadmissible. Evidence is not admissible to prove the content of Australian law nor the application of law to facts.[55] While her opinion evidence on the Victoria Police Manuals (**VPMs**) and Victoria Police policies may not be inadmissible due to her specialised knowledge in the regulation of policing, it will not be afforded any significant weight where the content of those manuals and policies are themselves in evidence.

(b) Professor McCulloch's evidence as to the effects of OC foam is inadmissible, both by reason of the lack of relevant expertise and because insofar as the evidence which consisted of a published peer reviewed article[56] and report[57] involving literature reviews, there is an insufficient factual basis in the literature to support the opinions, particularly as to the likely long term or fatal effects of OC foam. There is evidence of the effects of OC foam that has greater probative value than that of Professor McCulloch including the observations in the Victoria Police document 'Oleoresin Capsicum Manual 2019' (**OC**

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52 Defendant's List of Objections to the Plaintiff's Evidence. This position was confirmed at trial before Professor McCulloch gave evidence: Transcript 19/02/25, T238.22-T239.06 (McCulloch XN). Senior counsel for the State did observe that 'in our view it was…right on the line about whether or not it was objectionable and therefore not admissible at all or if it was a weight issue' (T239.02-04).

53 ***Dasreef*** *Pty Limited v Hawchar* (2011) 243 CLR 588, 599 [19]-[20] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

54 *Dasreef*, 599 [19]-[20].

55 ***Allstate*** *Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 6)* (1996) 64 FCR 79, 83 (Lindgren J).

56 Jude McCulloch, 'Capsicum Spray: Safe Alternative or Dangerous Chemical Weapon?' (2000) 7(3) *Journal of Law and Medicine* 311, 313 (Exhibit P40).

57 Second McCulloch Report, [26]-[33]; [35]-[36].

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Manual).[58]

(c) Some but not all of Professor McCulloch's opinion evidence on police tactics and alternatives to the use of OC foam was admissible:

(i) I accept that Professor McCulloch's opinion that the police conduct in attempting to arrest the Climbers 'escalat[ed] tension, risk and hostilities and increase[ed] the sense of chaos'[59] may entail the application of her specialised knowledge, however it carries limited weight as the Court may make its own observations and assessment based on the primary evidence including video footage.[60]

(ii) The opinion that there are levels of tactical response which should have been preferred to the use of OC foam is based on Professor McCulloch's specialised knowledge and is admissible.

(d) Professor McCulloch's opinions about the proportionality of the use of force by police, specifically the use of OC foam against the plaintiff, is a legal assessment that the Court is equipped to make. Insofar as the opinion is based on specialist knowledge of the *Operational safety equipment* VPM, it may be admissible. However I have accorded it limited weight because it remains in the nature of a legal assessment that may be made by the Court.

The effect of OC aerosols

33 Before turning to the events on the day of the IMARC Protest, it is necessary to refer to the evidence on the effect of OC aerosols, in order to understand the specific claims of assault and battery based on the deployment of OC foam.

34 The primary source of evidence as to the effect of OC aerosols, in circumstances where I have not admitted Professor McCulloch's evidence on this issue, was the OC Manual.

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58 Victoria Police Oleoresin Capsicum Manual 2019 dated 6 August 2019 (Exhibit P1) (**OC Manual**), Parts 3.1 and 7.

59 **Plaintiff's Primary Submissions** dated 8 May 2025, [3].

60 *R v Rolfe (No 4)* [2021] NTSC 58 (Mildren AJ).

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The version of that manual which was in evidence was current as at 6 August 2019.

35 The OC Manual contained descriptions of OC aerosol units (both spray and foam cannisters) and their effect. It also contained provisions as to the policy and legal justifications for use, tactical deployment considerations, after care requirements and action to be taken after use.

36 The OC Manual stated the following about the effect of OC aerosols:

> **3.1 Physical and psychological effects**
>
> The effects of OC aerosols are both physical and psychological. On unprepared subjects the effects are both rapid and debilitating, enabling members to control subjects with minimal physical contact. The eyes immediately shut due to an involuntary response known as blepharism. Breathing becomes temporarily difficult and there is inflammation and a burning sensation on any exposed skin. The mucous membranes secrete freely and there may be reduced muscle coordination.
>
> Consequently, there is a requirement for the subject to be constantly reassured as to their wellbeing in order to avoid panic.

37 In the context of after-care procedures, the OC Manual stated the following:

> **7 AFTER-CARE**
>
> The physical and psychological effects of OC are immediate and debilitating. It causes blood vessels to dilate rapidly, irritation to the bronchial passages, mucous membranes to secrete freely and eyes to burn and close tightly. Although the immediate effects may be severe, full recovery should occur within 10-45 minutes. There are no known long term after-effects.
>
> When persons are exposed to OC it is essential that treatment commences as soon as practicable. After-care is to be maintained until symptoms are alleviated and the person is no longer experiencing the effects. Subjects are to be kept under constant observation for at least 45 minutes or until the symptoms are no longer apparent (longer than 45 minutes if required).
>
> **7.1 Asthmatics**
>
> Approximately 10% of the population suffer from some form of Asthma. The effects of OC on asthmatics may in addition to the effects already outlined cause narrowing of the airways (bronchoconstriction).
>
> **7.2 Initial Action**
>
> - Provide reassurance
> - Advise subject NOT to rub their eyes
> - Place in an area where breezes (preferably COOL) can provide relief.

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…

- Flush hands, face, or any other skin areas affected with COOL water (non-oil based soap may be used to assist the cleansing – DO NOT USE WARM OR HOT WATER, salves or creams).

7.3 Medical Attention

Medical attention must be provided immediately, if the subject:

- Does not recover within a reasonable time.
- Complains of a medical condition.
- Asks for medical attention.
- In the member's opinion appears to be suffering from a medical condition.

If the effects are still being experienced beyond 45 minutes, OR THERE IS ANY DOUBT as to the wellbeing of the person, then seek medical treatment. While medical treatment is being sought maintain reassurance and appropriate after care techniques.

7.4 Medical Conditions / Respiratory Distress Symptoms

May include:

- Rapid breathing rate (more than 20 breaths/minute)
- Audible wheezing or noisy breathing, particularly on breathing out
- Inability to talk in sentences
- Blue discolouration of lips and tongue (cyanosis)
- Rapid pulse rate (more than 100 beats /minute)
- Deteriorating consciousness
- Chest or neck pain
- Profuse sweating
- Shallow, restrained or difficult breathing (lasting more than 2 to 3 minutes)

38 The OC Manual also observed that police officers are to 'keep in mind that OC is non-discriminatory' and 'may affect both the user and other Police if deployed incorrectly'.[61] The OC Manual referred to a minimum safety distance for the deployment of all OC aerosols, but the exact distance, which is a matter of some tactical relevance, was redacted on the basis of public interest immunity principles.[62]

39 The OC Manual also contained the following specific information relating to restraint and control of persons by police officers:

6.7 Restraint and Control

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61 OC Manual (Exhibit P1) Part 6.4, 26

62 Noting the potential strategic importance of that information in police tactical responses and the potential to undermine police responses were it generally known to the public.

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> Secondary exposure to OC aerosol may occur where members handle the subject/s their clothing or other objects which have been exposed to OC aerosol. Where time and circumstances allow, tactics should include the use of an arrest team to restrain the subject. In all cases, where possible, members should have available and wear protective gloves, suitable eye and face protection. This will reduce the likelihood of a secondary exposure during the restraining process.
>
> **Positional Asphyxia**
>
> Due to the possibility of inducing positional asphyxia, (i.e. asphyxia caused when the position of the body interferes with normal breathing) members must ensure that a person is not restrained in a manner in which the face is covered and/or is left lying face down with hands cuffed behind the back.
>
> "*Keep any person who is physically restrained under close observation. Take care to ensure the person is placed in and maintains a position that allows unrestricted breathing. If any restriction or impairment to respiration is observed or suspected, immediately seek medical assistance.*
>
> *Restraint techniques that could impair a person's unrestricted breathing should only be used when absolutely necessary and for the briefest possible time." (VPM – Operational Safety Equipment, Section 6.2).*

40 Other relevant evidence of the effect of OC aerosols is contained in the *Operational safety equipment* VPM. Part 6.2 of that manual, relating to 'After care and medical attention', states:

> Application of OC aerosols or handcuffs in the presence of the following factors may increase the likelihood of positional asphyxia:
>
> – extreme physical exertion, as occurs in a violent struggle, combined with illicit drugs, prescribed medication or alcohol intoxication
> – obesity
> – the presence of demonstrable natural disease, including mental illness and acute behavioural disturbance.
>
> When using OC aerosols or handcuffs, prevent the possibility of positional asphyxia by ensuring subjects:
>
> – do not have their face covered
> – are not left lying face down with their hands restrained behind their back.

41 The plaintiff gave evidence of the effect on him of being sprayed with OC foam on 30 October 2019, which was consistent with the statements about the effect of OC foam in the OC Manual. The plaintiff said that the OC foam caused a 'burning sensation', and:

> When it was in my eyes it just felt like razor blades in my eyes. Obviously the

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> material sort of gets in your eyes and it's stuck in your eyes and because it's oily it's moving around on your eyeball and that just feels like … it felt like knives in my eyes and it's excruciating, and all you can do is just, yeah, close your eyes. You can't think of anything else but the pain.[63]

42 The effects of the OC foam were reactivated when he later showered, and the OC foam combined with 'the vapours of the steam of the shower and it was … choking'.[64]

43 His eyes continued to feel itchy and gritty the following day.[65] The plaintiff's evidence as to his emotional reaction to being sprayed was that he felt 'very confused …very heightened state of emergency, feeling very unsafe…'.[66]

44 Taking into account the content of the OC Manual as to the effects of OC foam, and the evidence of the plaintiff, I find that OC foam has the following effects on a person on whom it is deployed:

(a) acute burning sensation to the skin until the foam is removed, and skin sensitivity for some hours or days afterwards;

(b) extremely painful eye irritation, causing closure of the eyes and subsequently blurring of vision;

(c) feelings of panic, alarm and confusion;

(d) after-effects of burning and irritation of the skin and eyes if the OC foam is 'reactivated' by warm or hot water or steam; and

(e) the realistic potential to cause bronchodilation and/or breathing difficulties for people who come into contact with OC foam, in particular, those who have asthma or other pre-existing respiratory conditions.

The legal principles relevant to the plaintiff's claims

The law of battery

45 The plaintiff pleaded in the Further Amended Statement of Claim that police officers

63 Transcript 18/02/25, T147.20–T148.05 (Plaintiff XN).
64 Transcript 18/02/25, T153.11-12 (Plaintiff XN).
65 Transcript 18/02/25, T154.15-21 (Plaintiff XN).
66 Transcript 18/02/25, T150.20-22 (Plaintiff XN).

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pushed, crushed and grabbed protesters (including himself), and also discharged OC foam on protesters (including himself).[67] In closing submissions, the plaintiff focussed only on the discharge of OC foam as a battery and did not submit that he had been the subject of assault or battery by reason of being pushed, crushed or grabbed.[68] The plaintiff's closing submissions also did not address the issue of whether he had in fact been assaulted. The evidence in chief and cross-examination of witnesses did not specifically address issues relevant to whether a distinct tort of assault had occurred. This may have been because in both cases of deployment of OC foam on the plaintiff, the evidence was to the effect that the OC foam was unexpected by him and he had no prior apprehension of the threat of its deployment.[69] The plaintiff did not ultimately seek any declaration as to the commission of any assault. In these circumstances I do not make any findings as to assault.

46 The plaintiff's submission is that the acts of Sergeant Guthrie and A/Sergeant Bolzonello in spraying him with OC foam were acts that were 'deliberate, harmful, applications of force, without the [his] consent' and that unless the defendant establishes a lawful justification for each spray, these actions constitute batteries.[70]

47 To establish the tort of battery, the plaintiff must prove the following:

(a) there has been a positive and voluntary act directed by the defendant's conscious mind,[71] which may be satisfied by a wilful intent to apply force, a reckless indifference as to the plaintiff suffering the application of force;[72]

(b) there was a direct application of force that interferes with the plaintiff's person;[73] and

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67 Further Amended Statement of Claim, [3].

68 Plaintiff's Primary Submissions, [8], [17].

69 The elements of the tort of assault are a threat by the defendant, by words or conduct, to inflict harmful or offensive contact upon the plaintiff without consent or legal justification; and a subjective intention on the part of the defendant that the threat will create in the plaintiff's mind an apprehension that the threat will be carried out immediately: ***Slaveski*** *v State of Victoria* [2010] VSC 441 (Kyrou J, as his Honour then was), [241]-[242].

70 Plaintiff's Primary Submissions, [17].

71 ***Carter*** *v Walker* (2010) 32 VR 1, 38 [215(3) and (4)] (Buchanan, Ashley and Weinberg JJA).

72 *Carter*, 38 [215(7) and (8)].

73 *Carter*, 38-41 [216]-[226]; *Slaveski,* [241]-[242].

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(c) that direct application of force is unlawful or offensive and done without consent.[74]

48 In ***Carter*** *v Walker*, the Court of Appeal considered in some detail the contemporary law of battery in Australia. The observations of the Court relevant to the batteries alleged in this case are the following:

(a) 'it is a so-called "intentional" tort, but care needs to be taken in considering the intention which is relevant';

(b) 'it involves the defendant doing an act which causes physical contact with the plaintiff', an act which 'must have a direct rather than consequential impact on the plaintiff';

(c) 'it does not require that the defendant intend the plaintiff any harm, or that the plaintiff suffer harm in fact and it is actionable *per se*';

(d) 'if the act is voluntary, and the defendant "meant to do it" in the sense of meaning to contact the plaintiff, it will be relevantly intentional';

(e) 'it may be that an act should also be considered intentional if it is substantially certain that the act will result in contact with the plaintiff'; and

(f) 'once battery is established, immediate harm and consequential damage are compensable. The boundary of entitlement is set by the conception of 'natural and probable consequence (or "result")'.[75]

Lawful justification

49 An application of force will be a battery only if unlawful and done without consent. There is no question of consent in this case. The focus was on lawful justifications. The State relied on the justifications of use of force in effecting or assisting in effecting an arrest, as authorised by s 462A of the *Crimes Act*, and self-defence or defence of others,

74 *Slaveski*, [242]-[243].
75 *Carter*, 38-39 [215] (citations omitted).

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as authorised by s 322K of the *Crimes Act* and by the common law.

50 The State also pleaded in its defence that Sergeant Guthrie's use of force was 'informed by the need to restore the peace', which invoked the common law defence of preventing a breach of the peace. However, the State in its Further Amended Defence did not rely on that pleading or defence.[76]

Use of force to effect or assist in effecting an arrest

51 Section 462A of the *Crimes Act* provides:

> **462A Use of force to prevent the commission of an indictable offence**
>
> A person may use such force not disproportionate to the objective as he believes on reasonable grounds to be necessary to prevent the commission, continuance or completion of an indictable offence or to effect or assist in effecting the lawful arrest of a person committing or suspected of committing any offence.

52 Section 462A refers to effecting or assisting in effecting the lawful arrest of a person. The section does not itself provide a power of arrest, but requires the existence of a valid power of arrest as a prerequisite to the use of force to effect that arrest.[77] The reference to 'effecting the lawful arrest of a person committing or suspected of committing any offence' involves a requirement of contemporaneity between the arrest or attempted arrest and the commission or suspected commission of an offence.[78]

53 The power to arrest without a warrant is contained in ss 458 and 459 of the *Crimes Act.* Section 458 provides a power of arrest for any person. That power arises where any person finds another person committing any offence and where the first person 'believes on reasonable grounds' that the apprehension of the second person is necessary for specified reasons.[79]

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76 Further Amended Defence, [30(e)].

77 *Slaveski*, [122].

78 *Slaveski*, [124].

79 Section 458(1)(a) refers to the following reasons:
(i) to ensure the attendance of the offender before a court of competent jurisdiction;
(ii) to preserve public order;

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54 The expression 'finds committing' is given an extended meaning by s 462 of the *Crimes Act*.[80] Section 462 provides that the expression extends to the case of a person found 'doing any act or so behaving or conducting himself or in such circumstances that the person finding him believes on reasonable grounds that the person so found is guilty of an offence'.

55 Pursuant to s 458(1)(b) of the *Crimes Act*, a person may also arrest a person when instructed to do so by any police officer having power under that Act to apprehend that person.

56 The assessment of whether a belief is on reasonable grounds and of whether a use of force is not disproportionate to the objective for the purposes of s 462A must be considered in the context of the circumstances in which the use of force occurred. In *Walker v Hamm*,[81] in the context of considering a defence under s 462A, Smith J observed, in a passage later cited by the Court of Appeal in ***Gebrehiwot*** *v State of Victoria*:[82]

> What is critical is that the issue of the reasonableness of the police officer's conduct should be approached in a realistic manner and that due consideration is given to the reality that the officer has to make decisions quickly, often in emergencies and under pressure. As Heydon JA said in *Woodley v Boyd*:
>
> > And, in evaluating the police conduct, the matter must be judged by reference to the pressure of events and the agony of the moment, not by reference to hindsight.
>
> In *McIntosh v Webster* (1980) 43 FLR 122 at 123, Connor J said:
>
> > [arrests] are frequently made in circumstances of excitement, turmoil and panic [and it is] altogether unfair to the police force as a whole to sit back in the comparatively calm and leisurely atmosphere of the courtroom and there make minute retrospective criticisms of what an arresting constable might or might not have done or believed in the circumstances.[83]

57 In *Walker v Hamm*, Smith J did find that the officers had used excessive force in

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(iii) to prevent the continuation or repetition of the offence or the commission of a further offence; or

(iv) for the safety or welfare of members of the public or of the offender.

80 *De Moor v Davies* [1999] VSC 416, [14]-[15] (Warren J).

81 [2008] VSC 596 (Smith J).

82 [2020] VSCA 315, [104] (Tate, Kaye and Emerton JJA).

83 *Walker v Hamm* [2008] VSC 596, [55] (Smith J).

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effecting an arrest (and also that there was, in any case, no proper basis on which to have arrested Walker). However, his Honour's caution is an important one, particularly in the context of actions taken in the dynamic and often difficult environment of a protest.

58 A question arises in this case as to whether assessment of proportionality to the objective involves a consideration of the nature of the offence for which the arrest is to be made. The State submitted that the offence for which the lawful arrest is to be made is not a matter to which s 462A makes reference, and is not necessarily relevant.[84]

59 It would, in my view, be artificial to exclude consideration of the reason for the arrest (being the offence for which the person is to be arrested) from, first, the proper identification of the objective, and secondly, consideration of what degree of force is not disproportionate to that objective. In the case of use of force to effect or assist in effecting a lawful arrest, the objective is the 'lawful arrest', and the understanding of that objective must entail a comprehension of why the arrest is warranted. An arrest for a relatively minor offence, not involving violence, is undoubtedly an objective of a different quality to an arrest for an offence of murder, and the proportionality assessment relating to those different objectives will necessarily be different.

60 The example which accompanies s 462A of the *Crimes Act* provides some support for this understanding, in that it provides an example of an indictable offence and the use of force which is not disproportionate force in response. It states, relevantly:

> A police officer … uses lethal force on a person to prevent that person from committing an indictable offence that involves causing really serious injury or death because the officer believes on reasonable grounds that it is necessary to use that force for that purpose. The police officer… may do so before that offence is committed.

61 The objective in this example is not simply prevention of an indictable offence (the language of s 462A) but an indictable offence of a particular kind. In the context of an arrest, it is similarly necessary, in my view, to take into account the offence for which

84 Transcript 11/06/25, T42.27-28 (Submissions).

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the arrest is to be made in order to properly understand the objective and make an assessment of what force is not disproportionate to that objective. Other matters, such as the reaction of the person being arrested (for example whether there is violent resistance), could also be relevant in understanding the objective and assessing what degree of force is not disproportionate to it.

62 Section 459 of the *Crimes Act* provides powers of arrest specific to police officers and protective services officers. Section 459(1) states:

> (1) In addition to exercising any of the powers conferred by section 458 or by or under any other Act a police officer, or a protective services officer on duty at a designated place, may at any time without warrant apprehend any person–
>
> (a) he believes on reasonable grounds has committed an indictable offence in Victoria (including any indictable offence which may be heard and determined summarily); or
>
> (b) he believes on reasonable grounds has committed and offence elsewhere which if committed in Victoria would be an indictable offence against the law of Victoria (including any indictable offence which may be heard and determined summarily).

Self-defence or defence of others

Self-defence at common law

63 The common law defence of self-defence is established if:

(a) the defendant believed at the time that the use of force was necessary in their own defence or the defence of another; and

(b) that belief was based on reasonable grounds.[85]

64 The first question is whether the person 'believed upon reasonable grounds that it was necessary in self-defence to do what he did'.[86] The second element does not require consideration of what a hypothetical reasonable person may have believed, but whether the defendant 'had reasonable grounds for his belief, in the circumstances as

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85 ***Zecevic*** *v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645, 661 (Wilson, Dawson and Toohey JJ); ***Watkins*** *v Victoria* (2010) 27 VR 543, 561 [71]-[75] (Ashley and Beach JJA, with whom Mandie JA agreed at 575, [166]).

86 *Zecevic*, 661 (Wilson, Dawson and Toohey JJ);

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he perceived them to be'.[87] The proportionality of a person's response to the threat giving rise to the need for self-defence is a matter to be taken into account in determining whether he or she believed their actions were necessary.[88] The plaintiff emphasised that the belief must be an honest one, citing observations of Gaudron J in *Zecevic v Director of Public Prosecutions (Vic)* and the Court of Appeal in *R v Portelli*.[89] This may be little more than an emphasis on the requirement that the view must actually be held.

65 Whether a person subjectively believed the force was necessary is a matter of fact, to be determined on the evidence, which evidence may include but is not limited to the person's own evidence.[90] The subjective state of mind may be inferred from circumstances other than the person's own statement as to his or her perceptions.[91]

66 Whether there were reasonable grounds for that subjective belief depends on whether facts existed that would induce that belief in a reasonable person.[92] It was submitted by the State that 'the belief may be based on surmise or conjecture',[93] citing the High Court authority *George v Rockett* where the Court discussed the issue of what constitutes reasonable grounds for suspicion and belief, for the purposes of the issue of a search warrant. The Court's unanimous observation in that case (which was the passage apparently relied on by the State) was as follows:

> The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief [than in the case of suspicion], but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and **the grounds which can reasonably induce that inclination of**

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87 *Watkins*, 561, [71].

88 *Watkins*, 561, [71]; [73].

89 Plaintiff's Primary Submissions, [18(a)], citing Gaudron J in *Zecevic* (at 647, scil 687) and the Court of Appeal in *R v Portelli* (2004) 10 VR 259, 265-266 [12]-[13] (Ormiston JA with whom Winneke P and Charles JA agreed).

90 *Croucher v Cachia* (2016) 95 NSWLR 117, 137 [104] (Leeming JA with whom Beazley P and Ward JA agreed); ***Sangha** v Baxter* [2009] NSWCA 78, [153]-[154] (Basten JA with whom Handley AJA agreed).

91 *Sangha*, [153] (Basten JA with whom Handley AJA agreed).

92 ***George v Rockett*** (1990) 170 CLR 104, 112 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); ***Cruse** v State of Victoria* (2019) 59 VR 241, 270 [127]-[129] (Richards J as her Honour then was).

93 **Defendant's Primary Submissions** dated 10 April 2025, [18.2].

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the mind may, depending on the circumstances, leave something to surmise or conjecture.[94]

67 The effect of this last sentence is, in my view, somewhat different to the conclusion drawn by the State. I do not take the passage, read in the broader context of the High Court's reasons, as saying that surmise or conjecture *alone* could constitute reasonable grounds. In my view, that passage instead acknowledges that reasonable grounds require a state of affairs involving objective, factual matters which can positively induce an actual belief, which factual matters may be supplemented by surmise or conjecture.[95]

Statutory defence of self-defence

68 Section 322K of the *Crimes Act* was introduced with effect from 1 November 2014. It provides:

> **Self-defence**
>
> (1) A person is not guilty of an offence if the person carries out the conduct constituting the offence in self-defence.
>
> (2) A person carries out conduct in self-defence if—
>
> (a) the person believes that the conduct is necessary in self-defence; and
>
> (b) the conduct is a reasonable response in the circumstances as the person perceives them.
>
> (3) This section only applies in the case of murder if the person believes that the conduct is necessary to defend the person or another person from the infliction of death or really serious injury.
>
> **Notes**
> 1 …
> 2 The circumstances in which a person may carry out conduct in self-defence include—
> - the defence of the person or another person;
> - the prevention or termination of the unlawful deprivation of the liberty of the person or another person;
> - the protection of property.

69 By s 322N of the *Crimes Act*, the common law defence of self-defence was abolished.

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94 *George v Rockett*, 116 (emphasis added).

95 This is consistent with the conclusions, based on *George v Rockett*, expressed by Richards J in *Cruse* at 270, [130] and also the observations of the Court of Appeal in *Gebrehiwot* at [114] as to the decision of Gageler J (as his Honour then was) in *Prior v Mole* (2017) 261 CLR 265 where his Honour observed at 277 [24] that there must be an 'actual subjective belief', which must be 'formed by reference to objective circumstances'.

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There was an issue, noted by the State[96] but not the subject of any submissions from either of the parties, as to whether the common law defence of self-defence was abolished only with respect to self-defence to a criminal offence, or whether the intention of s 322N was to also abolish self-defence as a defence to a common law tort claim such as battery. Section 322N itself does not provide guidance on the question because it simply provides '[s]elf-defence at common law is abolished'. However, s 322G in Part IC of the *Crimes Act*, which also includes ss 322K and 322N, provides some guidance. It states:

> **322G Application of Part**
>
> This Part applies to any offence, whether against any enactment or at common law.

70 Taking into account the context of the provisions in the *Crimes Act*, I consider that the limitation of the application of Part IC (including s 322N) to 'any offence' was unlikely to have been intended to alter the common law with respect to torts and defences to torts.

71 This conclusion derives some limited support from the circumstances of the introduction of ss 322K and 322N, which was in the context of changes to the law relating to defences to homicide. The background to the amendments was described by Croucher J in *R v Frank (No 2)* (footnotes in original):[97]

> In this State, prior to 2005, self-defence was governed solely by the common law. The leading case was *Zecevic v DPP*.[98] In short, the question to be asked was:[99]
>
> > whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal.
>
> From 23 November 2005, a statutory form of self-defence replaced the common law in homicide offences, whereas the common law was left to apply to other

96 Transcript 04/03/25, T1122.05-26.
97 [2021] VSC 7, [135]-[138].
98 *Zecevic v DPP* (1987) 162 CLR 645.
99 *Zecevic v DPP* (1987) 162 CLR 645, 661 (*per* Wilson, Dawson and Toohey JJ, Mason CJ agreeing at 654).

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offences.[100] Ignoring the burden and standard of proof for the moment, an accused would be found not guilty of murder if he or she carried out conduct that would otherwise constitute murder "while believing the conduct to be necessary to defend himself or herself or another person from the infliction of death or really serious injury".[101] Thus, unlike the common law test, which contained a mixture of subjectivity and objectivity, this statutory test was purely subjective, and it expressly extended the requisite belief by the accused to the infliction of death or really serious injury.

During the same period, an accused would be not guilty of manslaughter if he or she carried out the conduct that would otherwise constitute manslaughter "while believing the conduct to be necessary to defend himself or herself or another person or to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person and he or she had reasonable grounds for that belief".[102] Thus, like the common law test, both subjective and objective elements were applicable in the statutory test in respect of manslaughter (but, of course, there was no requirement that the requisite belief was as to the infliction of death or really serious injury).

Then, from 1 November 2014, by operation of the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic), a new Part IC was inserted into the *Crimes Act 1958* (Vic) ("the Crimes Act"). As a result, self-defence at common law was abolished[103] and, in its stead, a new statutory version of self-defence was enacted.[104] This statutory form of self-defence is applicable to any offence allegedly committed since the commencement date, whether against any enactment or at common law.[105]

72 The changes occurred in the primary context of amendments to defences to criminal offences relating to murder and manslaughter. There is no indication it was intended to alter the common law relating to tort.

73 There is limited authority regarding the application of s 322K,[106] and the issue of whether it exclusively defines self-defence, to the exclusion of the common law, including in its application to tort claims, has not been determined. I consider that the better answer is that it does not apply in a situation where self-defence is relied on

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100 Various provisions were inserted into the *Crimes Act 1958* (Vic) by the *Crimes (Homicide) Act 2005* (Vic), including s 9AC (self-defence for homicide), s 9AD (defensive homicide) and s 9AE (self-defence for manslaughter).

101 *Crimes Act 1958* (Vic), s 9AC (now repealed). The statutory offence of defensive homicide was also created by s 9AD (but that provision is also now repealed). Section 9AD provided that 'a person who kills in circumstances that, but for s 9AC, would constitute murder will be guilty of the indictable offence of "defensive homicide" if he or she did not have reasonable grounds for his or her belief'.

102 *Crimes Act 1958* (Vic), s 9AE (now repealed).

103 *Crimes Act 1958* (Vic), s 322N.

104 *Crimes Act 1958* (Vic), s 322K.

105 *Crimes Act 1958* (Vic), s 322G.

106 The section is mentioned without discussion in *Jones v The Queen* [2018] VSCA 11, [17] (Priest, Beach and Niall JJA); *Henshaw v The Queen* [2021] VSCA 356, [118] (Priest and Kyrou JJA); *Director of Public Prosecutions (Vic) v Frank* [2019] VSCA 306, [46] (Priest, Beach and T Forrest JJA).

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purely as a defence to a tortious claim, so that the State's pleaded reliance on s 322K could be disregarded. The reliance on the common law self-defence remains open.

74 Ultimately, the answer to that question may not make a significant difference, as authority since the introduction of s 322K has treated the section as engaging, in substance, the same questions as the common law of self defence. The person relying on the defence must establish that he or she believed that the conduct was necessary in self-defence, in response to the circumstances as they perceived them, and the conduct must be a reasonable response to those circumstances.

The context of the events at IMARC

75 I now turn to the factual findings about events on the day of IMARC event, relating to the context to the alleged assault and battery of the plaintiff and the Common Questions.

76 A number of the Common Questions that were identified as being appropriate to determine at the initial trial of this representative action were relevant to the broader context of the events at the IMARC Protest.

77 I address these questions where relevant in making findings on the context in which the batteries arising from use of OC foam alleged by the plaintiff occurred, and the defences to those batteries which are relied on by the State. The parties in their submissions agreed on the evidence relevant to many of the Common Questions, and also agreed in some cases as to the appropriate conclusions to be drawn from them.

Common Question 1: What were the roles, powers, responsibilities and statutory obligations of Police Officers relevant to their response to the IMARC Protest?

Common Question 18: Were Police Officers acting as 'public authorities' under the Charter and obliged to abide by s 38 when planning for and attending IMARC?

78 IMARC is a major, international conference and in 2019, it was anticipated there would be thousands of attendees each day at the MCEC as conference venue.[107]

[107] Transcript 20/02/25, T434.17-27 (Tully XN); Intelligence summary prepared by Victoria Police dated 15 July 2019 (Exhibit D3).

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Victoria Police arranged a formal presence at IMARC in response to information received that there would be daily protests at the event. All operational police officers present at IMARC, including A/Sergeant Bolzonello and Sergeant Guthrie, were police officers appointed pursuant to s 27(1) of the *Victoria Police Act*. They had the powers and duties conferred by that Act and other legislation, including the power to make arrests under ss 458 and 459 of the *Crimes Act*, and the power to use force in self-defence or defence of another, or to effect or assist in effecting an arrest, under ss 322K and 462A of the *Crimes Act*. They also had the powers of a police constable at common law, which includes the power to act in self-defence or defence of another, and to prevent a breach of the peace.[108]

79 The role of Victoria Police is, at a fundamental level, to serve the Victorian community and uphold the law so as to promote a safe, secure and orderly society.[109] Under the *Victoria Police Act*, Victoria Police officers have the statutory functions of preserving the peace, protecting life and property, preventing commission of offences, detecting and apprehending offenders and helping those in need of assistance.[110] The police at IMARC had these functions with respect to the events at that site, and in relation to conference delegates, organisers, members of the public, protesters and other police officers.

80 Victoria Police is a 'public authority' within the meaning of the *Charter*.[111] Individual police officers are public authorities for the purposes of the *Charter*, and are required to comply with s 38(1) of the *Charter*. This included with respect to their preparation and planning for the policing of the IMARC event, and in their actions and decisions when physically present at that event.[112]

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108 In relation to the powers of a police constable at common law, see *Poidevin v Semaan* (2013) 85 NSWLR 758, 762-763 [18]-[20] (Leeming JA with whom Ward JA and Emmett JA agreed), cited by Gageler J (as his Honour then was) in *Binsaris v Northern Territory* (2020) 270 CLR 549, 562 at [28].

109 *Victoria Police Act*, s 8.

110 *Victoria Police Act*, s 9.

111 See s 4(d) of the *Charter*. Section 4 of the *Charter* defines 'public authority', and expressly in s 4(d) includes 'Victoria Police'. Section 3 of the *Charter* defines 'Victoria Police' to have the same meaning as in the *Victoria Police Act*. Section 6 of that Act provides that 'The police force of Victoria is constituted by a body established by this section known as Victoria Police', and s 7 provides that it consists of a list of persons including 'police officers'.

112 The answer to both parts of Common Question 18 is, therefore, 'yes'.

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81 Pursuant to s 38 of the *Charter*, police officers must consider the human rights of all people in decision-making, and in the provision of services and the enforcement of the law. This is reflected in the guidance set out in the Victoria Police *Human Rights Ready Reckoner* (**HRRR**),[113] a tool provided to police officers that identifies a process of considering human rights and provides a summary of different rights and how they may arise in police work, which is further discussed below. The State submitted that Victoria Police has a responsibility to ensure that human rights considerations are integrated and balanced when planning and making decisions about policing an event,[114] which I accept is an accurate understanding of the effect of s 38 in the context of planning.

82 The role of Victoria Police at IMARC was the subject of internal police communications and planning documents prior to the event. The attendance of Victoria Police was described as being organised to focus on the main infrastructure and premises targeted by protesters, including the MCEC, for public order management.[115] The evidence established that relevant officers of Victoria Police approached the planning for IMARC on the basis that people were entitled to attend the conference without disruption, but that protesters also had a right to attend and protest lawfully, which was to be facilitated by police presence. The purpose of police attendance at IMARC was described by Commander Galliott and A/Commander Tully (Commanders of the North West Metro Region at the time), as being to 'facilitate protests to occur safely',[116] and to 'facilitate a peaceful and lawful protest'.[117] The ways in which Victoria Police facilitates safe protests include providing guidance to protesters about how to protest safely and within legal limits,[118] considering the human rights of all stakeholders at a protest;[119] and applying the Operational Response Principles set out in the *Operational safety and the use of force* VPM to minimise

113 Human Rights Ready Reckoner (Exhibit P33). See the discussion of the content of this resource at [106]-[108] below.
114 Transcript 20/02/25, T440.08-15 (Tully XN).
115 Email from Richard Paterson to various recipients titled 'State T&C Application re IMARC 2019' dated 18 October 2019 (Exhibit P58).
116 Transcript 05/03/25, T1223.04-06 (Galliott XN).
117 Transcript 20/02/25, T444.06-08 (Tully XN).
118 Transcript 05/03/25, T1223.10-12 (Galliott XN).
119 Transcript 05/03/25, T1223.17-T1224.07; T1225.01-23 (Galliott XN).

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the impact of protest and police response on community safety and confidence.[120]

83 I accept that these were the purposes of Victoria Police's attendance at IMARC, and that they were in fact integrated into the planning process. In A/Commander Tully's strategic planning for the event, he recognised that the human rights of persons at the protest could be impacted, and gave evidence that he had a responsibility to integrate human rights considerations into the planning of the operation.[121] Human rights considerations and the objective of facilitating the protest to occur safely were reflected in the PORT Tactical Plan prepared for the IMARC operation. The PORT Tactical Plan was endorsed by senior officers including the Police Forward Commander (Superintendent Trimble) and the PORT Tactical Commander (A/Inspector Caldwell) and is described further below.[122]

84 Victoria Police planning documents and assessments in evidence included information which had been gathered by Victoria Police about the groups likely to be involved in a protest at IMARC. A/Commander Tully regarded this as indicating the potential for public order related offences being committed in the course of the protest, as opposed to any threat of violence or terrorism.[123] The anticipated police response, which is appropriate and consistent with Victoria Police's functions, included responding to any breaches of the peace, criminal offending or conduct such as traffic obstruction.[124]

85 The objectives of the operation were identified in Victoria Police planning documents for the event, particularly the PORT Tactical Plan.[125] That plan identified the potential objectives of the IMARC operation as follows:

> 1. Provide a response that prioritises the health and safety of all police members, the community and other persons partaking in the incident or event.

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120 *Operational safety and the use of force* VPM dated 2 October 2019 (Exhibit P2). See further the discussion of the Operational Response Principles at [123] below.
121 Transcript 20/02/25, T440.10-15 (Tully XN).
122 PORT Tactical Plan (Exhibit P10).
123 Transcript 20/02/25, T432.13-21, referring to Exhibit P58 (Tully XN).
124 Transcript 20/02/25, T439.21-T440.03 (Tully XN).
125 Exhibit P10 (PORT Tactical Plan) 'Objectives'.

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2. Provide a visible police presence to ensure public order is maintained.

3. Prevent breaches of the peace.

4. Arrest offenders identified for offences whereby a power of arrest and/or a power to detain is applicable.

5. Facilitate dispersal of person/s engaged in public order incident or event.

6. Facilitate the safe access and egress by attendees to an event site.

7. Facilitate the right to peaceful assembly and protest by attending protest groups.

86 The document included the option of ticking a box next to either of the objectives as being 'Yes' or 'No'. All boxes were ticked 'Yes' other than the objective at item 2 ('Provide a visible police presence…') and the objective at item 7 ('Facilitate the right to peaceful assembly and protest…'). As to the objective at item 5, the evidence of A/Commander Tully was that it was not an objective to disperse people generally, only in response to a public order incident, and not those involved in lawful protest.[126] With respect to the objective at item 7, of facilitating peaceful assembly and protest, A/Commander Tully explained that the objectives in the document were identified as relevant or not as they relate to PORT.[127] I accept the evidence of A/Commander Tully and find that the objective at item 7 was ticked 'No' not because there was any belief on the part of police responsible for planning that it was not a function or objective of police officers to facilitate peaceful protest, but rather because it was not the primary role of the PORT officers to do so. Facilitating peaceful protest would usually be the responsibility of the general duties police officers (rather than PORT officers). PORT supports that role of general duties police by providing specialist capabilities to respond to any incidents that arise, including officers with skills in removing protesters who have locked onto or glued themselves to surfaces, structures or equipment.[128]

126 Transcript 21/02/25, T482.28-T483.07 (Tully XN).
127 Transcript 21/02/25, T522.21-26 (Tully XXN).
128 Transcript 21/02/25, T521.06-T523.22 (Tully XXN); IMARC Demonstration Organisational Chart (Exhibit P50).

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Responsibilities of specific units

87 The policing of IMARC was planned within the framework of the Incident Command and Control System (**ICCS**),[129] which represents 'management by objectives'. The function of the ICCS is to assist in the identification of the objectives and priorities for policing an event and to ensure that risks are identified, the event is properly resourced, and the safety of all parties involved is taken into account.

88 The different police units present at IMARC were the general duties officers (also referred to in the evidence as 'uniform' members) of the North West Metro Region; PORT teams (then under the ORU); and specialist police including officers from the Mounted Branch, Water Police Squad and Search and Rescue Squad.[130] There were also police officers from the Prosecutions Frontline Support Unit (**PFSU**).

89 General duties police officers from the North West Metro Region were deployed at the IMARC event to create and hold a police line in front of the steps outside the MCEC, nearest to the street frontage to the MCEC on Clarendon Street. General duties officers were used around the perimeter of the MCEC and also as a barrier between protesters and the MCEC entrance.[131]

90 PORT assists general duties police officers in policing high volume public order events such as protests, using specialist capabilities such as protester extraction.[132]

91 PORT has been organised to arrange officers into teams, sometimes called police support units, which are generally comprised of one sergeant and six other (more junior) ranking officers. These units can act separately as four small teams each under the supervision of a sergeant, or as a larger group of the 24 officers with four sergeants.[133] At IMARC on 30 October 2019, there were multiple teams of PORT officers comprising the 301 Unit with Blue, White, Red and Green teams and the 401 Unit with Blue, White, Red and Green teams. Each of the teams consisted of one

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129 IMARC Demonstration Organisational Chart (Exhibit P50); Transcript 20/02/25, T440.22-T441.04 (Tully XN).
130 IMARC Demonstration Organisational Chart (Exhibit P50).
131 Transcript 28/02/25, T813.01-11 (Trimble XN).
132 Transcript 03/03/25, T876.07-T877.19 (Barras XN).
133 Transcript 03/03/25, T878.20-T879.14 (Barras XN).

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Sergeant as supervisor and five or six 'other ranks' of officers.[134] The PORT teams were present at the MCEC to provide a specialist resource in the event that the protesters engaged in unlawful activity, to support the North West Metro Region officers to respond to incidents which may develop, and to support that region's strategic objectives of facilitating both access to the conference by attendees and peaceful protest.[135] PORT officers were used as arrest teams for people identified as having committed offences.

92 Officers from the Mounted Branch were also present. There was no evidence of their specific role, other than that they were there as a visible presence[136] and appeared from the footage to be involved in crowd management. The Search and Rescue Squad have specialised training in climbing and use of ropes relevant to removal of protesters who have climbed or attached themselves to structures.[137] They were also present at the site as part of a protester extraction team.[138]

93 Two police officers from the PFSU, A/Senior Sergeant Luke Devlin and Sergeant Lisa Barnes were present. Their role was to provide specialist advice and support to Police Commanders and the processing team, including on powers of arrest and determining what offences, if any, had been committed. They did not make decisions to arrest people as this was the responsibility of the Police Forward Commander and the PORT Tactical Commander.[139]

Responsibilities of specific officers

94 The evidence, including the Victoria Police roster sheet for 30 October 2019, and the evidence of A/Commander Tully, Superintendent Trimble and A/Inspector Caldwell, established that the roles and responsibilities of particular officers were as follows:

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134 IMARC Demonstration Organisational Chart (Exhibit P50); Roster Sheet for 30 October 2019 at the location of the Melbourne Convention and Entertainment Centre (Exhibit 59) (**Roster**); Transcript 03/03/25, T947.16-T948.19 (Caldwell XN).

135 Transcript 21/02/25, T521.20-T522.31 (Tully XN).

136 Transcript 18/02/25, T209.03-11 (Battersby XN).

137 Transcript 03/03/25, T875.01-07; T875.29-T876.06 (Barras XN).

138 Transcript 20/02/25, T443.11-25 (Tully XN).

139 Transcript 28/02/25, T813.22-T814.04 (Trimble XN).

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(a) A/Commander Tully of the North West Metro Region was the Police Commander with overall responsibility for the police operation at IMARC. He was responsible for the overall strategic objectives and priorities of the operation, including oversight of planning of the police operational response to the IMARC Protest.[140]

(b) Superintendent Trimble was the Police Forward Commander for the morning shift on 30 October 2019 until about 12.30pm. He reported to the Police Commander, A/Commander Tully. He was present at the MCEC and was responsible for 'everything that happened on the ground at the demonstration'.[141] He was the officer in charge at the MCEC with overall decision-making responsibility for the command of police resources deployed to the IMARC event. As Police Forward Commander, Superintendent Trimble had the responsibility, if a disturbance or offending occurred, to deal with that behaviour and how resources were used in response to it. His role also included giving directions to police officers to make arrests. He was responsible for the decision to arrest the Climbers.

(c) A/Inspector Caldwell was the PORT Tactical Commander for the morning shift on 30 October 2019, until about 12.30pm. PORT's role was to deliver specialist tactical support for the IMARC operation.[142] A/Inspector Caldwell was responsible for PORT resources on duty at the event and had the 'ultimate say from a PORT perspective and will give the advice to the Police Commander'.[143] His role was to facilitate discussion with the PORT Forward Commander and to advise him on PORT tactics.

(d) Inspector Barras was the PORT Deputy Tactical Commander for the morning shift on 30 October 2019, until about 12.30pm. His role at IMARC involved specific responsibility for protester extraction, being to remove people from

140 Transcript 20/02/25, T424.25-T426.02 (Tully XN).
141 Transcript 28/02/25, T808.06-09 (Trimble XN).
142 Transcript 03/03/25, T876.11-T877.03 (Barras XN).
143 Transcript 03/03/25, T889.18-21 (Barras XN).

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crowds or who were locked, glued or tied to infrastructure.[144] His role as Deputy Tactical Commander also involved giving advice to the local Police Commander in the lead up to and during the event on specialist tactics and resources that could be used by PORT.[145]

(e) Senior Sergeant Pierlot was the PORT Tactical Advisor for the morning shift on 30 October 2019, until about 12.30pm. His role was to provide advice and support and convey information to the PORT Tactical Commander on an ongoing basis, and to be involved in discussions about tactical options.[146]

Common Questions relating to policies, procedures, standards of conduct and training applicable to police at IMARC

95 Before turning to the relevant events at IMARC on 30 October 2019, it is useful to address the policies, procedures and training applicable to police officers in their roles on that day. There are several Common Questions relating to these issues which I address in turn below.

Common Question 11: What Victoria Police policies and procedures were operational and applicable to the use of force at IMARC?

96 The evidence established (and the parties agreed in their submissions)[147] that the following Victoria Police Manuals and extracts from these manuals were operational and had application or potential application to the use of force at the IMARC Protest:

1. *Operational safety and the use of force* VPM;[148]
2. *Operational safety equipment* VPM;[149]
3. *Specialist support* VPM (which, relevantly to IMARC, includes content relating to the ORU (now PORT), the Mounted Branch and Search and

144 Transcript 03/03/25, T877.12-19; T887.08-18; T888.10-T889.01 (Barras XN).
145 Transcript 03/03/25, T876.20-24 (Barras XN).
146 Transcript 03/03/25, T889.23-29 (Barras XN); T968.10-12; T969.09-13; T974.14-18; T975.18-27 (Caldwell XN).
147 **Defendant's Answers to Common Questions** filed 10 April 2025, [54]. **Plaintiff's Response to Defendant's Answers to Common Questions and Plaintiff's Answers to Common Questions** dated 8 May 2025, [102]. See also Transcript 03/03/25, T915.29-T916.07 (Barras XXN).
148 Extract of Victoria Police Manual, section 'Operational safety and the use of force', dated 2 October 2019, (Exhibit P2) (**Extract of Victoria Police Manual, section 'Operational safety and the use of force'**).
149 Extract of Victoria Police Manual, section 'Operational Safety Equipment' (Exhibit P3).

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Rescue Squad);[150]

4. *Public order* VPM (Policy Rules dealing with the minimum standards that police members must apply when undertaking public order policing);[151]

5. *Breach of the peace* VPM (Procedures and guidelines);[152]

6. *Police attendance at events* VPM (Procedures and guidelines);[153]

7. *Move on powers* VPM (Procedures and guidelines);[154]

8. *Crowd control* VPM (Procedures and guidelines);[155]

9. *Human Rights-Ready Reckoner*.[156]

The Victoria Police Manuals

97 VPMs are issued pursuant to the Chief Commissioner's statutory power to issue instructions under s 60 of the *Victoria Police Act*. The VPMs applicable in 2019 acknowledge that they were issued under the authority of the Chief Commissioner pursuant to s 60 of the *Victoria Police Act*.[157] The *Victoria Police Act* provides that all personnel must comply with the Chief Commissioner's instructions and that non-compliance can constitute a breach of discipline.[158] The legal status of VPMs issued under the predecessor legislation, the *Police Regulation Act 1958* (Vic), was that they do not themselves have the force of law.[159] That remains the case with VPMs issued

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150 Victoria Police Manual – Specialist support dated 7 October 2019 (Exhibit P39) (**Victoria Police Manual – Specialist support**).

151 Victoria Police Manual - Public order dated 22 February 2010 (Exhibit P34) (**Victoria Police Manual - Public order**).

152 Victoria Police Manual – Breach of the peace dated 28 May 2014, ' (Exhibit P35) (**Victoria Police Manual – Breach of the peace**).

153 Victoria Police Manual – Police attendance at events dated 1 July 2014 (Exhibit P36) (**Victoria Police Manual – Police attendance at events**).

154 Victoria Police Manual – Move on Powers dated 1 April 2015 (Exhibit P37) (**Victoria Police Manual – Move on Powers**).

155 Victoria Police Manual – Crowd Control dated 14 August 2018 (Exhibit P38) (**Victoria Police Manual – Crowd control**).

156 Exhibit P33.

157 See for example the prefatory words at the commencement of the *Operational safety and the use of force* VPM (Exhibit P2), the *Operational safety equipment* VPM (Exhibit P3) and the *Specialist support* VPM, (Exhibit P39).

158 *Victoria Police Act*, ss 61 and 125(1)(c).

159 *Slaveski*, [206]-[207] (Kyrou J); *Watkins*, 558 [53] (Ashley and Beach JJA). In *Watkins*, Ashley and Beach JJA observed with respect to authorisation of use of force for taking of fingerprints under s 464K of the *Crimes Act*: 'It is correct to say that the procedure laid down by the Police Manual does not have the force of statute. But in our opinion, it is critically important that authorisation be real and not a matter of indifference. The authorisation of reasonable force has the effect of permitting not merely a technical assault but an assault which may be substantial'. These authorities relate to the VPM as issued pursuant to powers of the Chief Commissioner under s 17 of the former *Police Regulation Act 1958* (Vic).

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pursuant to s 60 of the *Victoria Police Act*. However, the fact that breach of VPMs may constitute a breach of discipline reinforces the importance of the VPMs' content in setting mandatory standards and regulating police conduct.

98 The *Operational safety and the use of force* VPM and the *Operational safety equipment* VPM address:

(a) the circumstances in which police officers can use force, including principles on lawfulness, risk assessments and operational safety; and

(b) the use of operational safety equipment, and the training for officers on the types of operational safety equipment.[160]

99 The *Operational safety equipment* VPM specifically states the following with respect to use of OC aerosols:[161]

> **5.3 *OSE – Specific use of force requirements***
>
> In addition to the requirements outlined in VPM Operational safety and the use of force, **members and PCOs must comply with the following instructions**.

Oleoresin capsicum aerosols	• OC aerosols should only be used where there are reasonable grounds to believe the use is necessary and proportionate in situations: - of violence or serious physical confrontation - where violent or serious physical confrontation is imminent - where a person is involved in violent or other physical conduct likely to seriously injure themselves or result in suicide- • Members and PCOs: - should not use OC aerosols when a person is only passively resisting e.g. simply hanging limp or refusing to comply with instructions only - may use OC aerosols to deter attacking animals

100 The *Crowd control* VPM *Procedures and Guidelines* relevantly state at Part 7.5:[162]

> ***7.5 Arrests***

160 Defendant's Answers to Common Questions, [55].
161 Exhibit P3, Part 4.6 (bold emphasis added).
162 Exhibit P38.

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If it is necessary to make arrests, follow these guidelines:

…

- Minor offences should be ignored in the interests of containing the overall situation. However, take appropriate action to prevent conduct involving violence to people or damage to property

The Oleoresin Capsicum Manual 2019

101 The OC Manual was in operation at the time of the IMARC Protest.[163] It is not a VPM, but an internal police manual.[164]

102 The OC Manual refers to mandatory and minimum standards contained in the VPMs applicable to the carriage and use of OC products.[165] It refers to the Operational Response Principles, and incorporates Part 5.3 of the *Operational safety equipment* VPM dealing with 'Specific use of force requirements – OC aerosols' (which is set out at [99] above).[166]

103 Some parts of the OC Manual refer to what police officers 'should' do with respect to use of OC aerosol. Other parts of the OC Manual use the language of what officers 'must' do.[167] For example, the instructions in Part 6.3 on 'Methods of Deployment' state:

> **6.3 Methods of Deployment**
>
> The decision to deploy OC aerosol can be either planned or unplanned.
>
> **Unplanned use**
> Unplanned use may be defined as where a member is required to react to an immediate threat and deploys OC aerosol to prevent serious injury, in a reactive way.
> Members must keep in mind that the unplanned use of OC aerosol is still a tactical decision to be made commensurate with the appropriate level of force required to deal with the situation.
>
> **Planned use**
> Planned use of OC is a deployment in circumstances whereby the member/s has a degree of preparation and consciously decides to deploy OC aerosol as an option in resolving a critical situation.
> As with all plans, the risk assessment should take into account the operational

163 Exhibit P1.
164 Transcript 05/03/25, T1258.16-25 (Galliott XXN).
165 Exhibit P1, Part 4.1.
166 Exhibit P1, Part 4.6.
167 Exhibit P1, Parts 5.3, 6.3, 6.5 and 6.6.

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response principles.

104 The requirements in Part 6.6 on 'Deployment' are expressed in terms of what officers 'must' do:

> **Warning Prior to Use**
> Critical Incidents
>
> …
>
> "A verbal warning must be given prior to discharging OC aerosol. Unless the urgency of the situation makes it impracticable to do so".
>
> The word "SPRAY" is uttered in a loud clear voice on deployment of the aerosol.
>
> …
>
> Application
>
> The risk assessment must take account of all safety factors including the potential for harm to the member or the subject/s, i.e. increase the determination to commit suicide or in the case of attack, give the individual the chance to take evasive/deflective action or increase the intensity or achievability of the attack. The member's risk assessment should be mindful of the gravity of the overall incident and all the prevailing circumstances. It remains an operational decision whether to warn or not, based on the risk assessment process which when followed will provide valid justification for the decision.

105 There was an issue between the parties as to the extent to which the OC Manual contained mandatory standards. That issue is more directly raised by Common Question 13 and is discussed in that context below.

Human Rights Ready Reckoner

106 A/Commander Tully gave evidence that the HRRR is available to all police via the police intranet and could be used in the planning phase for an operation.[168] There was no evidence that the HRRR was used in planning for the operation at IMARC, nor that it was provided to individual police officers deployed there. The HRRR is a four page document which commences by observing:

> …
>
> The *Charter of Human Rights and Responsibilities Act 2006* requires all public authorities, including Victoria Police to consider the human rights of all people

168 Transcript 20/02/25, T454.30-T455.08 (Tully XN).

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we interact with in our decision making when we provide services and when we enforce the law. [169]

107 The HRRR provides guidance as to how the *Charter* can be applied to the work of police officers:

> We must consider the following when making decisions:
>
> 1. What is the **reason** for acting?
>
> Under what law or authorisation are you acting?
>
> 2. Consider your **impact**
>
> Which human rights are relevant and will your actions protect or limit these rights?
>
> 3. It is **reasonable?**
>
> If your actions limit human rights, is the limitation *reasonable* and can it be *justified* in the circumstances?
>
> • Is the limitation authorised by law
>
> • Is it for a legitimate purpose
>
> 4. It is **necessary?**
>
> Is the limitation necessary and proportionate to the goal you are trying to achieve?
>
> 5. Is there a **less restrictive** option?
>
> Is there another reasonable way of achieving your goal that is less restrictive of human rights; can it be done better or differently?
>
> ***Strike the right balance***
>
> In some circumstances we may lawfully limit a person's human rights. This can only be done to the extent that it is reasonable and can be justified. All limitations of a human right must be:
>
> 1. **A**uthorised by law
>
> 2. **N**ecessary, reasonable and proportionate
>
> 3. **T**he less restrictive alternative.

108 The HRRR then briefly summarises the rights in the *Charter* and explains how they may be relevant to police work.

109 I find that HRRR does not itself create rules or standards but it is an accurate and appropriate summary of the statutory obligations imposed by the *Charter*, and guidance on the *Charter*'s implementation in practice. The HRRR's guidance was applicable to police officers working at IMARC, but I find that it was not specifically

169 Exhibit P33.

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referred to or provided when the officers on duty were briefed for the IMARC event.

Other relevant policies and procedures

110 The plaintiff contended that in addition to the VPMs and the OC Manual, the Human Rights Risk Assessment (**HRRA**)[170] and the Human Rights Impact Assessment in the PORT Tactical Plan (**HRIA**)[171] were applicable to police officers on the day of the IMARC Protest.

111 The HRRA was prepared by the Human Rights Portfolio Manager at Victoria Police, John Croker, for the purpose of the IMARC event.[172] A/Inspector Caldwell gave evidence that the HRRA 'applied to that day', referring to 30 October 2019.[173] However, he was not asked to elaborate on how or to whom it 'applied'.[174] It was not expressed as a policy or procedure, but as an assessment of the risks which may arise in policing IMARC. It contained a detailed analysis of which *Charter* rights might be limited, how they might be limited and the suggested mitigation strategies in instances were those rights were limited. For example, with respect to the right to recognition and equality before the law, in s 8 of the *Charter*, the HRRA states as a suggested risk mitigation strategy:

> *– Any enforcement action taken should be focused on the individual and their actions – don't arrest/intervene based on actions of group alone.*

112 Similarly, for s 12 of the *Charter*, freedom of movement, it identifies as a risk mitigation strategy:

> *– Police should exercise discretion towards lower level offending to allow a peaceful protest (i.e. only execute arrest powers where offences are serious, seek guidance from PFSU and TAC Commander.) Also refer to VPM on managing public order/protests in relation to lower level offences.*

113 Regarding the peaceful protest rights protected by ss 14, 15 and 16 of the *Charter*, the HRRA observes:

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170 IMARC – Human Rights Risk Assessment document dated 21 October 2019 (Exhibit P47).
171 Exhibit P10 (PORT Tactical Plan).
172 Transcript 21/02/25, T488.29 (Tully XXN); 03/03/25, T936.27-31 (Barras XXN); 04/03/25, T1022.11-16 (Caldwell XXN).
173 Transcript 04/03/25, T1022.11-16 (Caldwell XXN).
174 Transcript 04/03/25, T1022.11-16 (Caldwell XXN).

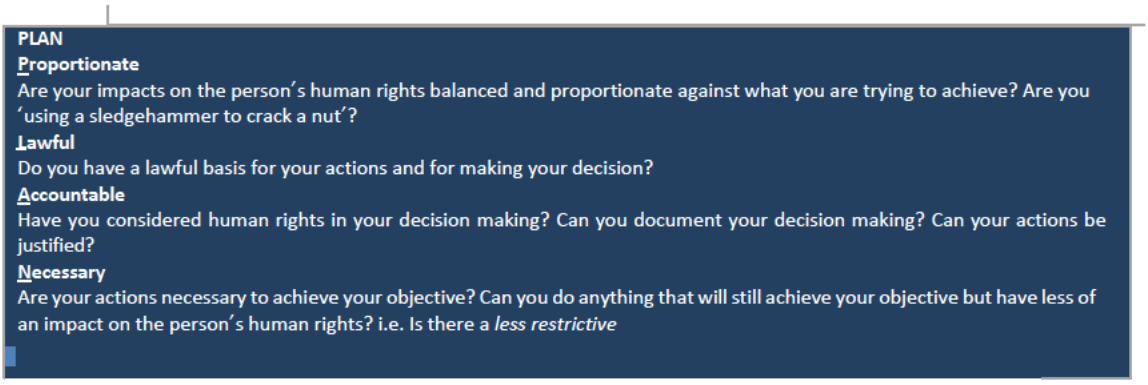
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– The right to peacefully assemble may be limited if there are clear risks to public safety and order.

114 The State did not agree that the HRRA or any element of it was a policy which applied to police at IMARC.[175]

115 The HRRA includes content which would provide useful guidance for police officers seeking to understand how to comply with the *Charter* in practice. However, it was not provided to individual police officers working at IMARC. I find that in these circumstances, it was not a policy or procedure that constituted an operational document applicable to the conduct of individual police officers at the IMARC event. It was used in the overall tactical planning for the event.

116 There was one element of the HRRA, the mnemonic 'PLAN', which was similar to the format and content of the HRRR. It is as follows:


PLAN
Proportionate
Are your impacts on the person's human rights balanced and proportionate against what you are trying to achieve? Are you 'using a sledgehammer to crack a nut'?
Lawful
Do you have a lawful basis for your actions and for making your decision?
Accountable
Have you considered human rights in your decision making? Can you document your decision making? Can your actions be justified?
Necessary
Are your actions necessary to achieve your objective? Can you do anything that will still achieve your objective but have less of an impact on the person's human rights? i.e. Is there a *less restrictive*

117 This mnemonic was included in the PORT briefing delivered at IMARC to every PORT officer.[176] A visual presentation which accompanied the briefing referred to the importance of the PLAN considerations and it was also referred to in Incident Management Team (**IMT**) meetings during the IMARC event.[177]

118 I find that the PLAN guidance included in the HRRR, HRRA and the PORT briefing document was an instruction which was applicable to the police officers policing IMARC.

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175 Defendant's Answers to Common Questions, response to Common Question 11; [54]-[56].
176 Transcript 03/03/25, T894.06-25 (Barras XN); Briefing document titled 'Blockade IMARC – 28th to 31st October 2019' dated 30 October 2019 (Exhibit P31).
177 Debrief - Human Rights - IMARC Protests 2019, 21 November 2019 (Exhibit P32), 2.

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119 The HRIA, which formed part of the PORT Tactical Plan,[178] derives from a template originally prepared by the training senior sergeant at PORT.[179] The template is completed for specific events and was likely to have been completed by Mr Croker with respect to the PORT Tactical Plan for the IMARC event.[180] This Briefing Plan was provided to A/Inspector Caldwell as the PORT Tactical Commander, North West Metro Region, for approval, and was used to assist in planning for the day.[181] The Briefing Plan includes a range of planning considerations as well as the HRIA. The plaintiff contends that the HRIA was one of the policies and procedures applicable to the use of force at the IMARC Protest.[182] I accept that the document was specifically prepared for the IMARC Protest, but it was a document intended to facilitate planning for the police response, rather than containing instructions or standards with which police officers were required to comply.

Common Questions 12(a)-(d): Training and supervision in respect of the police role at protests; appropriate policing tactics at protests; and use of force including OC foam at protests.

Foundation training and generally applicable training principles

120 Victoria Police officers all receive foundation training at the Police Academy. This includes training in the use of standard operational safety equipment including OC aerosol.[183]

121 Police officers are trained on the use of force and of OC aerosols as part of their foundation training, and as part of their requalification, in Operational Safety and Tactics Training (**OSTT**) through the operational safety unit, which occurs twice every year.[184] The foundation training also addresses the content of police powers, legislative justifications for the use of force, situational awareness and decision

178 Exhibit P10.
179 Transcript 03/03/25, T957.08-10 (Caldwell XN).
180 Transcript 21/02/25, T486.24-T487.10 (Tully XXN).
181 Transcript 03/03/25, T956.29-T958.29 (Caldwell XN).
182 Plaintiff's Response to Defendant's Answers to Common Questions and Plaintiff's Answers to Common Questions, [105]; [107].
183 *Operational safety equipment* VPM (Exhibit P3): Transcript 06/03/25, T1294.30-T1295.03 (Lahman XN).
184 Transcript 05/03/25, T1247.08-21 (Galliott XN); 06/03/25, T1294.13-T1295.16 (Lahman XN).

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making in a public order setting.[185]

122 Police are trained in the principle that use of force is to be determined by each individual police officer, having regard to the circumstances, their risk assessment, and an assessment of proportionality to comply with the legal restrictions on use of force.[186] The decision to use force is the particular police officer's alone, and although it is possible for a police officer to ask another to use force, that officer must be personally satisfied that it is justified.[187] The subjective and individual nature of a determination to use force is reflected in the *Operational safety and the use of force* VPM, which sets out factors to be considered, including an individual risk assessment and an assessment of proportionality.[188]

123 A relevant element of the foundation training is the requirement that police officers apply the Operational Response Principles when considering the use of force. These are addressed in Part 4 of the *Operational safety and the use of force* VPM, which states:[189]

> **Operational response principles**
>
> The operational response principles:
>
> - reflect that operational safety has a broader application beyond dealing with armed offenders or using force
>
> - recognise that Victoria Police has a responsibility under the VPA to provide a community service which is often dangerous and involves the exercise of significant powers
>
> - commit to performing our role and function under the VPA as safely as possible, while minimising harm.
>
> The principles are:
>
> - **Service** – police and PSOs make a solemn undertaking, via oath or affirmation, to provide a policing service to the Victorian community, in line with their legislated responsibility. In performing this role, members may be required to perform tasks that may be considered inherently unsafe. Police and PSOs are trained, equipped and empowered to perform such tasks and there is a community expectation that they will do so

185 Transcript 06/03/25, T1295.05-16; T1295.29-T1296.01 (Lahman XN).
186 Transcript 06/03/25, T1295.09-16 (Lahman XN).
187 Transcript 03/03/25, T882.17-27 (Barras XN); 06/03/25, T1294.13-19; T1296.10-26 (Lahman XN).
188 Extract of Victoria Police Manual, section '*Operational safety and the use of force*' (Exhibit P2).
189 *Operational safety and the use of force* VPM (Exhibit P2), Part 4, p.3.

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- **Safety** – while providing a policing service our members will, as far as practicable, identify hazards and mitigate risks to themselves and others. This is consistent with the requirements of the *Occupational Health and Safety Act 2004*

- **Harm Minimisation** – the goal of policing activities is to minimise harm caused by our own actions or the actions of others. This is a broader concept that extends beyond the use of force and physical injury. It encompasses human rights, psychological and emotional harm and other impacts on community safety and confidence.

124 An Operational Safety Tool developed by Victoria Police to support the application of the Operational Response Principles is the mnemonic 'SAFE TACTICS'. The Operational Safety Tool is set out in Part 5 of the *Operational safety and the use of force* VPM, and given its importance to all uses of force, including use of OC aerosols, it is appropriate to set it out in full:

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OPERATIONAL SAFETY TOOL		
S	**Slow Down / Step Back** Consider your response, don't rush in	*Always consider the safety of yourself & others. Take control of your emotional response & adrenalin. Control the urge to rush in; your response is likely to be ineffective if it is not safe. Consider whether what you are doing, or intending to do, is safe, necessary & sanctioned by legislation or policy.*
A	**Assess the Risks** What can go wrong?	*Identify potential hazards & the risks they pose. Think broadly, sometimes there are just as many risks in getting to the job as there are once you arrive. Consider how you will manage the risks to yourself & others.*
F	**Formulate a Plan** Identify objectives and how they'll be achieved	*Make every effort to prepare a planned response to an unplanned incident. Consider the information you have at hand, your personal capability & experience along with that of other attending resources. Having assessed the risks, develop a plan that mitigates those risks & achieves your objectives. The complexity of the plan will vary depending on the incident & the risks identified.*
E	**Evaluate your Options** Consider the likely consequences of your action or inaction	*Consider the full range of responses open to you & select the most appropriate. Don't allow tunnel vision to restrict your thinking. Consequences are not limited to physical injuries and include a wide range of potential harm. Remember, some options, such as forced entry searches, present greater risk that need to be managed.*
T	**Take Charge** Demonstrate calm, maintain order, provide decisive leadership	*Provide leadership & direction. Be prepared to make decisions. Depending on the nature of the incident you may be required to perform command, control and / or co-ordination roles as dictated by legislation / policy. Implement effective ICCS structures as applicable to the event.*
A	**Apply Relevant Legislation / Policy** Consider the rules	*The Victoria Police Act articulates that we must serve the community & uphold the law. When conducting your duties you must ensure that you are working within the various rules that govern policing activities. This includes things like the Charter of Human Rights, use of force, search powers, entry powers, holding powers & considerations around urgent duty driving & pursuits.*
C	**Create a Safe Operating Environment** Isolate and manage potential hazards	*Depending on the situation this may involve a range of tasks, for example: isolating potential weapons at a family violence incident; closing roads at an accident scene; creating a safety corridor during a traffic intercept; establishing a cordon around an armed offender or evacuating & cordoning off a clandestine drug lab.*
T	**Tactical Options** Select the most appropriate, but be prepared to adjust	*You have a variety of tactical options, including operational safety equipment, available to assist you in effectively & safely responding to policing tasks. The required response may range from a mere uniform presence to quell crowd unrest through to the use of lethal force in extreme cases. The choice of tactical option should always consider the nature of the task & the proportionality of the police response.*
I	**Information Gathering** Increase your situational awareness	*Situational awareness is critical to the safe & successful resolution of many policing tasks. The more accurate information that can be gathered, in the time available, to inform planning & response activities, the better. You are encouraged to utilise existing police records & databases as well as other sources of information to increase your situational awareness.*
C	**Communication** Provide clear, calm and concise communication	*Effective communication can often diffuse confrontation & eliminate the need to use force. In situations where communication has proven or is likely to prove ineffective & action must be taken, those actions must still be professional, reasonable and proportionate. Communication between police members is vital to ensure that everyone involved in or responding to an incident has a clear understanding of the circumstances, the police objectives & the risks involved. The provision of quality Situation Reports and On Air Directions must be treated as a priority to achieve a safe and successful outcome. In a multi-agency response EMTs should be conducted as required.*
S	**Support** Request assistance where appropriate	*Consider what additional support services or other resources might be required or are available to increase the safety of your activities or response. This may include additional general duties police units, specialist units or external agencies. In country areas, additional resources may not be available & this should also be factored in to your planning & response. Consider post incident support & welfare needs.*

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125 The OC Manual reiterates the 'Operational Response Principles' in Part 4.5. It includes a visual representation of the Operational Safety Tool, in a format more likely to be remembered in the context of rapid decision making:[190]





126 The *Operational safety and the use of force* VPM contains an additional tool, the *Tactical Options Model* or 'TOM'. That is described in Part 6.2 of the VPM as 'an organisational visual aid that outlines the various tactical options available to officers and includes communication and physical presence as well as operational safety equipment'.[191] The visual aid is reproduced below:

190 OC Manual (Exhibit P1) Part 4.5.

191 *Operational safety and the use of force* VPM (Exhibit P2) Part 6.2 '*Tactical Options Model* (TOM)'. Inspector Barras and Commander Galliott gave evidence that like the SAFE TACTICS Operational safety tool, the TOM is taught to all police officers. Transcript 03/03/25, T884.03-T885.11 (Barras XN); 05/03/25, T1247.19-T1248.11 (Galliott XN).

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127 The *Operational safety and the use of force* VPM further states with respect to the *Tactical Options Model*:

> - When considering which tactical options to choose, members should be mindful that their goal is to minimise the overall harm caused by their actions or the actions of others.
>
> - Where the use of force is required, the random arrangement of tactical options encourages members to escalate and de-escalate the choice of equipment or tactics in accordance with the direction the incident is taking, the objective and the information available to them.

128 Inspector Barras gave evidence that the *Tactical Options Model* applies to 'everything from planning an event all the way through to engaging in a conversation in the street which could become very dynamic', and also applies to a protest environment.[192]

PORT Training

129 PORT officers receive specialist training in addition to foundational training. In 2019, PORT officers undertook a short crowd management team training session before completing the foundational PORT course. The PORT foundational course was of approximately two weeks' duration with around 80 hours of content.[193] The training included theory based sessions on legislation relevant to public order environments, including the *Charter*, relevant offences and crowd behaviours. It also included practical sessions where instructors explained and demonstrated skills which were

192 Transcript 03/03/25, T886.03-07 (Barras XN).
193 Transcript 06/03/25, T1286.20-24; T1288.24-T1289.13 (Lahman XN).

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then practised by participants.[194] One objective of the PORT foundation training was to provide PORT officers with the skills and training to implement crowd control techniques and deploy specialist crowd control equipment, including batons.[195]

130 There was limited evidence about the content of the training received by PORT officers about policing tactics appropriate for use at protests, as a claim for public interest immunity was made over large parts of the PORT Tactics Manual.[196] There was some evidence of the Manual's content relating to how police should move in the context of a 'resistive crowd', including an instruction to keep an engaged step and use one hand, if batons are not being carried, to push the crowd back as the police line advances.[197] Part 4 of the PORT Tactics Manual relating to 'Wedges' was redacted in part, but included the following:[198]

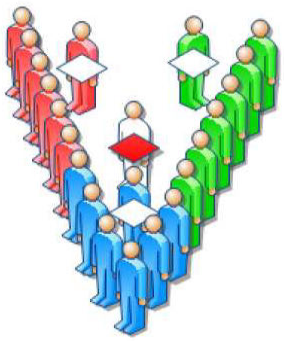
4.) – Wedges PII [redacted]

Wedge

Word of Commands, **"Unit... Form Wedge... (Fixed point / Paces)... GO"**

The front officer of the centre section will move forward five (5) metres / fixed point to form the head of the wedge. The remaining centre section will alternate left and right of the front officer. Left section moves forward to form the left flank and right section, right flank. The formation should have a 30° angle to assist the formation moving through the crowd without undue resistance. The wedge formation can be used to escort a VIP through a potentially hostile crowd, rescue an injured officer, or used to push a crowd from an area.

Figure 4.1: Wedge formation



131 This image shows the wedge formation on a large scale with more than one PORT Team (each of which usually consists of six officers and a supervisor: see [91] above).

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194 Transcript 06/03/25, T1286.10-T1289.25 (Lahman XN); ***Crowd Management Team, Course Management Package***, version 2.0, 16 November 2016 (Exhibit D9); PORT Use of Force, Street Offences and Preventative Powers (Exhibit D10); Charter of Human Rights Training for the Operations Response Unit of Victoria Police (Exhibit D11).

195 Crowd Management Team, Course Management Package version 2.0 dated 16 November 2016 (Exhibit D9); see also **PORT Course Management Package** version 2.0 dated 17 August 2016 (Exhibit P72).

196 **PORT Tactics Manual, version 3.0** dated 6 June 2018 (Exhibit P73).

197 PORT Tactics Manual, version 3.0 (Exhibit P73), Part 3.

198 PORT Tactics Manual, version 3.0 (Exhibit P73).

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At the IMARC Protest, smaller wedges using a single team were also used, which involved three police officers on each side and the supervisor in the centre.[199]

132 Evidence was also given as to the purpose and method of the wedge formation. It was described as a tactic involving a group of officers coming closely together shaped in a 'V' or wedge formation, to move into a crowd with the point of the 'V' forward. The police officers hold on to each other's equipment belt, with the other hand free to move people or achieve another objective. A sergeant, or other senior police officer in the role of supervisor, stands in the middle to coordinate the movement of the wedge, with an ability to maintain situational awareness of the environment around them, and make decisions on whether to move forward or withdraw from a crowd. This formation is used as a type of plough to move through crowds to make arrests, or to access a person such as an injured person, and withdraw with them from the crowd.[200]

133 PORT training includes theoretical training about the source of police powers for use of force. However, it does not teach use of force tactics and what level of force could be used in a protest environment because this is taught in the foundation training for all police officers. Police officers are referred back to the foundation training on use of the standard operating equipment in the context of PORT training exercises.[201]

134 The foundation training on use of force is that there are no absolute tactics; that use of force must be legally justified, and must be based on an individualised risk assessment. Consistent with this, PORT officers are not trained prescriptively on when to use force.[202] Specifically, PORT officers are not taught that particular circumstances require the use of force, or use of particular operational safety equipment such as OC aerosols.[203] There was no evidence of training for PORT officers in use of OC aerosols. Although the State submitted PORT supervisors were trained in the use of OC

199 Transcript 03/03/25, T880.28-T881.13 (Barras XN).
200 Transcript 03/03/25, T983.03-16 (Caldwell XN); T880.25-T881-09 (Barras XN); 06/03/25; T1289.28-T1290.20 (Lahman XN).
201 Transcript 06/03/25, T1294.13-29 (Lahman XN).
202 Transcript 03/03/25, T882.17-27 (Barras XN); T913.16-19 (Barras XXN); T1007.02-13 (Caldwell XXN).
203 Transcript 06/03/25, T1294.13-29 (Lahman XN); T1354.12-24 (Lahman XXN).

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aerosols,[204] there was no evidence that any such training was in fact given to PORT officers or supervisors.[205] I find that there was not in fact any specific PORT training relating to OC aerosols.

135 The PORT Tactics Manual contained a range of other material, most of which was withheld on public interest immunity grounds. The following content on arrests in a crowd control situation was not withheld:

> In some crowd control situations it may be necessary to make arrests. If so, the following guidelines should be followed:
>
> - Whenever practicable, arrests should be made on the direction of a Sub-officer.
> - Minor offences should be ignored in the interests of containing the overall situation however; appropriate action must be taken to prevent conduct involving violence to people or damage to property.
> - Arrests should be undertaken only when they can be physically accomplished and then without seriously depleting personnel numbers or exposing police or the public to unnecessary risk.
> - An arrest must be justified under the provisions of the Crimes Act or any other specific legislative authority.
>
> These arrest teams can be used with or without PPE, depending on the risk assessment on overall objectives. Regardless of the type of arrest, loud, clear and direct verbal commands should be given to the offender to assist with gaining compliance. [206]

136 There was a human rights component to the PORT training but there was no specific evidence about what this training entailed.[207] Inspector Barras gave evidence that the PLAN mnemonic relating to *Charter* rights consideration (referred to at [116] above) was a 'tool' within the decision making framework which officers are to apply to the objective that they need to achieve or are being asked to achieve, and the factors of proportionality, lawfulness, accountability and necessity, which should be

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204 Defendant's Answers to Common Questions, [62]. The evidence of senior police officers relied on by the State for the proposition that there was training of PORT supervisors on OC aerosol use and other matters referred to particular tactics, but did not refer to *training* given in relation to those tactics.

205 Including no content relating to OC aerosols in the PORT Tactics Manual, version 3.0 (Exhibit P73) or the *PORT Course Management Package* versions dated 17 August 2016 (Exhibit P72) and 16 November 2016 (Exhibit D9).

206 PORT Tactics Manual, version 3.0 (Exhibit P73), Part 14.

207 Transcript 03/03/25, T878.12 (Barras XN).

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considered.[208] In addition to the tool being a specific part of the briefing of officers on the morning of 30 October 2019 at the IMARC event, it appeared that it was used in other police training, although it was not clear whether it was taught in foundation training or PORT training.

Specific evidence given by Sergeant Guthrie about training

137 It is appropriate, in the context of the Common Question about training, to address evidence given by Sergeant Guthrie as to her understanding of her training in the use of OC aerosols.

138 Sergeant Guthrie gave evidence that in the context of events on the day of the IMARC Protest, the common law 'would supersede what the VPM's guidelines say', in particular the statement in the VPMs that it is 'not ideal to use it at a protest situation'.[209] She regarded that element of the VPM as being inconsistent with her training that when she is in a wedge formation, the supervisor is at the rear and is to use OC foam 'over the top of the police line' if they find it necessary and justified.[210] She described the OC Manual as a 'consideration' but regarded her training as a supervisor as superseding that consideration. [211]

139 I find that if the training provided to Sergeant Guthrie was that she could 'spray over the top of' a police line in circumstances which were contrary to the instructions set out in the OC Manual, it was not authorised by that Manual, nor by the content of any VPMs relating to the use of force. The evidence about training was that supervisors in wedge formations are not *required* to deploy specific options, but rather have a responsibility for situational awareness and have discretion as to the appropriate tactics to be used.[212] I have also found, for reasons elaborated below, that the OC Manual contained instructions and standards with which police officers were required

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208 Transcript 03/03/25, T894.26-T895.22 (Barras XN).
209 Transcript 05/03/25, T1140.07-08; T1140.20-21 (Guthrie XXN).
210 Transcript 04/03/25, T1079.23 (Guthrie XN); 05/03/25, T1140.17-18 (Guthrie XXN).
211 Transcript 05/03/25, T1140.03-31 (Guthrie XXN).
212 Transcript 06/03/25, T1295.17-T1296.01 (Lahman XN). See also Transcript 06/03/25, T1353.01-T1354.09 (Lahman XXN). Sergeant Guthrie gave evidence that she was required to comply where possible with instructions in the *Operational safety equipment* VPM is not a qualification found in the VPM itself: Transcript 05/03/25, T1144.26-T1145.19 (Guthrie XXN).

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to comply.[213]

140 The evidence did not enable a determination of whether the training that Sergeant Guthrie had received did in fact depart in some way from the OC Manual or whether she had misconceived the effect of the training. It is unnecessary for the purposes of this proceeding to determine whether the training was in some way non-compliant with the VPMs, or that Sergeant Guthrie's understanding of the training was inadequate.

141 Commander Galliott gave evidence, referred to below,[214] that VPMs had been compiled from historical documents, which contained both instructions and non-mandatory policy observations, so that some content was in his view not mandatory. In light of that evidence, it may well be that there is some lack of clarity in the broader understanding of police officers as to the status of instructions in the VPMs, which is reflected in training.

142 I emphasise that I do not accept that the formal standard set by Victoria Police was that police officers could use OC aerosols in circumstances contrary to the instructions relating to circumstances and methods of use in the OC Manual and the *Operational safety and the use of force* VPM.

Supervision of police officers in their role at protests; policing tactics and the use of force including OC foam at protests

143 Common Question 12 asks, in addition to training, what supervision was provided to police officers in relation to their role and powers at protests.

144 The evidence established (and the parties agreed in their submissions)[215] that the supervision arrangements for the IMARC event used an ICCS[216] structure, which involved the following roles and hierarchy:

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213 See [159]-[165] below.

214 See [150]-[151] below.

215 Defendant's Answers to Common Questions [64]-[66]. Plaintiff's Response to Defendant's Answers to Common Questions and Plaintiff's Answers to Common Questions, [114]. See also Transcript 03/03/25, T915.29-T916.07 (Barras XXN).

216 IMARC Demonstration Organisational Chart (Exhibit P50), Transcript 20/02/25, T440.22-T441.04 (Tully XN).

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(a) A/Commander Tully as Police Commander had overall responsibility (including supervision) for the police operation;

(b) Superintendent Trimble as Police Forward Commander had ultimate responsibility for police resources and decision making at the scene; and

(c) the supervision structure was then arranged by reference to Zones of Responsibility, each headed by a Zone Commander with a Deputy Zone Commander, leading teams of sergeants and other ranks.[217]

145 For PORT, the supervision hierarchy on 30 October 2019 was as follows:[218]

(a) A/Inspector Graham Caldwell was the PORT Tactical Commander.

(b) Inspector Gregory Barras was the PORT Deputy Tactical Commander.

(c) Inspector Ian Geddes and Senior Sergeant Michael Pierlot were the PORT Strategic Tactical Advisor and Tactical Advisor respectively.

(d) Each of the PORT 301, 401, 501, 601 and 701 teams had a senior sergeant in charge. The PORT 301 and 401 teams were stationed in positions near the East and West Poles. The officer in charge of the PORT 301 team was Senior Sergeant Kevin Vincent. The officer in charge of the PORT 401 team was Senior Sergeant Shaun Howard.

(e) Each PORT 301 and 401 team was supervised by a Sergeant or Acting Sergeant. The supervisors of the relevant PORT teams were

(i) Daniel Whelan for the Green 301 team;

(ii) Paul Sanders for the Blue 301 team;

(iii) John Bourke for the White 301 team;

217 IMARC Demonstration Organisational Chart (Exhibit P50).

218 Exhibits P51 and P52 (also tendered together as Exhibit D5), PORT Deployment sheets for 30 October 2019.

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(iv) Peta Probert for the Green 401 team; and

(v) Travis Pritchard for the Blue 401 team.

146 Inspector Barras was the supervisor of the protester extraction team, which included Sergeant Guthrie.[219]

Common Question 13: Limitations or standards of conduct applicable to Police Officers using OC foam at a protest

Legal restrictions on the use of force

147 Police officers are permitted to use OC aerosols only in circumstances where they are legally permitted to use force. The primary limitation on their use is therefore that it is unlawful unless specifically justified by law. The legal authorisations of use of force by police officers in Victoria derive from:

(a) **Section 462A of the *Crimes Act***, which authorises the use of force (including use of an OC aerosol) to prevent the commission, continuance or completion of an indictable offence, or to effect or assist in effecting the lawful arrest of a person committing or suspected of committing any offence. The use of OC aerosol must not be disproportionate to the objective of preventing the commission of an indictable offence, or effecting or assisting in effecting an arrest.

(b) **Section 322K of the *Crimes Act***, which relates to use of force in self-defence. The police officer must believe that use of OC aerosol is necessary in self-defence and a reasonable response to the circumstances as the police officer perceives them.[220] As discussed at [68]-[74] above, the better view is that this statutory authorisation of self-defence applies only in the context of conduct charged as an offence, rather than conduct relied on as a defence to a tort claim.

(c) **Defences at common law**, including most relevantly in the context of public order policing, the common law on self-defence and the common law

219 Daily Deployment Sheet – Support dated 30 October 2019 (Exhibit P53; Exhibit D5).

220 *Crimes Act*, s 322K(2).

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authorisation to use of force if necessary to prevent a breach of the peace or restore the peace.[221] There is no definitive definition in Australia of what constitutes a breach of the peace, however the balance of authority is to the effect that it must involve conduct which involves violence to a person or harm to property, or is likely to lead to or promote violence.[222]

Restrictions imposed pursuant to statute, by the Victoria Police Manuals

148 Further lawful limitations and restrictions on use of OC aerosols by police officers are imposed by the Chief Commissioner's instructions given in the VPMs, issued pursuant to s 60 of the *Victoria Police Act*. Section 61 of the *Victoria Police Act* provides:

> **61 Personnel to comply with the Chief Commissioner's instructions**
>
> All members of Victoria Police personnel must comply with the Chief Commissioner's Instructions.

149 The VPMs in evidence include instructions expressed in a variety of ways, including what police 'must' do and 'should' do. The State contended that where a VPM uses the language 'should', this 'contain[s] guidance rather than mandatory

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221 The scope of the police common law powers to prevent a breach or threatened breach of the peace are the subject of limited Australian authority. In ***Nicholson v Avon*** [1991] 1 VR 212, 221 Marks J held that 'a police officer has a duty at common law to prevent a breach or threatened breach of the peace', which in that case included taking steps to arrest a person. His Honour at 222 cited *Rice v Connolly* [1966] 2 QB 414. In that case, Lord Parker CJ said at 419 'it is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury.' In *Nicholson v Avon,* Marks J also referred to *Thomas v Sawkins* [1935] 2 KB 249 in which the Court concluded that entry onto private premises was authorised where a breach of the peace was apprehended, and Lawrence J held at 256 that '[i]f a constable in the execution of his duty to preserve the peace is entitled to commit an assault, it appears to me that he is equally entitled to commit a trespass.' In *State of New South Wales v Cullen* (2024) 116 NSWLR 377, White JA held at 417 [218]-[219] that where a person had assaulted a police officer, a member of the public had the power to use reasonable force to arrest that person. His Honour had observed that the powers of the member of the public with respect to an apprehended breach of the peace were the same as those of police officers. See also *Coleman v Power* (2004) 220 CLR 1, 24 [10] (Gleeson CJ).

222 See *R v Howell (Errol)* [1982] QB 416, 426-427 (Watkins LJ, Cantley and Hollings JJ). Watkins LJ, delivering judgment for the Court, said at 426: '…we cannot accept that there can be a breach of the peace unless there has been an act done or threatened to be done which either actually harms a person, or in his presence his property, or is likely to cause such harm, or which puts someone in fear of such harm being done. There is nothing more likely to arouse resentment and anger in him, and a desire to take instant revenge, than attacks or threatened attacks upon a person's body or property.' This statement was discussed in *State of New South Wales v Tyszyk* [2008] NSWCA 107 at [88]-[101], where it was noted that some authorities adopt a broader view that encompasses situations not directly involving violence, but that it was unnecessary to decide in that case whether *Howell* was correct. Justice Marks in *Nicholson v Avon* at 221 approached the issue of what constitutes a breach of the peace as involving whether relevant conduct would be 'likely to promote violence'.

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considerations'.[223]

150 Commander Galliott gave evidence that where a VPM refers to what police 'should' do, it is 'not mandatory but advisory'.[224] He described Part 5.3 of the *Operational safety equipment* VPM (which was repeated in the OC Manual) and its application in a public order policing context, as 'one of the considerations that the Police Commander or Police Forward Commander, or any person making that decision to use OC spray can be guided by before they use that particular tactical option'. [225] Commander Galliott was asked why he described Part 5.3 in terms of 'considerations' and guidance' when the introductory words to that section state '[i]n addition to the requirements outlined in VPM Operational safety and the use of force, members and PCOs *must* comply with the following instructions'.[226] Commander Galliott's response was that:

> This is the differentiation between some of our internal documents. They were originally policy rules and policy guidelines, policy rules were mandatory. Defining policy guidelines were just that. In certain circumstances they were a guide on members what they should do. When I see that in these documents, because this particular document is a combination of the previous policy rules and policy guide, and this particular section was in the policy guidance. So it was not mandatory but it was advisory, and these are things a member has to take into account. And things like 'should' and 'must' appear throughout our documents, and the 'should' is an option but not mandatory to follow, depending on the circumstances because they can't cater for every circumstance where OC or one of the other tactical options might be used.[227]

151 In cross-examination, Commander Galliott was referred to the fact that the VPMs contain sections specifically identified as guidelines, and others identified as being mandatory instructions. He agreed that Part 5.3 of the *Operational safety equipment* VPM *is* mandatory. He said that the OC Manual was not mandatory, as it had been developed by the Centre for Operational Safety rather than being an instruction given under the Chief Commissioner's power. [228]

152 The evidence thus showed not only differing views of senior officers of Victoria Police

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223 Defendant's Answers to Common Questions, [69.2].
224 Transcript 05/03/25, T1251.26-1252.10 (Galliot XN).
225 Transcript 05/03/25, T1251.15-19 (Galliott XN).
226 Transcript 05/03/25 T1251.20-25 (Galliott XN) (emphasis added).
227 Transcript 05/03/25, T1251.26-T1252.10 (Galliott XN).
228 Transcript 05/03/25, T1258.09-25 (Galliott XXN).

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as to the status of the OC Manual and relevant parts of the VPMs, but also some lack of clarity and consistency as to how individual officers described the effect of the VPMs and the OC Manual. This was, unfortunately, reflected in differing views of the officers who used OC foam at the IMARC event.

153 A/Sergeant Bolzonello accepted in evidence that he understood that he was subject to strict rules when using OC foam, and that the OC Manual sets out mandatory minimum standards that he was required to follow.[229] However, Sergeant Guthrie did not accept in her evidence that the OC Manual contained mandatory requirements, and stated that 'if there is a situation where law or common law or policy supersedes it, then I would be using the VPMs as a guideline'.[230]

154 I consider the State's submission that VPM requirements, where expressed in terms of what officers 'should' do is guidance rather than a mandatory requirement, is too absolute a characterisation of the way in which the Chief Commissioner's instructions, as found in the VPMs, are to be understood. The VPMs' content must be understood in its full context. Some of the references in the VPMs to what officers 'should' do are properly, in my view, construed as instructions with which police officers must comply, pursuant to s 61 of the *Victoria Police Act*. That understanding is entirely consistent with the explicit direction which prefaces the VPMs, that is: '[n]on-compliance with or a departure from the Victoria Police Manual may be subject to management or disciplinary action'.[231] Where the content is intended to be a guideline only, that is stated (such as the 'Procedures and Guidelines' in the *Breach of the peace, Police attendance at events, Move on powers* and *Crowd control* VPMs).[232]

155 A relevant example is provided by the State's submission that certain instructions relevant to the use of OC aerosols in the VPMs should be regarded as guidance, rather than an instruction for the purposes of ss 60 and 61 of the *Victoria Police Act*.[233] Most

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229 Transcript 26/02/25, T681.28-29; T682.05-12; T686.13-17 (Bolzonello XXN).
230 Transcript 05/03/25, T1139.17-31 (Guthrie XXN).
231 See the opening statement of the VPMs in Exhibits P2 (*Operational safety and the use of force*), P3 (*Operational safety equipment*) and P39 (*Specialist support*).
232 Exhibits P35, P36, P37 and P38.
233 Defendant's Answers to Common Questions, [69.2].

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relevantly, it was submitted that two instructions contained in the *Operational safety equipment* VPM were 'guidance rather than mandatory considerations'. Those instructions state:

> 'OC aerosols *should only* be used where there are reasonable grounds to believe that the use is necessary and proportionate in situations:
>
> - of violence or serious physical confrontation
>
> - where violent or serious physical confrontation is imminent
>
> - where a person is involved in violent or other physical conduct and is likely to seriously injure themselves or result in suicide.'
>
> and
>
> 'Members and PCOs
>
> - *should not* use OC aerosols when a person is only passively resisting e.g. simply hanging limp or refusing to comply with instructions only.'[234]

156 These statements are preceded in the VPM by the instruction '[i]n addition to the requirements outlined in VPM Operational Safety and the use of force, members and PCOS **must comply with the following instructions**'.[235] There is no doubt that the 'following instructions' as to the circumstances in which OC aerosols 'should only be used' or 'should not be used' are mandatory instructions, and not guidelines. That is made clear by the preceding words, and is consistent with the legal restrictions on use of force imposed by s 462A and s 322K of the *Crimes Act* which permit it to be used only when it is a proportionate response. Other content of the *Operational safety equipment* VPM recognises the serious consequences that use of OC aerosols may have.[236] Taken in context, these instructions as to the limited circumstances in which OC aerosols can be used should be understood as an assessment made in the course of preparation of the VPM, and then reflected in the Chief Commissioner's instructions in the form of the VPM, of when use of OC aerosols may be proportionate with a specific objective and thus lawful.

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234 Defendant's Answers to Common Questions, [69.2], referring to Exhibit P3, *Operational safety equipment* VPM, Part 5 'Use of OSE'.

235 Exhibit P3, Part 5.3 (emphasis added)

236 Exhibit P3, Part 6, 'After care and medical attention'.

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157 I conclude, consistent with the express direction in the relevant VPMs themselves, that the instructions in the *Operational safety and the use of force* VPM and the *Operational safety equipment* VPM are issued by the Chief Commissioner pursuant to s 60 of the *Victoria Police Act* and that compliance with them is mandatory, as stipulated by s 61. Where the content is expressed in terms of guidelines rather than what a police member 'must' do, it is mandatory to consider the guidelines in the circumstances to which they are intended to apply.

158 Specifically, I find that the following elements of the VPMs constitute limitations and restrictions on the use of OC aerosols by police officers, including in a protest context:

(a) The Operational Response Principles set out in the *Operational safety and the use of force* VPM and referred to in the OC Manual[237] which stipulate the principles relating to service, safety and harm minimisation, are relevant in protest policing work. The service principles relating to the tasks that police are performing, pursuant to their legislative responsibility, will be prominent in officers' consideration as it will shape their roles and operational instructions for the day. The principles relating to safety (of police officers and of members of the public including protesters) and of minimisation of harm from use of force or other harm arising from police action are also standards of conduct which police must consider in making the risk assessments and considerations of proportionality related to any use of force, including OC aerosols.

(b) The Operational Safety Tool, SAFE TACTICS, which is set out in the *Operational safety and the use of force* VPM and reiterated in the OC Manual,[238] and the *Tactical Options Model* in the *Operational safety and the use of force* VPM,[239] set out standards of conduct applicable to all police officers in their use of force including OC aerosol, including in the context of a protest.

(c) The contents of the *Operational safety and the use of force* VPM and of the

237 See [123] and [124] above.
238 See [124]-[125] above.
239 See [126] above.

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Operational safety equipment VPMs which relate specifically to use of OC aerosols[240] are legal limitations which apply to police officers when they use OC aerosols at a protest.

The status of the OC Manual

159 The OC Manual contains both information about oleoresin capsicum and OC aerosols[241] and, in Parts 4 to 9 of the OC Manual, statements as to the legal restrictions on its use and directions relating to how it is to be deployed and what should occur after deployment.[242]

160 There was a difference between the parties as to whether compliance with the contents of the OC Manual was mandatory. For the reasons that follow, I consider that those directions described at [103] – [104] above are mandatory standards with which police officers are required to comply.

161 In submissions, the plaintiff contended that compliance with the OC Manual was and is mandatory.[243] The State contended that compliance with the OC Manual is not mandatory except to the extent it cross-references mandatory provisions in a VPM, although the State acknowledged that non-compliance may result in 'possible disciplinary action'.[244]

162 There was also differing evidence amongst police witnesses as to the status of the OC Manual and whether it was mandatory to follow the instructions in the Manual. A/Inspector Caldwell gave evidence that compliance with the OC Manual is

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240 See [98]-[99] above.

241 Exhibit P1, Parts 1 to 3 (including the effect of OC aerosols.

242 Exhibit P1, Part 4 (Policy and Legal Justifications), Part 5 (Issue and Carriage of OC Aerosol), Part 6 (Tactical Deployment), Part 7 (Aftercare), Part 8 (Action after Use) and Part 9 (Storage and Stock Control).

243 Plaintiff's Response to Defendant's Answers to Common Questions and Plaintiff's Answers to Common Questions, [104].

244 Defendant's Answers to Common Questions [69.4]; see also [56]. At [69] the State referred to *Slaveski* [207], applying *Director of Public Prosecutions (Vic) v Zierk* [2008] VSC 184 [26] (Warren CJ), for the proposition that breach of the OC Manual may result in disciplinary action. The OC Manual relevant in those cases was issued by the Chief Commissioner pursuant to s 17 of the *Police Regulation Act*. There is no material difference in the effect of the VPMs issued pursuant to s 60 of the *Victoria Police Act*, it now being explicitly recognised in s 125(1)(c) of that Act that non-compliance with a VPM can constitute a breach of discipline.

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mandatory and applied to all police on the day of the IMARC event.[245] A/Commander Tully gave evidence that the OC Manual contains 'guidelines' and policy,[246] but also agreed that the Manual provides mandatory and minimum standards that officers must apply to the carriage and use of OC aerosols.[247] He accepted in relation to the OC Manual that 'the instructions would be mandatory but…it's written in a way that probably doesn't cover every particular situation that people could be faced with.'[248] Sergeant Lahman, who was at the time of giving his evidence a trainer for PORT (and had also previously been assigned to that training section in 2019 to 2021 and June 2023 to 2025)[249] responded when asked whether the OC Manual was a 'mandatory document':

> …that's been produced by the centre for operational safety which are the supporting unit that generate the foundation training, so yes, I agree with that.[250]

163 Sergeant Lahman also agreed that it was mandatory for police officers to comply with the content of Parts 4.6 and 5.3 of the *Operational safety and the use of force VPM* which was repeated in the OC Manual (and cited above).[251]

164 I find that the requirements in Parts 4 to 9 of the OC Manual, which are expressed as instructions or what officers 'must' do, are mandatory instructions with which police officers are required to comply. Although there was no evidence enabling a conclusion that the OC Manual is issued by the Commissioner pursuant to s 60 of the *Victoria Police Act*, I am satisfied that directions in the OC Manual are intended by the Victoria Police leadership to be mandatory. Those parts of the Manual expressed as policy or principles are standards of conduct to which police officers should have regard in making decisions as to use of OC aerosols.

165 It is appropriate to observe specifically that a view expressed by Sergeant Guthrie that

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245 Transcript 04/03/25, T1050.15-18 (Caldwell XXN).
246 Transcript 21/02/25, T490.03-T491.29 (Tully XXN)
247 Transcript 21/02/25, T491.13-16 (Tully XXN).
248 Transcript 21/02/25, T491.02-5 (Tully XXN).
249 Transcript 06/03/25, T1283.07-12 (Lahman XN).
250 Transcript 06/03/25, T1362.26-31 (Lahman XXN).
251 Transcript 06/03/25, T1363.01-31 (Lahman XXN).

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there were instances where the OC Manual may 'disagree' with the common law is incorrect.[252] The use of force sanctioned by the common law relevant to events in this proceeding involves concepts of reasonableness and proportionality, notably the use of self-defence, which I find are taken into account in the requirements applicable to use of OC foam in the OC Manual. For example, the requirement in Part 6.3 that '[a] verbal warning must be given prior to discharging OC aerosol' is expressly qualified by the statement '[u]nless the urgency of the situation makes it impracticable to do so'.

The Charter

166 The *Charter* imposes, by reason of the statutory obligations on police officers as public authorities, legal limitations and restrictions on the use of OC aerosols by police officers at protests.[253] Police are obliged to consider relevant human rights identified in the *Charter* when undertaking any action in the course of their work. In situations where rapid action is required, this will include a practical exercise of considering, in general terms, the rights of the person which may be affected and how the action will affect them.[254] In circumstances such as the policing of a protest, the prior opportunities to consider the nature of the rights of a person likely to be affected by a use of force during trainings or briefings will be part of the process of consideration, and should provide a foundation for assessments of proportionality, necessity and potential alternatives at the time of any potential use of force. What is required is that the police officer seriously turns his or her mind to the rights of a person against whom they may use force; the rights of others who may be impacted by the use of force; how those rights may be affected and whether in those circumstances the use of force is

252 Transcript 05/03/25, T1201.05-12 (Guthrie XXN).

253 See s 38 of the *Charter*. See discussion at [80]-[81] above.

254 In *Castles v Secretary, Department of Justice* (2010) 28 VR 141, 184 [185]–[186], Emerton J (as her Honour then was) said: '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. There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts…it will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person, and that the countervailing interests or obligations were identified'.

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proportionate and justified.

167 Victoria Police have formulated tools which guide police in applying the *Charter* requirements in the HRRR and the PLAN mnemonic, discussed at [106]-[108] and [116] above. These are useful guides directed to the particular context of public order policing in a way which facilitates compliance in dynamic and fast moving situations. PLAN was brought to the attention of police officers on duty at the IMARC event in the briefing.

168 While the *Charter* is properly described as a legal limitation, these tools, in identifying the expected approach to decision making by police officers in order to facilitate *Charter* compliance, may themselves be regarded as (using the language of Common Question 13) guidelines or standards of conduct applicable to police officers using OC foam at a protest.

169 There was no evidence that the HRRR was brought to the attention of officers in preparation for the IMARC event, including at the briefing, and it may be that there would be utility in referring to this in briefing processes prior to protests, as well as to the PLAN mnemonic. Certain additional matters identified in the HRRA, the document used for planning purposes, reinforced the legal requirements of the *Charter* in relation to assessment of proportionality and alternatives and could also have been usefully reiterated in the briefing material provided to the police officers on duty.[255]

Common Question 14: What, in general, ought to be considered by a Police Officer before and when using OC foam at a protest?

170 The parties broadly agreed on certain matters that 'before and when using OC foam … (and subject to the amount of time available)' a police officer should 'ordinarily consider'.[256] The plaintiff also identified additional matters that officers should consider before and when using OC foam.[257] These matters, which are set out in

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255 Such as, for example, the requirement to bear in mind that 'Any enforcement action taken should be focused on the individual and their actions' (Exhibit P47)

256 Defendant's Answers to Common Questions, [70]; Plaintiff's Response to Defendant's Answers to Common Questions and Plaintiff's Answers to Common Questions, [129].

257 Plaintiff's Response to Defendant's Answers to Common Questions and Plaintiff's Answers to Common Questions, [129.1]-[129.15].

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Annexure 3, are a useful source of considerations which are, for the most part, consistent with the policies and guidance documents in evidence in this case, and the evidence as to what occurred in the proceeding. However, I have reservations about making formal findings about what police officers should 'generally' or 'ordinarily' consider with respect to the use of OC foam in any way that extends on the answer to Common Question 13 as to the legal limitations and legally imposed restrictions on the use of force. I have concluded that Common Question 14, although identified as a question common to the plaintiff and to the group members, is not a question of law or fact arising out of the claims of all persons in the proceeding as contemplated by s 33C of the ***Supreme Court Act*** *1986* (Vic).[258] The question, in calling for a response to what considerations are 'generally' appropriate, bears some characteristics of an advisory opinion that is not appropriate for the Court to give.[259] The plaintiff's case relates to use of OC foam in specific circumstances, and group member claims will also involve consideration of specific circumstances and what police should consider in those circumstances.

171 I consider that it is inappropriate to answer this Common Question in any definitive way. In a case of the nature of the present proceedings, the Court is not equipped, and it is not its proper role, to give its own guidance by way of 'general' considerations for a police officer using OC foam at a protest. Victoria Police training, policies and procedures are developed and provided by police officers with years of practical experience and education in policing. They are informed by practical as well as legal matters that police must take into account when taking any action, including any use of force, across a range of circumstances involving competing duties and objectives.

172 The careful and realistic approach that Courts should adopt in evaluating police conduct has been noted on many occasions.[260] In *Rush v Commissioner of Police*, Justice

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258 See s 33C(1)(c) of Part 4A of the *Supreme Court Act 1986* (Vic), which identifies as one of the conditions of the commencement of a group proceeding that 'the claims of all those persons *give rise to* a substantial common question of law or fact' (emphasis added).

259 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 581-582 (Mason CJ, Dawson, Toohey and Gaudron JJ) citing *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 and *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421.

260 *Walker v Hamm* [2008] VSC 596 [55] (Smith J)

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Finn referred to the latitude that must be given by courts to those responsible for police operations:

> It is widely accepted in common law jurisdictions that, at common law, police officers owe to the general public a duty to enforce the criminal law and, correspondingly, that latitude necessarily must be given to those responsible for the conduct of police operations in the judgments required to be made to that end: see generally *Hinchcliffe v Commissioner of Australian Federal Police* (2001) 118 FCR 308 at [33]-[35]. [261]

173 I consider that this need for latitude in evaluating police conduct on the part of the courts extends to any attempt to stipulate proactively what the legal duties of police will require across a range of circumstances, including any identification of the matters police 'ought' consider in policing protests in future.

174 However, I accept that it is appropriate to respond to the Common Question in a more limited way which is directly responsive to the events at the IMARC Protest, and takes into account Victoria Police's own policies and procedures and assessments of how legal obligations under the *Charter* relate to police operations,[262] in the context of the evidence as to what occurred during the IMARC event. These observations do not relate to what individual police officers at the IMARC event should have considered, as I have not assessed the conduct of specific police officers other than A/Sergeant Bolzonello and Sergeant Guthrie in the context of the plaintiff's claims. The observations arise from my review of the video footage and the evidence as to what occurred in the implementation of the instruction to arrest each of the East Pole and West Pole Climbers. They also are informed by the evidence of the various police officers and my conclusion from the evidence that certain elements of the Victoria Police training and instructions may not have been as prominently or appropriately considered as others in decisions to use OC aerosols.

175 It would be appropriate, and useful in seeking to comply with legal limitations on the use of force, for police officers to consider the following in any use of OC aerosols,

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261 *Rush v Commissioner of Police* (2006) 150 FCR 165, 189 [91].

262 I have also taken into account observations made in the Human Rights Debrief prepared internally by the Victoria Police Human Rights Portfolio Manager, (Exhibit P32) which is referred to at [382]-[384] below.

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particularly in the context of a protest involving a crowd.

(a) Use of OC aerosols involves the use of a weapon, and a use of force which has serious debilitating physical and psychological effects.[263]

(b) Use of OC aerosols, as a use of force, must *only* be for lawful purposes such as effecting or assisting in effecting an arrest or in self-defence,[264] and not for other police tactical objectives such as maintaining police lines, unless directly related to those lawful purposes.

(c) For use of OC aerosol to be justified by s 462A of the *Crimes Act*, it must be necessary by reference to the objective of preventing the commission, continuance or completion of an indictable offence or effecting or assisting in effecting a lawful arrest. It is not sufficient that use of force may be regarded as necessary to achieve some intermediate step towards that objective (such as clearing a working space or creating a 'sterile' space in which arrests *might* be made). The use of OC aerosol must, to be justified by s 462A, be not disproportionate to effecting, or assisting in effecting, a specific arrest. It is not sufficient that its use may simply facilitate the making of potential arrests.[265]

(d) Use of OC aerosols in a crowd context may harm persons other than the subject of an arrest or attempt to arrest, or the source of a threat against which self-defence is necessary. The potential to cause harm to other persons (including other police officers) is a matter which must continually be considered in the assessment of whether the use of OC aerosol is proportionate to the objective.[266]

(e) The nature and scope of the harm that is or may be caused by use of OC aerosols

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263 See OC Manual (Exhibit P1).

264 *Crimes Act*, ss 322K and 462A, and the common law relating to self-defence and the limited circumstances of use of force to prevent a breach of the peace. See also evidence of Commander Galliott: Transcript 05/03/25, T1262.28-T1263.02 (Galliott XXN).

265 See in addition to the discussion of s 462A at [56]-[61]above, the evidence of Commander Galliott: Transcript 05/03/25, T1263.01-02 (Galliott XXN).

266 *Crimes Act*, ss 322K and 462A; obligations under s 38 of the *Charter* with respect to human rights which require an assessment of the proportionality of the limitation of human rights which use of OC aerosol will entail. The human rights debrief of 21 November 2019 observed that it was not clear 'whether frontline members understood how human rights related to their deployment'. The evidence in this case supports that conclusion.

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must be considered on an ongoing basis to assess whether it remains a proportionate response to the objective, or whether other tactical options, such as tactical withdrawal, are more consistent with the Operational Response Principles in the *Operational safety and the use of force* VPM, in particular the *Safety* and *Harm Minimisation* principles. Consideration should be given to whether use of OC aerosols is creating a greater safety risk or more extensive harm to persons than that which existed prior to its use, and if so, whether a tactical withdrawal or some other tactical option is more appropriate.[267]

(f) Where a direction is given to arrest a person, the obligation remains with the *individual* police officer who is complying with that direction to consider in the ongoing circumstances whether use of force, including use of OC aerosol, to achieve that objective is necessary and proportionate to the objective of arrest (and thus lawful). The seriousness of the offence for which the police officer understands the arrest to have been directed is relevant to this consideration.[268]

Events leading to and during the Relevant Time Period

The 'Relevant Time Period' in the Common Questions and group member definition

176 The plaintiff attended the MCEC between 7.00am and 8.00am on the morning on 30 October 2019,[269] and remained there until early that afternoon. The events relevant to the plaintiff's claims and the Common Questions occurred during a more confined period. The group members are defined in the Further Amended Statement of Claim as those who were present at the protest between 11.44am and 12.35pm, *and* who suffered harm as a result of being sprayed with OC foam between around 12.10pm to 12.35pm.[270] The Climbers are excluded from the group member definition. The time period during which findings were to be made for the purposes of the Common

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267 See *Operational safety and the use of force* VPM (Exhibit P2), Part 5, SAFE TACTICS and Part 6.2, *Tactical Options Model*.

268 See Operational Response Principles; SAFE TACTICS. See also the evidence of senior officers Barras, Galliott and Lahman: Transcript 03/03/25, T882.17-27 (Barras XN) T914.08-17; T917.14-15 (Barras XXN); 05/03/25, T1263.03-19 (Galliott XXN); 06/03/25, T1294.13-19; T1296.10-26 (Lahman XN).

269 Transcript 18/02/25, T141.07-09 (Plaintiff XN).

270 Further Amended Statement of Claim, [1].

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Questions was, in the course of the trial, narrowed to the period between 12.23pm and 12.35pm on 30 October 2019, defined as the **Relevant Time Period**.[271] This has the consequence that the scope of the findings on certain Common Questions relates to a more confined time period than the first part of the group member definition relating to the period during which group members were present at the protest. However, the second element of the group member definition requires that the group member suffered harm as a result of OC foam. There was no evidence in this proceeding of any OC foam being sprayed in the area at the front of the MCEC in the period between 12.10pm to 12.23pm.[272] As a consequence, despite the broader hypothetical scope of the definition of group member (encompassing persons sprayed with OC foam from 12.10pm rather than from 12.23pm) the difference between the time period in the definition of group members and that of the Relevant Time Period in the Common Questions should have no material practical consequence.

Common Questions 3(a), 3(c), 3(e) and 3(h): Protesters and police officer numbers and police resources at the IMARC Protest

177 The parties agreed that the events between 12.23pm and 12.35pm on 30 October 2019 were particularly relevant to the matters alleged in the pleadings, and several of the Common Questions relate to the Relevant Time Period.

178 During the Relevant Time Period, protesters were moving in and out of the vicinity of the MCEC where the protest was focussed, so that there were fluctuating numbers of protesters present in the general area of the MCEC forecourt and surrounds during the Relevant Time Period. The video footage from various angles taken during the relevant time showed that there were around 100 protesters in the area of the MCEC around the poles, increasing to between 150 and 200 protesters as time progressed

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271 No amendment was made to the definition of group members in the Further Amended Statement of Claim. Before any orders are made I will address with the parties whether there are any formal consequences of the Relevant Time Period in the Further Amended Statement of Claim being broader which should be addressed.

272 The **Public Order Log** dated 30 October 2019 (Exhibit P30) states 'O/C sprayed deployed to due to crowd pushing against PORT line' at 10.15am, but it is unnecessary to make any finding on that issue as it is well outside the Relevant Time Period and no submission was made that it had any bearing on events relevant to the plaintiff or the Common Questions.

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around 12.20pm and for the remainder of the Relevant Time Period.[273]

179 There were approximately 220 police officers rostered on at IMARC for the morning shift on 30 October 2019, and it appears from the video footage that it is likely that most, if not all, of those rostered officers were present.[274] This included PORT officers, general duties officers and other officers in support roles including police officers assigned to processing offenders, traffic control and logistics.[275]

180 The police were stationed around various locations in the area of operation for the IMARC operation, which included the MCEC and surrounding precinct. The key focus of the police presence was on the MCEC, particularly the MCEC forecourt.

181 The Police Commander of the operation, A/Commander Tully, was stationed off site at the Police Operations Centre and monitored the operation remotely. Other commanding officers were on site and mobile but were predominantly located on the steps of the MCEC forecourt, on the Clarendon Street side, behind heavy, water filled, plastic barriers. All other officers were stationed in and around the MCEC precinct.

182 The MCEC precinct was divided into four zones for the IMARC operation. Zone 1 predominantly covered the area in and around Clarendon Street out front of the MCEC and the remaining zones were in and around the MCEC.[276] Each area of operation had its own command structure overseen by a Zone Commander (of Inspector or Acting Inspector rank). General duties officers were stationed in their allocated zone with their commanding officer. PORT teams and the Mounted Branch were strategically positioned throughout the areas of operation and deployed as required.

183 Processing teams dealing with arrested people and traffic control officers were also

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273 See also Statement of Agreed Facts, 23.

274 Roster Sheet for 30 October 2019 at the location of the Melbourne Convention and Entertainment Centre (MCEC)', 'IMARC demonstration' (Exhibit P59).

275 Roster Sheet for 30 October 2019 at the location of the Melbourne Convention and Entertainment Centre (MCEC)', 'IMARC demonstration' (Exhibit P59), and IMARC Demonstration Organisational Chart (Exhibit P50).

276 Transcript 20/02/25, T441.29-T442.04 (Tully XN).

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present at the MCEC.[277] Water police were on standby if required.[278] The Dog Squad (K9)[279] was on call and additional Search and Rescue officers were on standby.[280]

Common Questions 3(j), (k) and (l): weapons available to police them at IMARC, how many carried OC foam and what size of OC foam cannisters was carried?

184 The general duties police officers at the IMARC operation were equipped with the following tools, which are standard OSTT equipment:[281]

(a) a firearm;

(b) an OC aerosol cannister;

(c) a mini torch;

(d) handcuffs;

(e) an extendable baton;

(f) communication equipment, including portable radios;

(g) a ballistic vest; and

(h) an equipment belt (or a ballistic vest as an equipment belt).[282]

185 PORT officers had that standard OSTT equipment, including the OC aerosol, but also carried a PR 24 extended baton.[283] They also had flexi-cuffs or cable ties available to them instead of handcuffs. PORT supervisors carried a cutting tool to cut cable ties.[284] Additional PORT equipment was positioned in vehicles outside the MCEC but was not used in the relevant events.

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277 Transcript 20/02/25, T446.18-28 (Tully XN).
278 Transcript 28/02/25, T808.31-T809.06; T819.03-07 (Trimble XN).
279 Daily Deployment Sheet – Support dated 30 October 2019 (Exhibit P53).
280 Transcript 28/02/25, T819.06 (Trimble XN); Daily Deployment Sheet – Support dated 30 October 2019 (Exhibit P53).
281 IMARC Operational Safety Briefing (Exhibit P26).
282 The vest was described in certain documents as an 'IOEV' vest but the meaning of that acronym was not in evidence. As of 8 April 2019, references to 'IOEV' in the *Operational safety equipment* VPM had been removed and replaced with 'ballistic vest'.
283 Transcript 26/02/25, T615.15-19 (Bolzonello XN).
284 Transcript 03/03/25, T880.13-19 (Barras XN).

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186 All operational officers including both general duties and PORT officers were required to carry an OC aerosol cannister.[285] There were two sizes of OC foam cannisters available to be carried by police officers, an MK-3 cannister which is relatively small resembling a small shaving cream can; and the MK-9 cannister, which is larger, with a grip handle and a greater effective range.[286] Police officers, including the PORT officers, had the option to decide which size of cannister to carry. The evidence was that most PORT officers in general carry the MK-9 cannister in a public order setting, while general duties officers have access to the smaller MK-3 cannister.[287] Most cannisters visible on the footage of the events during the Relevant Time Period showed that the cannisters which were used were the larger cannisters. I find that most police who carried OC foam carried the larger MK-9 cannisters. It is possible that all police who carried OC foam cannisters carried the larger cannisters, but it is not possible on the evidence to make that finding with the necessary degree of satisfaction.

Radio communication equipment and channels

187 There were dedicated police radio channels for the IMARC operation. This included a tactical channel used by the PORT teams, including the protester extraction team, and another channel for general duties officers, also described as the 'event channel'.[288] These were dedicated police channels on the police radio specifically set up for the IMARC operation, which was specific to the PORT TAC at the event, and were not operational channels that all police could hear and use.[289] Transcripts of these calls were also in evidence.[290]

<u>The events of the Relevant Time Period</u>

188 The assault and battery alleged by the plaintiff took place in the context of events

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285 OC Manual (Exhibit P1), Part 5.3. Transcript 21/02/25, T475.18-20 (Tully XXN).

286 OC Manual (Exhibit P1), pp 8-11.

287 Transcript 21/02/25, T476.08-14 (Tully XXN); 03/03/25, T880.22-24 (Barras XN).

288 Transcript 20/02/25, T429.26-T430.12 (Tully XN); 03/03/25, T968.27-T969.01 (Caldwell XN); T895.29-T896.10 (Barras XN).

289 Transcript 28/02/25, T811.04-25 (Trimble XN).

290 Audio of radio channel 0705 (Exhibit P23); Transcript of the radio call on channel 01.17 (Exhibit D22). The radio audio recordings refer on occasion to numbers which are police call signs allocated to individual positions. Call signs in the 100s are usually those of officers, and from the 200s up senior sergeant and more junior ranks: Transcript 28/02/25, T809.27-T810.06 (Trimble XN). IMARC Demonstration Organisational Chart (Exhibit P50).

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involving the arrest or attempted arrest of the two protesters who climbed the East and West Poles at the MCEC to unfurl the protest banner. The nature of the defences raised by the two police officers who deployed OC foam on the plaintiff, and certain of the Common Questions, make it necessary to make findings about these events in some detail.

189 The following findings are drawn primarily from the video footage and the audio of radio communications between the police, and from the police Public Order Log, a document completed by a staff officer accompanying the PORT Tactical Commander, A/Inspector Caldwell, who wrote down tactical decisions made and events occurring throughout the day.[291] The video and audio recordings provide an objective source of evidence which provides a reliable record of at least that specific part of the events they record. To the extent of inconsistency with any evidence of the witnesses, the recordings are the best evidentiary source in circumstances where over five years had passed between the relevant events and the trial. The difficulties for the witnesses in recalling the detail of the events during the IMARC Protest are compounded by the dynamic and in parts chaotic nature of the events, and reinforce the importance of the video and audio recording evidence.[292]

190 My findings on these contextual matters also draw on the evidence of Mr Battersby, the legal observer, and of the senior police officers at the event who were in a physical position to make general observations, and whose evidence I have accepted as reliable.[293] There were only limited areas in which there was any disagreement between the parties about the events leading up to the deployment of OC foam on the plaintiff. Where there was any material difference in position, I have identified more specifically why I make findings, including by reference in footnotes to the evidence on which those findings are based. I answer relevant Common Questions in the course of making findings on what occurred in the Relevant Time Period.

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291 Transcript 03/03/25, T970.27-T971.12 (Caldwell XN). The staff officer was a PORT officer, First Constable Samata.

292 See, for example, the observations of O'Meara J in *Yakou v Jo-Yo Nominees Pty Ltd* [2025] VSC 58 [170].

293 Primarily A/Inspector Caldwell and Inspector Barras, who at relevant times were physically in a location at the top of the stairs, which enabled some overview of the events involving the Climbers.

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191 The events directly involving the plaintiff and the deployment of OC foam at him are more contested, and require more specific identification of the evidence on which I have relied in making the relevant findings. I separately address the sources of evidence and submissions of the parties as to those matters in more detail below.

Common Question 6: Directions, orders and briefings to PORT Police Officers:
(a) the police response at the IMARC Protest?
(b) use of force against protestors at the IMARC Protest?
(c) use of OC foam specifically against protestors at the IMARC Protest?
(d) use of tactical options and measures to be used for crowd control of protestors at the IMARC Protest?
(e) alternatives to use of force against protestors at the IMARC Protest?
(f) any other matters relating to policing of the IMARC Protest?

Common Question 7: Directions, orders and briefings to Police Officers:
(a) the Advance?
(b) any use of force against protestors?
(c) use of OC foam against protestors?
(d) arrest of the climbers?
(e) formation of police officers at the IMARC Protest?

192 A number of orders were given by police at different levels of the hierarchy during the IMARC event. These include orders given by senior officers and those in supervisor roles in the course of the police advances and movements towards the East and West Poles, and directions by unidentified police officers, audible on body worn camera footage. The following paragraphs address briefings, directions and orders made more formally by more senior police. Orders and directions given in the course of police advances and movements are addressed in the context of my findings on the relevant events further below.

Briefings

193 Prior to deployment on a shift at IMARC, each police officer present received a briefing inside the MCEC by an Inspector, at which Superintendent Trimble, as Police Forward Commander, was present.[294] The briefing addressed operational matters and safety issues. The safety component of the briefing was accompanied by a visual presentation addressing operational safety prepared by the Safety Officer, North West

294 Transcript 28/02/25, T814.16-T815.03; T816.05-31 (Trimble XN); 20/02/25, T449.18-T450.08 (Tully XN); IMARC Operational Safety Briefing (Exhibit P26); **Superintendent Trimble Diary Notes** dated 30 October 2019 (Exhibit P55).

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Metro Region.[295]

194 There was an additional briefing for PORT officers. This occurred each time a PORT officer commenced a shift.[296] The briefing included operational and safety matters,[297] and was accompanied by visual presentations for the operational component[298] and the safety component.[299] The PORT safety briefing presentation was broadly the same as was delivered to general duties officers.[300]

195 The PORT operational briefing addressed the context of the IMARC Protest, the threat assessment, and PORT's mission, which was stated as being '[t]o provide a PORT response in the event that the protesters engage in unlawful activity and specialist support to NWMR's mission and strategic intent'.[301] The section in the PORT operational briefing document dealing with 'Execution' stated that the primary tasking for PORT 301 teams would be to provide internal and external PORT response and arrest teams, and that PORT 401 primary tasking was external patrolling and arrest teams. Both 301 and 401 teams were to '[b]e prepared to deploy to any alternate tasking as directed by the PORT TAC Commander'.[302]

196 The PORT operational briefing identified deployment locations, and addressed administration and logistics.[303] The briefing also contained a section on relevant police powers and potential offences, which included the following observations:

(a) breach of the peace powers involved a power to do what is reasonable to restore

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295 Transcript 03/03/25, T961.20-26; IMARC Operational Safety Briefing (Exhibit P26).
296 Transcript 03/03/25, T962.15-25 (Caldwell XN)
297 Transcript 03/03/25, T961.20-30 (Caldwell XN).
298 Briefing document titled 'Blockade IMARC – 28th to 31st October 2019' dated 30 October 2019 (Exhibit P31) ('Blockade IMARC' Briefing Document).
299 IMARC 2019 Operational Safety Briefing titled 'Zero Harm' (Exhibit P63).
300 See Exhibit P26 and Exhibit P31. The PORT presentation did not include certain content included the general duties officers' briefing, including a slide relating to the 'Zone Safety Sergeants' which related to the general duties officers' zone allocations. The PORT safety briefing included a section referring to PORT related hazards; and directed officers that in situations of protesters passively resisting and needing to be removed, PORT should be utilised, and in the case of protesters gluing themselves to surfaces, the substance used should be treated as unknown and immediately reported to a supervisor.
301 Exhibit P31.
302 Exhibit P31.
303 Exhibit P31.

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the peace, and is not an offence, or an arrest power;[304] and

(b) 'move on powers' under s 6 of the *Summary Offences Act* cannot be exercised at a protest.[305]

197 The briefing also included a template direction for officers to provide in the event of trespass, which included a request to leave the area, that the person must be given a reasonable time to consider the request, and if they refuse, they may be removed and charged under s 9(1)(f) of the *Summary Offences Act*.[306]

198 The briefing included a section addressing human rights. The slide in the presentation refers to the PLAN mnemonic referred to at [116]-[117] above[307] preceded by the following paragraph which was specific to the IMARC Protest:

> **1. Police recognise the Charter of Human Rights and specific rights of protesters to:**
>
> - Right to freedom of thought, conscience, religion and belief – s.14
> - Right to freedom of expression – s.1
> - Right to peaceful assembly and freedom of association – s.1
> - Right to freedom of movement – s.12[308]

199 A/Inspector Caldwell gave evidence that this human rights slide was intended to be a 'prompt and reminder' of human rights training previously undertaken by officers.[309]

200 The PORT operational briefing visual presentation did not contain any specific directions or guidance with respect to use of force, tactical options for crowd control, or alternatives to the use of force. The only mention of OC aerosols was in a slide in the operational briefing document which stated, amongst a list of safety considerations:

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304 Exhibit P31.
305 Exhibit P31.
306 Exhibit P31.
307 Transcript 03/03/25, T894.06-T895.22 (Barras XN); Exhibit P31, 22.
308 Exhibit P31.
309 Transcript 03/03/25, T964.20-T965.03 (Caldwell XN).

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- Use of force - OC spray & secondary exposure …[310]

201 The safety briefing document for general duties officers contained a slide on 'OSTT Equipment' which referred to officers wearing 'full OSTT equipment', and stated:

- Consider all tactical options.
- Consider wind direction if deploying OC spray.

* Use of OC/FIREARM/other Weapons – **Be aware and consider your**:

- ➢ Environment and surroundings – who else will you impact?
- ➢ Warn other members you are about to "SPRAY".

The Police Commander wants no secondary exposure to members.[311]

202 Although the need to consider the effect of use of OC aerosols on police officers was addressed as set out above, there was no specific reference in any of the briefings to general duties officers or PORT officers to a need to consider warning protesters or persons other than police officers with the word 'SPRAY', nor a direction to avoid secondary exposure for protesters not the subject of the intended use of an OC aerosol.

203 Superintendent Trimble gave a direction in a briefing that OC spray or foam be carried by the police officers at the IMARC operation, and that OC may be deployed if protesters push against the police line, with a clear direction to be given prior to deployment.[312]

PORT Tactical Plan

204 The PORT Tactical Commander, A/Inspector Caldwell, in conjunction with the Police Forward Commander, Superintendent Trimble, were responsible for preparing the PORT Tactical Plan,[313] which was approved by A/Commander Tully.[314] A/Commander Tully's evidence was that the purpose of the PORT Tactical Plan was to identify tactical options and contingencies to deal with reasonably foreseeable

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310 Exhibit P31.

311 Exhibit P26. The PORT safety briefing in the 'OSTT Equipment' slide did not include the reminder about wearing full OSTT equipment or remembering wind direction, but included the information about use of OC aerosols or other weapons referred to in the preceding paragraph. Exhibit P63.

312 Transcript 28/02/25, T834.21-T836.13 (Trimble XXN). Public Order Log dated 30 October 2019 (Exhibit P30).

313 Exhibit P10; Transcript 20/02/25, T450.18-24 (Tully XN).

314 Transcript 03/03/25, T1002.01 (Caldwell XXN).

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situations that arose.[315] A/Inspector Caldwell's evidence was that the PORT Tactical Plan provided options for PORT command in their decision-making, rather than being for use by PORT officers on the ground.[316]

205 The HRIA (referred to above at [119]) was attached to the PORT Tactical Plan. The HRIA states as to its 'Scope':

> This human rights impact assessment is based on the ORU employing tactics including less than lethal options. The overall aim is to ensure human rights are maintained by minimising the impact on members of the public.
>
> To ensure a safe event, all actions taken will be either to protect a person's human rights or, where it is necessary, to limit the rights of an individual or group, this limitation will be:
>
> - Authorised by law
> - Necessary, reasonable & proportionate
> - The least restrictive option.[317]

206 The HRIA relevantly stated with respect to ss 9, 10 and 12 of the *Charter*:

> Where tactical options including less than lethal weapons are used and a person/persons are affected and or injured then police will ensure appropriate aftercare and or medical treatment is arranged and or provided as far as practicable
>
> …
>
> Every protest/incident/event needs to balance the freedom of movement of the public, transport services and business.[318]

207 However, the PORT Tactical Plan and the HRIA were not provided to PORT officers on duty.

The events leading to and including the direction to arrest the Climbers

208 The evidence relating to the events leading to and including the direction given to arrest the Climbers engages Common Questions 6, 7 and 8,[319] which are answered in

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315 Transcript 20/02/25, T451.02-05 (Tully XN).
316 Transcript 03/03/25, T959.08-22; T960.04-23 (Caldwell XN).
317 Exhibit P10, PORT Tactical Plan, Human Rights Impact Assessment.
318 Exhibit P10, PORT Tactical Plan, Human Rights Impact Assessment.
319 **Common Question 6:** Regarding the IMARC Protest and prior to its commencement, what directions and/or orders and/or briefings were provided to PORT Police Officers, in respect of: (a) the police response at the IMARC Protest? (b) use of force against protestors at the IMARC Protest? (c) use of OC

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part above and in the course of my findings below. It is appropriate to note that the timing of events can be identified with a reasonable degree of accuracy from body worn camera footage timings, but that there were minor differences of one to two seconds between some timing settings which I have taken into account in making my findings below.

209 Protesters gathered at the MCEC site from around 7.00am in the morning on 30 October 2019. Throughout the morning, IMARC conference attendees were entering the MCEC building at the Clarendon Street entrance. The police had a line of plastic water filled barriers between the entrance and the forecourt of the MCEC where protesters were gathered. The Public Order Log notes that protesters were blocking access to the MCEC by delegates at around 7.30am and 9.50am, and that protesters were pushing against police lines. It is unnecessary to make specific findings about the extent to which that occurred.[320] Speeches were made to the protesters on the forecourt. Some protesters were holding signs and some were chanting. Police facilitated conference attendees to enter the MCEC.[321]

210 At around 11.45am,[322] one protester commenced climbing the East Pole and another the West Pole. The Climbers used climbing ropes to which they were clipped by harnesses to slowly ascend the poles, a process which took around 25 minutes.[323] An observation was made over police radio by an officer that there was 'a guy with some climbing gear climbing one of the poles out the front' at 11.46am.[324] An entry in the

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foam specifically against protestors at the IMARC Protest? (d) use of tactical options and measures to be used for crowd control of protestors at the IMARC Protest? (e) alternatives to use of force against protestors at the IMARC Protest? (f) any other matters relating to policing of the IMARC Protest?
Common Question 7: What directions and/or orders and/or instructions were given by Police Officers to other Police Officers in respect of the following acts, insofar as they occurred during the Relevant Time Period: (a) the Advance? (b) any use of force against protestors? (c) use of OC foam against protestors? (d) arrest of the climbers? (e) formation of police officers at the IMARC Protest?
Common Question 8: What directions and/or orders and/or instructions were given by the PORT Tactical Commander or any of the commanding officers in respect of the following acts, insofar as they occurred during the Relevant Time Period: (a) the Advance? (b) any use of force against protestors? (c) use of OC foam against protestors? (d) arrest of the climbers? (e) formation of police officers at the IMARC protest?

320 Public Order Log dated 30 October 2019 (Exhibit P30).
321 Body worn camera of Sergovich (Exhibit P4).
322 Body worn camera of Sergovich (Exhibit P4); **CCTV footage** (Exhibit P8); Exhibit P3.
323 Transcript 28/02/25, T841.11-16 (Trimble XXN).
324 Transcript of Radio Call (Exhibit P5), 1; Audio of radio channel 0705 identified (Exhibit P23).

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Public Order Log against the time reference 11.46am records '2 Protestors climbing Poles at MCEC'. An observation on the opposite page under the heading 'Decision – Supporting Rationale' reflects the relatively calm environment at that time, which is also evident on video footage. It reads:

> Decision not to go in and extract Protestors climbing Poles.
> Due to safety of members having to move to[o] far into crowd and protesters not disrupting anything.[325]

211 Protesters watched the Climbers and while they were climbing, were addressed by other protesters over loudspeakers. The protesters chanted, clapped, and occasionally cheered. At the top of the poles, the Climbers attached rope to the poles and between approximately 12.06pm to 12.19pm unfurled and attached to the two poles a banner stating 'Blockade IMARC for Climate Justice'.[326] At around 12.06pm, the PORT Tactical Commander gave instructions to the Green and White PORT 301 teams to move near the northeast side of the MCEC near Clarendon Street to stop the Climbers from raising a banner if it was to be raised from the ground. However, the process by which the Climbers attached the banner did not involve pulling it up from the ground and the teams were instructed to retreat to a police line at the barriers.[327] The body worn camera and other video footage[328] for the time during which the Climbers were ascending the poles shows the protesters chanting loudly and cheering, but with no evidently aggressive behaviour. A/Inspector Caldwell described the protesters as celebrating when the banner was unfurled.[329] CCTV footage shows that the protesters were spread out during the Climbers' ascent and the time during which they were arranging to unfurl the banner, and there was no close congregation of protesters under the two poles. Most protesters were sitting or standing around the MCEC stairs and others were observing from the area closer to the Yarra River.[330]

212 The police watched calmly and attentively, talking between themselves, from

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325 Public Order Log dated 30 October 2019 (Exhibit P30), 'Decision 14' under heading 'Decision – Supporting Rationale'.
326 Body worn camera of Sergovich (Exhibit P4); Body worn camera of McKay (Exhibit D25).
327 Statement of Agreed Facts, [13]-[15].
328 See [28] above as to the range of video footage in evidence in the proceeding.
329 Transcript 03/03/25, T975.13-17 (Caldwell XN)
330 CCTV Footage (Exhibit P8).

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positions behind and in front of the plastic water barriers on the stairs leading up to the MCEC entrance.[331] During the period the Climbers were ascending or unfurling the banner, there was no evidence that OC aerosols were deployed. There was also no direction by police by loudspeaker or otherwise that the Climbers stop climbing the poles.[332]

213 After the banner was unfurled, a protester made an announcement over a loudspeaker at around 12.19pm to the effect that this was the end of the day's protest events at the IMARC site. The Climbers started to descend the poles gradually and protesters slowly started to move away from the site.[333]

214 Over the time while the Climbers were climbing, unfurling the banner and then descending from the poles, there was discussion between Superintendent Trimble, A/Inspector Caldwell, Inspector Barras, Senior Sergeant Michael Pierlot the PORT Tactical Advisor, PFSU officers, and Senior Sergeant Kevin Vincent for the 300 unit and Senior Sergeant Shaun Howard who was responsible for the 400 units.[334] A/Inspector Caldwell was not present when the Climbers commenced climbing but went to observe them when he was made aware that protesters were climbing.[335] His staff officer was present, taking notes for the Public Order Log. They were standing on the raised area in front of the entrance to the MCEC, above the steps to the forecourt. They discussed whether the Climbers should be arrested.

215 The Public Order Log refers to a discussion at 12.19pm 'around protesters on poles to be arrested when they come down from poles'.[336] Inspector Barras gave advice to Superintendent Trimble about the risks arising from the Climbers' activity and what the response should be.[337] A/Inspector Caldwell gave evidence that the possibility of

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331 Body worn camera of Sergovich (Exhibit P4); CCTV Footage (Exhibit P8).

332 There was no evidence of any such direction being given. Some officers gave evidence that they were not aware of any such direction: Transcript 28/02/25, T837.05-06 (Trimble XXN); 03/03/25, T912.21-23 (Barras XXN). I conclude on all the evidence that no such direction was ever given.

333 Transcript 18/02/25, T210.09-27 (Battersby XN).

334 Transcript 28/02/25, T820.16-19; T827.01-06 (Trimble XN); 03/03/25, T969.05-26; T974.08-10; T975.18-T976.09 (Caldwell XN); T889.18-29; T896.24-T898.05 (Barras XN).

335 Transcript 03/03/25, T973.13-24 (Caldwell XN)

336 Public Order Log dated 30 October 2019 (Exhibit P30) entry at 12.19pm.

337 Transcript 03/03/25, T897.07-27 (Barras XN).

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removing the Climbers from the poles as they were climbing was considered but rejected as being unsafe, as it would require the use of a truck with long ladders, or long ladders alone, which would be unsafe for the protesters and the Climbers.[338]

216 A police prosecutor advised Superintendent Trimble that the offence of trespass by the Climbers was complete.[339] There was discussion of whether there was another offence such as recklessly or intentionally causing serious injury or conduct endangering life or persons. I find that no advice was given that either such offence was complete.[340] The discussion relating to the direction to arrest was recorded in the Public Order Log as having occurred at 12.19pm. The Statement of Agreed Facts states that the direction was made at 12.22pm. I find that it was around 12.22pm that the direction that the Climbers be arrested when they descended was made by Superintendent Trimble and communicated to A/Inspector Caldwell, the PORT Tactical Commander.[341] Superintendent Trimble was on the stairs at the entrance to the MCEC, which were higher than the level at which the protesters were standing and behind the plastic water barriers, at the time he gave the order.[342] A/Inspector Caldwell was also at the top of the stairs behind the police barrier at various times when he would have conversations with Superintendent Trimble, but also communicated with him by phone and police radio.[343]

217 A/Commander Tully, the Police Commander who was observing from off-site, was not involved in making the decision to arrest the Climbers.[344] This was consistent with the evidence that while A/Commander Tully had formal responsibility for the overall IMARC operation, his role had a strategic and planning focus, rather than on implementation and use of police resources at the site.

218 After having received the direction from Superintendent Trimble that the Climbers

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338 Transcript 03/03/25, T974.26-T975.12 (Caldwell XN).
339 Transcript 03/03/25, T976.15-19 (Caldwell XN).
340 Transcript 03/03/25, T897.22-T898.05 (Barras XN). See further [417] below.
341 Statement of Agreed Facts, [19]; Transcript 28/02/25, T812.23-31 (Trimble XN); T847.07-14 (Trimble XXN); Public Order Log dated 30 October 2019 (Exhibit P30).
342 Transcript 28/02/25, T817.17-19 (Trimble XN)
343 Transcript 03/03/25, T968.04-23 (Caldwell XN).
344 Transcript 20/02/25, T456.08-28; 21/02/25, T474.28-31 (Tully XN).

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should be arrested, A/Inspector Caldwell then discussed with Inspector Barras and PORT officers what tactics should be used to effect the arrest.[345] He determined to 'put some police around the pole, particularly around the eastern pole, the one closest to Clarendon Street where the climber was, to put the police in there to hold that area as an area so we could bring that person down to custody, or take the person into custody when they came down from the pole.'[346]

219 The Public Order Log records the observation '12.24 – offence complete from Prosecutors'.[347] I find that this refers to the PFSU advising that there was a complete offence of trespass for which an arrest could be made.[348] A further entry in the Public Order Log at 12.24pm states 'P150-400 to arrest'.[349] A later entry refers to the Police Forward Commander having 'directed arrest re 2 climbers for trespass' but states the time as 12.40pm.[350] I conclude that this was the time of the record having been made in the Public Order Log, rather than the time of the actual direction to arrest, given the timing on the audio recording of the radio call.

220 At just before 12.24pm,[351] A/Inspector Caldwell communicated an instruction to arrest the Climbers over the radio, and directed the PORT 400 units to move into positions to effect the arrests, as follows:

> PORT 150 to all 400 units... I want two 400 units on the water side and two 400 units on this side, in a position where you can get through and get these protesters. When they come down they will be arrested for trespass. There's no need to give the command on them. The defence is complete from prosecution so you'll take those people, they'll be arrested, and I'm sure they'll be expecting

345 Transcript 03/03/25, T977.17-21 (Caldwell XN).
346 Transcript 03/03/25, T978.02-09 (Caldwell XN).
347 Exhibit P30.
348 The evidence of Superintendent Trimble was that the role of this unit was to provide advice as to powers of arrest or what offences had been committed. Transcript 28/02/25, T813.22-28 (Trimble XN).
349 Exhibit P30.
350 Exhibit P30.
351 The State submitted that this occurred at around 12.25pm: **Defendant's Response to Plaintiff's Answers to Common Questions and Defendant's Answers to Common Questions** filed 29 May 2025, [23]. The radio audio recording timestamps A/Inspector Caldwell commencing speaking at 12.23 and 54 seconds (Exhibit P5, Transcript, and Exhibit P23, recording) In addition to the entry in the Public Order Log referred to in the preceding paragraph, a further entry in the at 12.24 states 'P150-400 to arrest'. A later entry refers to the Police Forward Commander having 'directed arrest re 2 climbers for trespass' but states the time as 12.40. I conclude that this may have been the time of the record having been made, rather than the time of the actual direction to arrest, given prior entries in the logbook, and the timing on the audio recording of the radio call. Taking all evidence into account I conclude that the order to arrest was communicated at 12.24pm.

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> it and you'll take them into the processing area. 300 units, the three sections that are out here, you'll be support for the 400 units. At this stage you'll remain over the stair area... Kev will stay with you there and you'll be the protection that if something goes pearshaped with the 400 you'll support them. I don't think the crowd will be volatile but just because we don't know… it looks like they're getting a- they're still getting the cables in place for the banner and from the way they got themselves up it will take them a little bit to come down.
>
> So I'll let the sergeant speak with the senior sergeant so Shaun, you can coordinate how it looks, how it happens, but as soon as they hit the ground they're to be arrested. Make sure you're wearing body-worn cameras.[352]

221 This direction was made over the radio channel accessed by uniform officers and the channel accessed by PORT officers.[353]

222 Superintendent Trimble's evidence was that his direction to arrest was broadcast over the general duties radio channel, and that it was not only A/Inspector Caldwell who would have heard the order, but also uniform officers. He said that he would have 'gone on the normal channel that this was going to occur, so that the uniform members would know what was going to happen.'[354] Superintendent Trimble did not give any directions as to use of OC foam or spray.[355] He gave evidence that he could remember the East Pole climber decamping, but did not see the physical taking hold of the West Pole climber and only became aware that she had been arrested some time after he saw that OC foam had been deployed.[356]

223 A note made by Superintendent Trimble about half an hour after the events involving the Climbers[357] was as follows:

> - two climbers – safety or person under as they only hanging by 1 pt. skills of climbers poor.
>
> - To be arrested when they come down – same two as per Intel photo
>
> - ORU moved forward as they came down crowd surged as per footage – crowd crush an issue – move uniform member forward to assist PORT – need to move people away – keep entry / exit positions clear. O/C deployed by

352 Audio of radio channel 0705 (Exhibit P23); Transcript of Radio Call (Exhibit P5).
353 Transcript 28/02/25, T844.31-T845.22 (Trimble XXN).
354 Transcript 28/02/25, T845.06-08 (Trimble XN).
355 Transcript 28/02/25, T824.04-05 (Trimble XN).
356 Transcript 28/02/25, T825.14-29 (Trimble XN).
357 Transcript 28/02/25, T815.10-T817.16; T818.22-27 (Trimble XN).

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members – surge stopped – 1x female climber arrested[358]

224 Superintendent Trimble gave evidence that intelligence Victoria Police gathered prior to IMARC had identified people suspected as having potential to 'cause trouble' or who 'have caused trouble or have assaulted police in the past, and there was intel that there was some climbers that would climb'.[359] The intelligence included photographs of these people. Superintendent Trimble gave evidence that the female climber on the West Pole was identified in the intelligence document, but that at the time it was not clear that the East Pole Climber was the same as the person identified in the intelligence.[360]

225 When the decision was made by Superintendent Trimble at approximately 12.19pm that the Climbers should be arrested, video footage shows that there were no protesters grouped around the base of the poles, but people were walking past from time to time and standing and observing the Climbers in the MCEC forecourt area, from then until around five minutes later when protesters moved to group around the two poles.[361] This was also A/Inspector Caldwell's recollection, who observed that at around the time the decision to arrest was made, and the tactics for arrest were being discussed, '[a] lot of the protesters were still over in the lawn area at that stage, so the crowd wasn't as dense.'[362]

226 The video footage shows that there was a chalk marked circle of about four to five metres in diameter around each of the poles, starting at the base and extending out in the direction towards which the poles lean.[363] The origin and purpose of the chalk circles was not explained, but I infer it is likely that they were drawn there by protest organisers to indicate a zone under where the Climbers would be. Most people were staying outside those chalked lines while the Climbers were climbing and unfurling

358 Exhibit P55.
359 Transcript 28/02/25, T821.21-25 (Trimble XN).
360 Transcript 28/02/25, T821.20-T822.05; T824.26-30 (Trimble XN).
361 Note that this and following paragraphs include findings responsive to **Common Question 3(b):** At the time that the decision was made to arrest the pole climbers, how many protesters were (i) around the east pole and (ii) around the west pole?
362 Transcript 03/03/25, T978.10-12 (Caldwell XN).
363 See CCTV footage (Exhibit P8); Body worn camera of McKay (Exhibit D25).

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the banner, but people moved within or walking through the lines in proximity to the poles from time to time.[364]

227 It is not possible to determine with precision how many protesters were around the Poles at the time of Superintendent Trimble's decision to arrest the Climbers, because there is no way to precisely determine the time of the decision (as distinct from the time at which it was communicated over police radio) and match it accurately to any video footage that is time stamped. However, on the basis of my observations of both time stamped body worn camera footage and other footage and events that are captured on both,[365] I find that during the time period between 12.19pm and 12.24pm, there were no protesters concentrated or gathered around either of the two poles.[366] There were around ten protesters in the area of the base of the East Pole at the time that police officers moved to encircle that pole, but those protesters were not concentrated around the base and police were able to move in to surround the pole.[367] During this period, there were occasional protesters walking through the area close to the base of the West Pole.

The police response to the direction to arrest – events around the East Pole[368]

228 At just before 12.24pm, the instruction to arrest the Climbers was communicated over police radio by A/Inspector Caldwell, with the direction made to Senior Sergeant Howard leading the 400 PORT units to move in towards the East Pole, two from the Yarra River side and two from the side near the MCEC entrance. At that time, there were also no protesters congregated around the base of the East Pole. A/Inspector

364 CCTV footage (Exhibit P8); Body worn camera of McKay (Exhibit D25).
365 CCTV footage (Exhibit P8).
366 CCTV footage (Exhibit P8); Body worn camera of Bolzonello (Exhibit P9); Body worn camera of Gray (Exhibit P11).
367 Body worn camera of Bolzonello (Exhibit P9); Body worn camera of Balvin (Exhibit P16).
368 Note that the findings in this section include findings responsive to:
Common Question 6: Regarding the IMARC Protest and prior to its commencement, what directions and/or orders and/or briefings were provided to PORT Police Officers, in respect of: (a) the police response at the IMARC Protest? (b) use of force against protestors at the IMARC Protest? (c) use of OC foam specifically against protestors at the IMARC Protest? (d) use of tactical options and measures to be used for crowd control of protestors at the IMARC Protest? (e) alternatives to use of force against protestors at the IMARC Protest? (f) any other matters relating to policing of the IMARC Protest?
Common Question 7: What directions and/or orders and/or instructions were given by Police Officers to Other Police Officers in respect of the following acts, insofar as they occurred during the Relevant Time Period: (a) the Advance? (b) any use of force against protestors? (c) use of OC foam against protestors? (d) arrest of the climbers? (e) formation of police officers at the IMARC Protest?

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Caldwell instructed the 300 units to be 'support for the 400 units'.[369]

229 The plaintiff gave evidence that 'there was a moment as they [the Climbers] were coming down where someone in high viz made some arm movements that would sort of signal to move in closer around the pole' and that he 'made a decision to move in with other activists and assemble around the pole'.[370] I find from watching the CCTV footage that this was likely to have been shortly before 12.26pm. Police from the Green and Blue PORT 401 teams moved towards the East Pole at approximately 12.26pm.[371] An instruction from one of the police in that unit is heard on the body worn camera footage, to 'surround the pole guys, nice and tight'.[372] Officers from the 301 units also moved in from the west of the East Pole.[373] Police surrounded the pole with the East Pole Climber still above them out of reach.[374] Some police directed protesters to move away and some pushed protesters standing below the East Pole.[375]

230 As the PORT teams approached and then surrounded the East Pole, they made various requests that protesters move away, saying statement such as 'Come on guys, just need a bit of space … to get them down safely'; 'Please move back'; 'Please step back guys'; 'Clear out'; 'Get back'; 'Get back from the police line', and 'Give us space'.[376] For the most part, the police sound calm and polite in their requests. Protesters moved towards the East Pole and a group of them encircled the police around the East Pole, some facing police and pushing against them, and some standing with arms linked.[377] Protesters continued to approach and surround the East Pole, and some made aggressive statements to the police, whilst others observed silently. Some protesters chanted 'Land rights not mining rights, shut Landmark

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369 Exhibit P4.
370 Transcript 18/02/25, T143.06-11 (Plaintiff XN).
371 Body worn camera of Lahman (Exhibit D12); Body worn camera of Turner (Exhibit D24). Statement of Agreed Facts [21], [39].
372 Body worn camera of Balvin (Exhibit P16).
373 Body worn camera of Kirk (Exhibit D26).
374 Victoria Police evidence gathering footage (Exhibit D1).
375 Statement of Agreed Facts, [38].
376 Body worn camera of Turner (Exhibit D24); Body worn camera of Bolzonello (Exhibit P9); Body worn camera of Gray (Exhibit P11); Body worn camera of Bhutia (Exhibit P15).
377 Transcript 03/03/25, T981.20-T982.25 (Caldwell XN); CCTV footage (Exhibit P8); Evidence gathering footage (Exhibit D1); Transcript of Radio Call (Exhibit P5); Audio of radio channel 0705 (Exhibit P23); Body worn camera of Balvin (Exhibit P16). Statement of Agreed Facts, [29].

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down'.

231 There were around 30 police around the East Pole at this time and around 40 protesters around the police and the East Pole.

232 At about 12.28pm, six officers mounted on police horses moved to take up positions along the plastic water barriers adjacent to the footpath at the front of the MCEC, with some 10-15 metres distance between them and protesters struggling with police around the East Pole.[378] Those officers watched from a stationary position on their horses. Rows of police remained lined up behind them and behind the plastic barriers.[379]

233 A/Inspector Caldwell gave an instruction over the radio around 12.28:30pm, saying to Senior Sergeant Howard, 'I think you're sandwiched in at the moment' and instructed them to withdraw:

> So what we're going to do is tactically and a section at a time move yours out, move yours out so a tactical withdrawal, let them own that area... The plan will be when they come down we'll have a 300 unit on one pole, a 400 on the other and we'll use a wedge and we'll go through in a wedge and we'll drive a wedge through the crowd to get to the pole when they hit the ground. I'm not having our members be surrounded like that.
>
> ….
>
> If you're assaulted on the way out I expect you to take that person with you, your call.[380]

234 A/Inspector Caldwell gave evidence (which I accept) that this latter instruction meant that if police were assaulted, he expected them to arrest the person for assault.[381]

235 In addition to giving these instructions over police radio, A/Inspector Caldwell delivered the instructions face to face to some senior sergeants, including Senior Sergeant Howard who was given the direction to advance on the East Pole.[382]

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378 Body worn camera of Cook (Exhibit P14).
379 Body worn camera of Cook (Exhibit P14).
380 Transcript of Radio Call (Exhibit P5); Audio of radio channel 0705 (Exhibit P23); Transcript 03/03/25, T982.21-T983.02; T984.05-21 (Caldwell XN); 04/03/25, T1053.04-07 (Caldwell RE-XN). See also Statement of Agreed Facts [29].
381 Transcript 03/03/25, T984.05-10 (Caldwell XN).
382 Transcript 03/03/25, T979.29-T980.05 (Caldwell XN).

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A/Inspector Caldwell gave evidence that the PORT officers were required to comply with these directions to move in with the wedge formation, but were required to make individual assessments while they are in the crowd.[383]

236 The police units around the East Pole moved back to police lines in front of the barriers just after 12.29pm, and were jostled by protesters as they moved.[384] There is a cheer from the protesters, which I find was at the time the police first withdrew from the East Pole.[385] The protesters chanted 'Pigs out'.[386]

237 A/Inspector Caldwell then gave an instruction on police radio at approximately 12.30pm to '[p]repare with your wedge', to the 300 unit for the pole closest to the building and the 400 unit to the pole closest to the road.[387] A/Inspector Caldwell stated:

> If they're pushing against you violently, remember you can use your spray but do it calmly and give a warning but just if you're getting – if you're being assaulted and you feel unsafe use your tactical options.[388]

238 A/Inspector Caldwell gave evidence, which I again accept, that this was not a direction to use OC foam, as it is not appropriate for him to give that direction, but to prompt officers to consider their tactical options.[389]

239 At 12.30:30pm, police from the Green and Blue 401 PORT teams then formed wedge formations at the outer side of the East Pole near Clarendon Street, and in that wedge formation re-entered the protesters grouped around the bottom of the East Pole.[390] At that time the East Pole Climber had almost reached the ground.[391] The protesters pushed back at police and blocked their pathway. There was shouting from both police and protesters and there was close range pushing between the police and

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383 Transcript 04/03/25, T1031.27-T1032.11 (Caldwell XXN).
384 Body worn camera of Bolzonello (Exhibit P9); Body worn camera of Lahman (Exhibit D12).
385 Body worn camera of unidentified officer (Exhibit D30).
386 Body worn camera of Lahman (Exhibit D12); Body worn camera of McKay (Exhibit D25).
387 Transcript of radio call (Exhibit P5).
388 Body worn camera of Turner (Exhibit D24); Transcript of radio call (Exhibit P5).
389 Transcript 03/03/25, T985.21-T986.11 (Caldwell XN).
390 Evidence gathering footage (Exhibit D2); Body worn camera of Turner (Exhibit D24); Body worn camera of Lahman (Exhibit D12); Transcript 06/03/25, T1333.24-T1334.12 (Lahman XN). See also Statement of Agreed Facts [49].
391 Statement of Agreed Facts [51].

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protesters.

240 Amid continued pushing back from protesters and police attempts to move protesters using their hands, police commenced using OC foam at around 12.31pm.[392] OC foam was deployed by several police forming part of the wedge formation, but not all. The OC foam came into contact with around 15 to 20 protesters' clothes, bodies and faces around the East Pole. Many protesters moved away toward the Yarra River, but some stayed around the base of the East Pole, refusing to move and continuing to link or lock arms with other protesters. Some were pulled away by police.[393]

241 During this time, the East Pole Climber had reached the base of the pole and was extracting himself from the ropes attaching him to the pole. At approximately 12.31pm, body worn camera footage of a police officer situated in front of the police barriers facing towards the East Pole records a police member saying 'he's out'.[394]

242 At around this time, a person in black clothing with a backpack ran out of the dense crowd around the base of the East Pole and down the footpath along the Yarra River away from Clarendon Street.[395] A member of the crowd can be heard on video footage shouting 'run away' and video footage shows police officers on the steps of the MCEC turning and watching him leave.[396] At 12.31:30pm, a male voice is heard on the body worn camera footage of A/Sergeant Bolzonello saying, 'We've lost him, we've lost him'.[397] No footage enables a clear view of the entire sequence of the East Pole climber detaching himself from the pole and moving through the crowd. I do conclude from all of the footage that the person running from the protest site was the East Pole Climber. A number of police officers on the MCEC stairs close to the direction in which the East Pole Climber was running observed him, but no police officer pursued him as he ran away. A/Inspector Caldwell explained that he did not consider taking steps

392 Body worn camera of Turner (Exhibit D24).
393 Transcript of Radio Call (Exhibit P5) Audio of radio channel 0705 (Exhibit P23).
394 Body worn camera of Schouten (Exhibit P13).
395 CCTV footage (Exhibit P8); Evidence gathering footage (Exhibit D2); I also take into account the evidence of Inspector Barras who was watching from an elevated position at the top of the steps: Transcript 03/03/25, T901.30-T902.05 (Barras XN).
396 Evidence gathering footage (Exhibit P6); Evidence gathering footage (Exhibit D2).
397 Body worn camera of Bolzonello (Exhibit P9).

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to apprehend him while he was running, because there are safety risks in police running with their equipment, and also in officers 'peeling off' and leaving the site when the events with other protesters were continuing.[398]

243 Some police moved from the East Pole to the police pushing towards the West Pole, and some police moved back in a line towards Clarendon Street.[399]

244 The East Pole Climber was arrested some months after the IMARC event. Victoria Police identified after the IMARC event that surveillance from the morning of 30 October 2019 captured images of the West Pole Climber in the company of a man who was identified as the East Pole Climber, but without the facial covering that had been concealing his face while he was climbing. Police made enquiries and discovered the East Pole Climber's identity from Facebook. Victoria Police spoke to the East Pole Climber during a separate incident on 22 November 2019 on the Princes Bridge in Melbourne, in which he was observed abseiling from the bridge and displaying a banner which contained the words 'Stop Adani'. He was wearing the same clothes on 22 November 2019 as he wore during the IMARC Protest. He was arrested by Victoria Police in August 2020.[400]

The police response to the direction to arrest – events around the West Pole[401]

245 At the time police moved in to encircle the East Pole for the first time at around 12.26pm, protesters started moving towards the West Pole. They appeared to be encouraged to do so by protest organisers wearing orange fluorescent vests, consistent

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398 Transcript 03/03/25, T988.08-11 (Caldwell XN).

399 Body worn camera of Bolzonello (Exhibit P9).

400 Briefing note of Senior Constable Schouten dated 19 August 2020 (Exhibit D23).

401 Note that the findings in this section include findings responsive to: **Common Question 3(m)** regarding actions of Police Officers at the IMARC Protest in the Relevant time Period; and
Common Question 6: Regarding the IMARC Protest and prior to its commencement, what directions and/or orders and/or briefings were provided to PORT Police Officers, in respect of: (a) the police response at the IMARC Protest? (b) use of force against protestors at the IMARC Protest? (c) use of OC foam specifically against protestors at the IMARC Protest? (d) use of tactical options and measures to be used for crowd control of protestors at the IMARC Protest? (e) alternatives to use of force against protestors at the IMARC Protest? (f) any other matters relating to policing of the IMARC Protest? and
Common Question 7: What directions and/or orders and/or instructions were given by Police Officers to Other Police Officers in respect of the following acts, insofar as they occurred during the Relevant Time Period: (a) the Advance? (b) any use of force against protestors? (c) use of OC foam against protestors? (d) arrest of the climbers? (e) formation of police officers at the IMARC Protest?

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with the plaintiff's evidence that a person in high visibility gear made signals to move in around the pole.[402] Many of the protesters around the West Pole had their arms linked together, some with their backs towards the pole and others facing it. I come back to the specific actions and position of the plaintiff below, but it is relevant to observe that he was initially standing between the poles watching, and then moved to the East Pole and with other protesters and formed a tight group of about 40-45 people around that pole,[403] at around 12.26pm.

246 Police were observing the West Pole Climber descending the pole from between the MCEC stairs and the West Pole. At about 12.30:45pm, a voice is heard on body worn camera footage of an officer standing amongst the PORT White and Blue 401 teams saying twice, 'Be mindful of spray' and then 'check your camera's on'.[404]

247 By 12.30:30pm when the 400 units were moving on the East Pole in the wedge formation, the Green, White and Blue PORT 301 teams were standing ready between the stairs and the West Pole, to the south east of the West Pole.[405] After the East Pole Climber had ran away at approximately 12.31pm, there was a discussion between police about the tactics to be used in response to the West Pole Climber.[406]

248 At 12.31:15pm, as the West Pole climber got closer to the ground but when she was still above the level of people's heads, the PORT teams moved north-west towards the West Pole in a wedge formation.[407] The police said loudly, 'Move, move, move' as they stepped into the group of protesters crowded around the West Pole.[408] Some protesters shouted at police, including aggressive statements such as 'Fuck you'.[409] Other protesters said nothing. Some police from the 401 units also moved from the

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402 Transcript 18/02/25, T143.06.11 (Plaintiff XN).
403 Evidence gathering footage (Exhibit D1).
404 Body worn camera of McKenna (Exhibit D29).
405 Body worn camera of Saunders (Exhibit P7).
406 Transcript 03/03/25, T902.06-13 (Barras XN).
407 Evidence gathering footage (Exhibit D2); Public Order Log, entry at 12.31pm (Exhibit P30); Body worn camera of Kirk (Exhibit D26). See also Defendant's Answer to Common Questions, [28] and Plaintiff's Response to Defendant's Answers to Common Questions and Plaintiff's Answers to Common Questions, [20].
408 Transcript 03/03/25, T902.18-31 (Barras XN). Body worn camera of McKay (Exhibit D25); Body worn camera of unidentified officer (Exhibit P71). See also Statement of Agreed Facts [62].
409 Body worn camera of McKay (Exhibit D25).

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East Pole towards the West Pole around 12.31:30pm, but not in a wedge formation.[410] The first group of police approaching the West Pole did not remain in a wedge formation as they approached the West Pole and protesters did not move away. The protesters stayed in positions around the West Pole with arms linked, some yelling at police and others standing without speaking. The police spread out and were positioned around the east side of the West Pole and the protesters around the pole on that side.

249 From around 12.31pm, various officers on the east side of the West Pole sprayed protesters with OC foam as police tried to move towards the West Pole and to make protesters move away from it. Evidence was not called specifically about deployment of OC foam on protesters other than the plaintiff. Although these sprays are shown on several pieces of video footage, it is unnecessary to make findings about which officers sprayed and which protesters were sprayed, with the exception of certain sprays occurring at around the same time as OC foam was deployed on the plaintiff.

250 Mr Battersby, the legal observer who was watching the protest at the time, was standing on the MCEC steps above the forecourt. It is apparent from other video footage, which shows him in a pink high visibility vest labelled on the back 'Legal Observer', that he moves closer to the West Pole and is filming with his phone.[411] He gave evidence that he watched the West Pole Climber descending the pole, and that:

> …she was trying to detach herself from the pole, she got close enough to the ground, I could see her fiddling with her straps, probably clips that she had. And as she was doing that the police approached and sprayed her in the face with OC foam from what I could see... [S]he wasn't able to shield herself from that and she also couldn't move. She was tethered in place. So I saw that happen.[412]

251 The police evidence gathering footage shows the West Pole Climber being sprayed with an extended burst of OC foam from one of the officers who had advanced towards the West Pole from the east, which resulted in foam landing on various

410 Body worn camera of Bolzonello (Exhibit P9); Body worn camera of Turner (Exhibit D24). See also Statement of Agreed Facts [68].
411 Body worn camera of unidentified officer (Exhibit P71).
412 Transcript 18/02/25, T213.21-30 (Battersby XN).

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protesters as well as the Climber. At about the same time, a second officer sprays OC towards protesters gathered on the east side of the West Pole, which landed on various protesters including the plaintiff, on his hair and back.[413] A second long burst of OC foam is sprayed at the West Pole Climber as she continues to descend, but while she remained above the head level of surrounding protesters. At this time there was a gap between the police and the protesters around the West Pole of about a metre and no protesters on the east side of the pole were pushing against police. During this time, general duties police were also moving in from the other side of the West Pole.

252 The CCTV, evidence gathering and other footage shows that the West Pole Climber had been sprayed with OC foam which was on her face and her eyes, and she was having difficulty extracting herself from the ropes that connected her to the West Pole. By 12.31:50pm, it is clearly visible from the east side that the West Pole Climber (who is at that time above the level of protesters' heads) had OC foam on her face, head and arms, and was struggling to detach herself from the pole which also had large amounts of OC foam on it.[414]

253 A/Inspector Caldwell, who was standing on the MCEC entrance stairs, is heard at 12.31:34pm on the police radio saying 'Don't spray while he's climbing'.[415] He gave evidence that he gave that direction in relation to the West Pole Climber, who he thought at the time was a male.[416] He said he gave the direction because 'I didn't want someone being sprayed climbing a pole because I thought that's unsafe on that person and everyone around them', particularly in circumstances where the climber was above head height at the time, and could get tangled in their rope if affected by OC foam.[417]

254 An unknown person is also heard on police body worn camera footage of an officer

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413 Exhibit D2.

414 Body worn camera of Saunders (Exhibit P7); Body worn camera of Balvin (Exhibit P16) (. See also the evidence of the Plaintiff who looked up and saw that the Climber had been sprayed and 'had spray all over her face and was dealing with the effects of OC spray, she was obviously very vision affected as she was trying to come down'. Transcript 18/02/25, T144.25-29 (Plaintiff XN).

415 Transcript of Radio Call (Exhibit P5) (transcript of radio call); Audio of radio channel 0705 (Exhibit P23).

416 Transcript 03/03/25, T991.01-10 (Caldwell XN).

417 Transcript 03/03/25, T991.04-19 (Caldwell XN).

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who is standing to the south east of the West Pole in front of the police barriers at approximately 12.30:50pm saying 'turn your cameras on'. The officer wearing that camera joins the wedge which advances towards the West Pole, and voices are heard saying to 'Get back', and 'Spray'. At 12.31:40pm, when police in the wedge are pressing towards the protesters at the West Pole, a voice is heard saying 'don't spray, I didn't want you spraying'.[418] At about the same time on the body worn camera footage of Senior Sergeant Saunders, who was in the group of police approaching from the east side, a male police officer's voice says twice 'get a team on the other side'.[419] At just before 12.32pm, an unidentified police officer in the course of moving on the West Pole from the eastern end says 'watch the sprays' and another unidentified officer then says at 12.32pm 'enough … stop spraying … no more spray'.[420] I that the directions to stop spraying where given by PORT officers with supervisor roles.[421]

255 Around the base of the West Pole there were protesters, including the plaintiff, facing towards the west still linking arms, and protesters around them also pushing back against the police. Inspector Barras was observing from the elevated position at the top of the MCEC steps. Inspector Barras, who had previously led police responses to many protests, described the situation amongst the crowd at this time as involving:

> … serious confrontation but not violent confrontation. Like, if I was to describe violent confrontation it's people throwing rocks, bricks. It's hitting, it's batons. This was not passive, definitely not passive but not incredibly aggressive to the point where someone was going to get injured. This was more about push and shove and people wanting to impede police's ability to conduct an arrest…[422]

256 Inspector Barras saw that there were less people on the west side of the West Pole than on the east where the police were concentrated. He had watched the wedge of police officers enter from the east side of the West Pole and decided that it was less crowded on the west side, closer to the Yarra River, and that this provided an opportunity to arrest the West Pole Climber, who was almost at the bottom of the pole. Inspector Barras discussed this with a Search and Rescue officer, Senior Constable Crane, and

418 Body worn camera of Sellwood (Exhibit P12).
419 Body worn camera of Saunders (Exhibit P7)
420 Body worn camera of Bhutia (Exhibit P15); Body worn camera of Kirk (Exhibit D26).
421 See also Statement of Agreed Facts [100].
422 Transcript 03/03/25, T903.19-27 (Barras XN).

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they moved to the base of the pole.[423] Senior Constable Crane and Inspector Barras can be seen in the video footage moving through the general duties police on the west side of the West Pole to get to the climber.[424]

257 When Inspector Barras and Senior Constable Crane got within arms' reach of the West Pole Climber at 12.32:30pm, they with at least one other general duties police officer held her by her backpack. They held her on her back at about shoulder height with her harness still connected to the West Pole.[425] The Climber also appears to have been held up by some protesters. Inspector Barras instructed Senior Constable Crane to cut the West Pole Climber's tape slings (which were ropes tied around the pole) using a jackknife, which is a hook with a razor blade that can cut rope safely without exposing the blade.[426] Senior Constable Crane was unable to reach the tape and at about 12.32:50pm, Inspector Barras assisted him by guiding his hand to cut the tapes which released the climber from the pole.[427]

258 Mr Battersby gave evidence that he saw that police had taken hold of the West Pole Climber and were using a device to try and cut her free from the pole. He perceived police to be trying to effect an arrest and take her into custody, and there was difficulty in that as she was still tethered to the pole at what appeared to be multiple points.[428]

259 From the time the West Pole Climber's tapes were cut, Inspector Barras and another police officer as well as protesters were holding the climber. When protesters at her feet moved, she dropped down and appeared briefly to be on her own feet. Inspector Barras and Senior Constable Crane carried her backwards from the West Pole on her back (in a position that Inspector Barras described as a 'stretcher carry').[429] While they were carrying the West Pole Climber they were surrounded by protesters, some of

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423 Transcript 03/03/25, T903.10-17 (Barras XN); T932.22-27 (Barras XXN).
424 Evidence gathering footage (Exhibit D2).
425 Evidence gathering footage (Exhibit D2).
426 Transcript 03/03/25, T904.18-28 (Barras XN).
427 Transcript 03/03/25, T903.10-T904.31 (Barras XN). Video footage filmed by Thomas Battersby (Exhibit P18).
428 Transcript 18/02/25, T214.04-10 (Battersby XN).
429 Transcript 03/03/25, T905.03-12 (Barras XN); T926.02-07 (Barras XXN). See video footage exhibits: Exhibit P8 and CCTV aerial footage (Exhibit P70) with the latter showing the Climber circled in red (addition by plaintiff).

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whom grabbed for the Climber and pushed the police officers. Other police officers were pulling protesters away from the police carrying the climber. As the West Pole Climber was taken away from the pole, space opened to the west of the West Pole, and there were no protesters between the pole and the police on the west side of it.[430] However, protesters including the plaintiff were still grouped around the eastern side of the pole and remained there after she was being carried away.

260 The West Pole Climber was carried by police officers (including Senior Constable Crane, Inspector Barras and Leading Senior Constable Evans) out of the crowd around the West Pole at approximately 12.33:15pm and was brought to the ground in front of the plastic water barriers. There were no protesters around them.[431] At that time a male voice can be heard on the audio of a body worn camera of one of the police saying 'Don't resist bitch'.[432] It was not possible to identify who said this, but I find from the tone and proximity of the voice to the body worn camera which recorded it, that it was one of the officers carrying and restraining the West Pole Climber. I accept Inspector Barras' evidence that it was not him.[433] I also find that the West Pole Climber was not in fact resisting. She was being held and carried in a position which was awkward for her on her back, had been dropped to the ground by the police carrying her and pulled by her backpack in a way which forced her head back, and was trying to get her hands to her face. She was closing her eyes tightly in apparent pain, which I find was because of the OC foam that had been sprayed on her while she was descending the West Pole and being removed from it. She did not appear to be resisting, but rather attempting to wipe her eyes with difficulty as her arms were held.

261 Inspector Barras accepted in cross-examination that he and other police had control of the West Pole Climber at the time when they were holding her and she was still on the West Pole, and after that time when they were carrying her. He also acknowledged that the Climber had not resisted arrest. However he observed other people in the

430 Evidence gathering footage (Exhibit D2).
431 Other than another protester on the ground next to them, who was also surrounded by police. Body worn camera of Cook (Exhibit P14); CCTV footage (Exhibit P8).
432 Body worn camera of Cook (Exhibit P14).
433 Transcript 03/03/25, T931.11-19 (Barras XXN).

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crowd were trying to rescue her.[434] I find that protesters were grabbing the Climber and trying to stop the police taking the Climber while the officers were carrying her through the crowd around the West Pole, but that there were no attempts to rescue her or to intervene in her being carried after 12.33pm when the police carrying her emerged from the crowd.[435]

262 Inspector Barras with a group of other officers then carried (and to some extent dragged) the West Pole Climber on her back past the plastic water barriers to the base of the MCEC steps by 12.33:25pm, where she was handcuffed behind her back and water was applied to her eyes and face.[436] Inspector Barras left her with general duties police, some of whom provided her with after care.[437]

263 At the same time that the West Pole Climber was being extracted from her ropes on the west side of the pole, there remained numerous protesters on the east side of the West Pole and a large number of police pressing against them from the east. A/Sergeant Bolzonello was in that group of police. At around 12.32:20pm, a police officer is heard on the body worn camera footage of A/Sergeant Bolzonello saying 'Withdraw, withdraw'. The police then stepped back to create some space between themselves and the protesters, but did not withdraw any further.[438] A/Sergeant Bolzonello and other police continued to press in towards the West Pole.[439] At a time around 12.32:45pm Senior Sergeant Howard, who is directing the 400 units, stated over the radio that 'We need to get our guys out of there. There's no way that we're going to be able to get through and grab that person'.[440] I find that, given that the East Pole Climber had run off by this time, he was referring to the West Pole Climber. Senior Sergeant Howard requested permission over police radio to tactically withdraw. A/Inspector Caldwell said on the police radio, 'If it's unsafe do that, if it's unsafe you can do that' and directs police to bring offenders back behind the plastic

434 Transcript 03/03/25, T925.08-T926.22; T931.11-26 (Barras XXN).
435 Body worn camera Cook (Exhibit P14).
436 Transcript 03/03/25, T905.16-27 (Barras XN); Body worn camera Cook (Exhibit P14).
437 Transcript 03/03/25, T906.07-20 (Barras XN).
438 Transcript 26/02/25, T713.06-29 (Barras XXN).
439 Body worn camera Bolzonello (Exhibit P9).
440 Exhibit P5.

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water barriers.[441] At about the same time, at 12.32:55 pm, Senior Constable Martin Balvin stated to other police officers 'we're gonna withdraw in a second alright?'[442]

264 At just before 12.33pm, the body worn camera footage of Sergeant Saunders, who was at that time in the group of officers approaching from the south east side of the West Pole, shows an arm being extended and spraying towards a protester at head level. At this time the protesters mostly had their backs towards the police and were facing towards the West Pole or were bending and crouching away from the police. Then there is a male voice saying immediately after 'enough, enough, enough'.[443] I find from the tone and proximity of the voice that it was a police officer and not a protester who said these words, and also conclude from the visual element of the footage that it was a response to the spraying of protesters with OC foam.[444]

265 Subsequently, around 25 seconds later, at about 12.33:25pm, Sergeant Guthrie in a position near Sergeant Saunders on the south side of the West Pole, reached over police officers in front of her, towards the West Pole, and deployed OC foam in a long spray which hit the plaintiff directly, and also hit other protesters.[445] This deployment of foam is the subject of the first claim of battery and is addressed in more detail below.

266 The plaintiff and other protesters moved away from the West Pole, moving in front of the police grouped on the east side of the pole. A group of around six protesters remained. Some of them had been sprayed by OC foam and were on the ground, and others appeared to be assisting them to get up and move away.

267 During the time between and 12.32pm to 12.34pm, other police were dealing with

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441 Exhibit P5.

442 Body worn camera of Balvin (Exhibit P16). See also Statement of Agreed Facts [127];

443 Body worn camera of Saunders (Exhibit P7). See also Statement of Agreed Facts, [129]

444 The plaintiff submitted that it was a particular police officer, but there was no evidence referred to which established that officer's identity. See Plaintiff's Response to Defendant's Answers to Common Questions and Plaintiff's Answers to Common Questions, [53.3]. Sergeant Saunders was the officer who was originally identified by the State in its Defence dated 12 May 2023 as having sprayed the plaintiff on the first occasion, and although Sergeant Saunders was not a witness, he was on notice of the allegations against him that he had sprayed a protester (having given an outline of evidence dated 12 July 2024 which was filed in the proceeding on that date).

445 Body worn camera of Saunders (Exhibit P7); see also Body worn camera of Kirk (Exhibit D26); Body worn camera of Turner (Exhibit D24); Evidence gathering footage (Exhibit D2); Statement of Agreed Facts, [143].

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people on the ground behind the group at the West Pole and in front of the police barrier. In some cases they were apparently simply helping protesters up and moving them away, and in other cases they pulled them out of the crowd to a position in front of the barriers and restrained them on the ground, then led them towards the MCEC entrance.[446] At about 12.34:15pm, A/Inspector Caldwell gave an instruction over police radio:

> Alright bring the offenders back, bring the offenders back behind the water barriers, back behind the water barriers for a slow withdrawal behind the water barriers. Make sure the arrested people move first and then tactically withdraw behind water barriers and then set up lines. So if we're doing aftercare on people and we're arresting them, make sure they're behind the barriers, get behind the barriers.[447]

268 At about 12.33:40pm, First Constable Jonathon Kirk stated to another officer 'let's withdraw I think we've got em' and a male voice says 'yes'.[448]

269 At about 12.34:45pm, police from the 301 unit and general police moved backwards away from the West Pole, walking backwards to the plastic water barriers, still facing protesters. Many protesters were shouting at the police, some of them very aggressively, and other protesters who were filming or photographing police with cameras and phones.[449] This continued for some minutes, with protesters slowly moving away from the area.

270 At approximately 12.36:20pm, the body worn camera of officer Martin Balvin records conversations between police officers, saying 'we should have waited until [the Climbers] hit the ground'; 'we just should have said no'; 'why didn't we just stay back … we should have just kept the bubble we had and get 'em down and then we could have gotten them out easy' and 'at least there was some summary justice'.[450]

271 By 12.42pm, there were few protesters left in the MCEC forecourt area, and police were behind the plastic water filled barriers.[451] At 12.53pm, A/Inspector Caldwell

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446 Body worn camera of unidentified officer (Exhibit P71); Exhibits P8 and P74 (CCTV footage).
447 Transcript of Radio Call (Exhibit P5); Audio of radio channel 0705 (Exhibit P23).
448 Body worn camera of Kirk (Exhibit D26).
449 Body worn camera of unidentified officer (Exhibit P71).
450 Body worn camera of Balvin (Exhibit P16); Statement of Agreed Facts, 162.
451 Body worn camera of unidentified officer (Exhibit P71).

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made a call over the radio to 300 and 400 team sergeants to have them report to the building for a 'hot debrief'.[452] At 1.30pm, an IMT meeting was held led by A/Commander Tully. Minutes of the meeting record:

> **INTELLIGENCE**
>
> **…**
>
> - Currently @ 1315 two protesters climbed convention centre, have been removed and OC was deployed.
>
> - 12 arrests confirms at 1218hrs
>
> …
>
> **OPERATIONS**
>
> **Tony**
>
> - Planned arrest for the 2 climbers (apparently only 1 of the climbers were arrested – to be confirmed)
>
> - 4 OC deployments and after care provided
>
> - Appears to have quietened down for time being.[453]

272 In recounting the events, it is finally relevant to observe,[454] that there was no evidence given by any police witness during the trial that they said the words 'you are hindering police', or words to that effect. The footage of 20 body worn cameras, and of two evidence gathering cameras[455] was in evidence and no submission was made that the words were audible on any of that footage. I did not hear the words on any of the footage and conclude on the balance of probabilities that they were not said.

The events involving the plaintiff

273 The plaintiff moved to a position under the West Pole at around 12.26pm, after a protest organiser signalled to protesters to move around the poles.[456] He gave evidence that he moved there to 'join the people underneath the poles to take that space and protect them from' anything 'bad' that might happen to them, after he had

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452 Transcript of Radio Call (Exhibit P5); Audio of radio channel 0705 (Exhibit P23); Transcript 03/03/25, T910.04-10 (Barras XXN).

453 Transcript 20/02/25, T437.04-15 (Tully XN); North West Metro Region IMT #16 - Op IMARC – RPOC, Minutes dated 30 October 2019, time 1330 hour (Exhibit P65).

454 In response to **Common Question 3(m)(vi):** Did Police Officers say words to the effect of 'you are hindering police' under the West Pole?'.

455 Exhibits P6, D1 and D2.

456 See above at [229] and [245].

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seen 'earlier in the day police activity that was heavy handed'.[457] He said that although it was clear from watching the footage while in Court that the police were trying to apprehend the West Pole Climber, this was not clear to him at the time.[458] He gave evidence that it was confusing and chaotic.[459] He also gave evidence that the situation was confusing because police were spraying the West Pole Climber with OC foam as she was still trying to come down, and that he wanted to protect her from 'the police coming in and doing something like this to her'.[460]

274 I do not accept the plaintiff's evidence that he moved to the West Pole to protect other protesters, rather than to seek to prevent the arrest of the West Pole Climber. The use of OC foam at the East Pole occurred after the plaintiff had moved to the West Pole. There was no evidence that *before* the plaintiff moved to the West Pole he had observed any specific 'heavy handed police activity' at the MCEC.

275 I find that the plaintiff moved to the West Pole to protect the West Pole Climber, not only to permit her to descend safely but also to prevent police from reaching her. I also find that although the situation was very confusing and chaotic, and police had not given a specific warning to the protesters around the West Pole that they were trying to arrest the West Pole Climber, he was aware that police wanted to arrest her. However, I also find that after he had been at the West Pole for some minutes and observed the West Pole Climber being sprayed with OC foam as she was climbing down, he also intended to stay to hold some space to provide some protection to her.[461]

276 The evidence gathering footage and CCTV footage shows the plaintiff standing fairly still from the time that he moves to the West Pole, and looking around at events behind

457 Transcript 18/02/25, T143.06-26 (Plaintiff XN).
458 Transcript 18/02/25, T176.24-T177.11 (Plaintiff XXN).
459 Transcript 18/02/25, T183.06-25 (Plaintiff XXN).
460 Transcript 18/02/25, T177.16-25 (Plaintiff XXN).
461 Ultimately, the plaintiff's objective in standing at the West Pole linking arms with other protesters, of protecting the West Pole Climber from arrest, has limited relevance. No reliance is placed on s 462A to justify Sergeant Guthrie's use of force. It is said to be justified by self-defence. As discussed further below, it was not suggested that the plaintiff was being violent, or doing more than linking arms with other protesters. The State does rely on s 462A to justify A/Sergeant Bolzonello's use of force, but by the time of that deployment of OC foam the plaintiff was no longer standing at the West Pole with linked arms but moving away from it.

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him at the East Pole and up towards the West Pole Climber. Early on before the police wedge first moves in, he can be seen laughing on one occasion. When police later attempt to move in on the West Pole in a wedge formation, the plaintiff continues to stand still, although is jostled by other protesters around him, and is facing the West Pole with his back to the police behind him. He is not speaking and appears expressionless. Body worn camera footage from behind the plaintiff also shows him to be standing fairly still, facing the West Pole, with his back to police. Body worn camera footage to the side and in front of him also shows him standing still, facing the West Pole with his head slightly bowed down, and jostled by the movement of protesters around him.

277 When OC foam sprays were directed towards the West Pole Climber and other protesters at around 12.32pm or just before, some blobs of foam land on the plaintiff's hair and backpack while he continued to stand facing the West Pole.[462] There were groups of protesters on the west side of the West Pole and to the plaintiff's right who were facing police and confronting police verbally, but the plaintiff and the persons with whom he had linked arms did not appear to be engaging with police verbally or physically.

278 The plaintiff gave evidence that when the police moved on the West Pole and there was OC foam deployed and shouting from police and protesters, he felt unsafe and 'began to disassociate' and that this, and the confusion he felt, affected his state of mind.[463] It was submitted by the State that this evidence should not be accepted as it was not referred to in medical reports.[464] I do accept the plaintiff's evidence that he was confused and was at times disassociated or disconnected from what was going on around him. It is consistent with his demeanour and posture at the time after police advanced on the West Pole, which is that he had his head down and appeared (as far as can be seen given that he had glasses on), fairly expressionless. Although 'disassociation' was not referred to in medical reports, I do not take the absence of

462 Evidence gathering footage (Exhibit P6); Body worn camera of Saunders (Exhibit P7).
463 Transcript 18/02/25, T144.12-19; T148.14-23; T149.05-11 (Plaintiff XN); T177.02-09 (Plaintiff XXN).
464 Defendant's Primary Submissions [94.3].

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reference to the issue in the reports to indicate that he did not, at the time of the IMARC event, experience a sense of disassociation or disconnection.[465]

279 The State also contended that the plaintiff's evidence that he felt scared and anxious should not be accepted because he had linked arms with other protesters and did not attempt to leave the area.[466] I accept the plaintiff's evidence that he did feel anxious and confused, and that there was not an immediate way form him to leave his position.[467] He had linked arms with other protesters at a time prior to the police advance while the situation was calm. After the police advance from the east, and given the police presence to the west by the time the situation became chaotic, I accept that there was no ready way for the plaintiff to leave the area as he was surrounded by protesters for most of the time. When a space opened up at his left there was a large number of police there, some of whom were displaying OC foam cannisters.[468] I accept that he would not have regarded it as an option to move in that direction as he had already been hit by OC foam being sprayed over his head towards the West Pole Climber. It was rational not to want to move towards a position where police were apparently threatening to deploy OC foam.

The deployment of OC foam on the plaintiff by Sergeant Guthrie

280 Sergeant Guthrie was a member of the PORT protester extraction team at the IMARC event on 30 October 2019, reporting to Inspector Barras. She had at that time just started in the training wing, and had completed PORT training.[469] Sergeant Guthrie wore a body worn camera on that day, but it was not functioning during the Relevant Time Period. She could not recall precisely why but she gave evidence that it could have been because she did try to turn the camera on but it was not operational as her camera had been damaged the previous day when it had been ripped off her by a protester and fallen on the ground.[470]

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465 Transcript 18/02/25, T178.01-07 (Plaintiff XXN).
466 Defendant's Primary Submissions, [94.4].
467 Transcript 18/02/25, Transcript T174.19-T176.13 (Plaintiff XXN).
468 This was the plaintiff's evidence (Transcript 18/02/25, T176.03-13 (Plaintiff XXN)), which is confirmed by video footage: Evidence gathering footage (Exhibit D2).
469 Transcript 04/03/25, T1070.02-22; T1071.03-19 (Guthrie XN).
470 Transcript 04/03/25, T1073.04-16 (Guthrie XN).

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281 On the morning of 30 October 2019, Sergeant Guthrie was physically located at the top of the stairs at the MCEC, from which position she could be tasked to move whenever protester extraction skills were required. From that position she observed the Climbers climbing the poles. She was not party to any discussion about what the Climbers were doing or whether they were committing offences.[471]

282 Sergeant Guthrie gave evidence that after a decision had been made to move in to attempt to arrest the Climbers, it became a 'quite physical and chaotic confrontation between the police and the protesters at the base of the poles'.[472] She observed police moving towards the West Pole in a wedge attempting to arrest the West Pole Climber.

283 Sergeant Guthrie gave evidence that she was instructed by A/Inspector Caldwell to 'go down and assist to help bolster the police line and the police resources to the altercations that were happening.'[473] A/Inspector Caldwell, who gave evidence prior to Sergeant Guthrie, did not give evidence of having given any direction to Sergeant Guthrie. Inspector Barras, to whom Sergeant Guthrie reported, gave evidence that he did not give Sergeant Guthrie any direction to advance into the group of protesters or any other direction about the West Pole Climber.[474] Sergeant Guthrie later gave evidence in cross-examination that she did not remember the instruction she said had been given by A/Inspector Caldwell and agreed that she was 'reconstructing' what she thought logically may have happened.[475] I find, taking into account that A/Inspector Caldwell did not give evidence of any instruction to Sergeant Guthrie, and that she accepted that she had no recollection of such an instruction and was reconstructing it based on what she thought was likely, that she was not given any instruction to assist the police at the West Pole by A/Inspector Caldwell.

284 Sergeant Guthrie was not aware of what the West Pole Climber was being arrested for as she had not heard the radio direction in relation to arresting the Climbers for

471 Transcript 04/03/25, T1073.17-T1074.12 (Guthrie XN).
472 Transcript 04/03/25, T1074.16-18 (Guthrie XN).
473 Transcript 04/03/25, T1074.18-23 (Guthrie XN).
474 Transcript 03/03/25, T932.17-30 (Barras XXN).
475 Transcript 05/03/25, T1150.20-30 (Guthrie XXN).

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trespass. She had not observed the Climbers do anything violent.[476]

285 Video footage shows Sergeant Guthrie, at approximately 12.31pm, having moved down from the MCEC steps, walking around the back of the police at the south and southeast of the West Pole, and who were by that time no longer in a wedge but broadly grouped in a line facing the protesters.[477] Sergeant Guthrie said that she was moving around to position herself and 'get a better vantage point',[478] and to:

> …mak[e] sure that I'm in the right position as the supervisor so that I've got the best observation of what's happening through the police line … Because as the supervisor it's my job to keep that line where it needs to be and controlled, and if I need to make a decision to use other tactical actions, that's where I would make that decision from, at the rear there.[479]

286 Sergeant Guthrie did not explain in her evidence what she meant by her role as a 'supervisor'. She did not have a particular role as supervisor of a PORT team on the day, and was instead a member of the protester extraction team. No other police officer gave evidence that she had a role as supervisor.

287 Sergeant Guthrie was carrying a small cannister of OC foam, as there was 'not a need' to carry a larger cannister in her role in the protester extraction team. At some point after she had joined the police at the West Pole, a police officer gave her a large OC foam cannister.[480]

288 Sergeant Guthrie's evidence was that she was not aware at the time whether police attempts to reach the West Pole Climber were succeeding. Her concern was that the police were not successfully holding a police line and that she perceived a risk of 'losing that safe area behind us and the possible pathway into the venue'.[481] Her evidence in chief was that she considered that it was necessary 'to fix that line and bolster that line to prevent a potential crowd crush over the top of the members, or into storming of the venue essentially'.[482] She saw that protesters were not responding

476 Transcript 04/03/25, T1074.13-T1075.23 (Guthrie XN); 05/03/25, T1149.23-T1150.04 (Guthrie XXN).
477 Evidence gathering footage (Exhibit D2); CCTV footage (Exhibit P8).
478 Transcript 04/03/25, T1093.09 (Guthrie XN).
479 Transcript 04/03/25, T1093.12-21 (Guthrie XN).
480 Transcript 04/03/25, T1079.01-16 (Guthrie XN).
481 Transcript 04/03/25, T1080.01-05 (Guthrie XN)
482 Transcript 04/03/25, T1079.29-T1080.14 (Guthrie XN).

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to police requests to 'move back', and were linking arms and stopping the police from moving through the crowd to reach the West Pole Climber.[483] Her evidence was that protesters were being asked to 'move back' because the crowd 'was pushing against the police line which was then encroaching on that safe area'.[484]

289 The body worn camera footage of Sergeant Saunders shows that at 12.33pm, Sergeant Guthrie was standing to the south of the West Pole, with two police officers in between her and the protesters around the West Pole. At 12.33:20pm, she reached over the top of two officers to spray OC foam then brought her arm with the cannister back to adjust the pin on the cannister. At about 12.33:25pm, she extended her arm again and sprayed the plaintiff with bursts of OC foam for two seconds.[485] I accept her evidence that she said 'Spray' as or just before she deployed the OC foam.[486] At this time, the plaintiff was standing facing the West Pole, with his back mainly towards Sergeant Guthrie. The OC foam hit his face and hair.

290 Sergeant Guthrie gave evidence in her examination in chief that she sprayed because the police line was 'not as steady as it needs to be', and:

> …then there's members that were trying to effect an arrest. In the process of that and what was happening in front of the police line, I formed the opinion that the best course of action at this stage was to use my spray.[487]

291 Sergeant Guthrie said it was appropriate to use the OC foam to 'ensure the safety of myself and the safety of the police members and in particular, the safety of the members trying to effect the arrest to my left'.[488] The reference here to 'the arrest to my left' was to activity in relation to a protester on the ground that the State sought to introduce in its defence at trial, for which leave was refused, primarily because there had been no notice in witness outlines or otherwise that any other relevant arrest had

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483 Transcript 04/03/25, T1083.01-10; T1086.09-19 (Guthrie XN).
484 Transcript 04/03/25, T1083.18-28 (Guthrie XN).
485 Evidence gathering footage (Exhibit D2); Body worn camera of Saunders (Exhibit P7); Body worn camera of Kirk (Exhibit D26).
486 Transcript 05/03/25, T1167.31-T1168.03 (Guthrie XXN).
487 Transcript 04/03/25, T1095.08-14 (Guthrie XN).
488 Transcript 04/03/25, T1095.16-19 (Guthrie XN).

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taken place.[489] At that time, there were several police standing to the left of Sergeant Guthrie, and to the left of them, police officers were bending or kneeling and a protester was visible on the ground. No evidence had been given that an arrest was taking place, and there was no evidence as to whether the protester was arrested or assisted to get up. These officers and protesters to Sergeant Guthrie's left were three to four metres in front of the plaintiff and on the other side of the West Pole from him. There were two or three police officers between Sergeant Guthrie and the people kneeling on the ground.[490]

292 Sergeant Guthrie gave evidence that 'as per the public order training the supervisor stands at the rear and you would come over the top of the police line and spray between the other police members'[491] and that she sprayed the plaintiff and protesters near him because:

> I was concerned for the safety of myself and my members, particularly the ones on the ground, mainly around the crowd crush situation, but also I was concerned for the safety of members that were being pushed against and because of the imminent breach of the peace that was taking place.[492]

293 Sergeant Guthrie said that the people that she sprayed:

> …were still there at the front of the police line causing the issues and being – pushing/being aggressive towards the police, and failing to move out of that safe working space so that the police had a safe area to (a), conduct the arrest to my left, but (b), keep the members in front of me safe where they should be and in that formation.

294 In cross-examination, Sergeant Guthrie said that the plaintiff was part of a group of protesters who were 'pushing up against police', being the police in front of her 'in the police line'.[493] However, she also acknowledged that she could not actually see the

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489 *Brown v State of Victoria (No 2)* [2025] VSC 59. I note also that the evidence at trial, in the form of a use of form she completed shortly after the events, indicated that Sergeant Guthrie had not perceived that any other arrest was relevant to her deployment of OC foam. See [308]-[309] below.

490 Exhibit P18 (Battersby phone footage). Exhibit P8 (CCTV footage). Body worn camera of McKenna (Exhibit D29).

491 Transcript 04/03/25, T1095.29-T1096.01 (Guthrie XN).

492 Transcript 04/03/25, T1096.15-21 (Guthrie XN). See also Transcript 05/03/25, T1140.12-21 where Sergeant Guthrie again gave evidence in cross-examination that it is 'public order training that the supervisor is at the rear and that they are to hold the OC spray, and if they find it necessary and justified to use the OC spray over the top of the police line… that is my role.'

493 Transcript 04/03/25, T1114.19-27 (Guthrie XXN).

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bodies of the plaintiff and protesters with him and that she could not remember anything about what she saw of the top half of their bodies that indicated that they were pushing. She conceded that she did not in fact see them pushing.[494] She said the reason she thought they were pushing is because of the police jostling around her and 'the yelling and chaotic scenes that was happening around us'.[495] The police were not, however, losing their footing or stepping back towards her.[496] She did not hear or see the plaintiff or the protesters around him yelling, and did not remember what they were doing.[497]

295 Sergeant Guthrie's evidence in cross-examination was that the plaintiff and the group of protesters around him:

> … were contributing to the crowd crush because the pushing up against the police line had previously happened and it was continuing, and they were within that safe working space of those members, or the officers that were on the ground. All it took was for them to move forward and crush those members on the ground.[498]

296 At the time Sergeant Guthrie sprayed the plaintiff, he was not moving (other than being jostled in the crowd) and had his arms locked with other protesters who were also not moving toward police.

297 Sergeant Guthrie gave evidence that she could not see the West Pole Climber at the time she was deploying OC foam, but said she believed that the West Pole Climber was being arrested somewhere to her left.[499] In cross-examination, it was put to Sergeant Guthrie that she was in a position before she had deployed OC foam that the West Pole Climber had already been removed from the West Pole some time earlier, and she was aware this had occurred before spraying but she did not accept this.[500] This ultimately was of limited significance because in cross-examination Sergeant Guthrie said that she did not use the OC foam to assist in effecting the arrest of the

494 Transcript 04/03/25, T1116.04-19; T1117.09-11 (Guthrie XXN).
495 Transcript 04/03/25, T1117.17-25 (Guthrie XXN).
496 CCTV footage (Exhibit P8).
497 Transcript 04/03/25, T1118.03-29 (Guthrie XXN).
498 Transcript 05/03/25, T1147.21-27 (Guthrie XXN).
499 Transcript 04/03/25, T1097.25-T1098.07 (Guthrie XN).
500 Transcript 05/03/25, T1156.05-T1160.12 (Guthrie XXN).

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Climber, nor another arrest. She said that she used it in 'self-defence' and in response to a 'breach of the peace', and her overall purpose of deploying the foam was to 'help the police officers that were trying to bolster the line'.[501]

298 After Sergeant Guthrie had used the OC foam, she checked on the police officers that were on the ground and then returned to the top of the MCEC steps.[502]

299 After being sprayed with OC foam, the plaintiff and other protesters moved away from the West Pole towards the Yarra River, moving along the space in front of the police line on the east side of the West Pole, crouching, with arms around their heads and hands to their faces. What occurred as the plaintiff moved away is addressed further in the context of the deployment of foam by A/Sergeant Bolzonello, below.

Was the deployment of foam by Sergeant Guthrie a battery?

300 The State admits that Sergeant Guthrie directly sprayed the plaintiff with OC foam.[503] That is also evident from the video evidence referred to above. Sergeant Guthrie accepted in evidence that she intended to deploy the OC foam in the direction of the plaintiff and the protesters near him.[504] The deployment of OC foam by Sergeant Guthrie on the plaintiff was a voluntary act which constituted a direct use of force.

301 The question is whether there was a lawful justification for that direct use of force on the plaintiff. The State in its Further Amended Defence relied on the lawful justifications of self-defence under s 322K of the *Crimes Act* and the common law, and s 462A of the *Crimes Act*. It pleaded that Sergeant Guthrie's use of force was a response to:

> (i) the Plaintiff hindering her and other police in the execution of their duties [footnote in the Further Amended Defence: 'Such duties being their lawful duties as police officers to: arrest the west pole climber; take steps to avoid the potential of a crowd crush; and take steps to mitigate the risk of physical harm to police members and protesters'];
>
> (ii) the Plaintiff attempting to prevent the safe arrest of the west pole

501 Transcript 05/03/25, T1160.26-T1161.14; T1162.18-26 (Guthrie XXN).
502 Transcript 04/03/25, T1104.01-10 (Guthrie XN).
503 Further Amended Defence, [30](c); Defendant's Primary Submissions, [20].
504 Transcript 04/03/25, T1096.01-14 (Guthrie XN); 05/03/25, T1177.06-13 (Guthrie XXN).

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climber;

(iii) the Plaintiff hindering and resisting police in the safe arrest of the west pole climber;

(iv) the presence of other protesters under the west pole encroaching and remaining on, and rendering unsafe, the area to her left;

(v) the conduct of other protesters who were hindering police by refusing to move away from the area under the west pole; and

(vi) her concern about the potential for a crowd crush which could cause injuries to protesters and police members.[505]

No defence of breach of the peace

302 Sergeant Guthrie in her evidence said that one reason she sprayed the plaintiff and the protesters near him was 'because of the breach of the peace',[506] or 'imminent breach of the peace'.[507] The State did not rely in its defence to any justification based on keeping the peace, and had removed an original allegation in the defence that Sergeant Guthrie's use of force was 'informed by the need to restore the peace'.[508]

303 The State's position in not relying on a defence of use of force being justified by common law powers of keeping the peace was well founded. The evidence is clear from the video footage that the plaintiff was not at any time violent, nor doing anything that could suggest that he would engage in violence, nor any other act which would lead to or promote violence. Sergeant Guthrie's own evidence, that she did not observe the plaintiff pushing or yelling or doing anything other than standing with his arms linked, was consistent with the video evidence. I accept that she had seen actual pushing and crowding around the West Pole, some minutes before she deployed the OC foam on the plaintiff and other protesters.[509] However, I find that this was her observation from her original vantage point on the steps and that she did

505 Further Amended Defence, [30(e)].

506 Transcript 04/03/25, T1101.17-23; T1113.07-10 (Guthrie XN).

507 Transcript 04/03/25, T1096.15-21 (Guthrie XN).

508 Amended Defence to Amended Statement of Claim, [30(e)]. See also the State's confirmation that it 'disavowed reliance on breach of the peace in respect of Mr Brown': Transcript 04/03/25, T1121.01-05.

509 Transcript 05/03/25, T1183.01-07 (Guthrie XXN). Sergeant Guthrie put the timing of seeing this pushing at about two minutes before she sprayed.

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not observe the pushing in the time immediately before she deployed OC foam.[510]

304 There was no basis in substance for Sergeant Guthrie's assertion that her use of force related to a breach or imminent breach of the peace. The State's position in not taking that defence accords as a matter of substance with the evidence.

No reliance on justification pursuant to s 462A

305 Sergeant Guthrie first gave evidence in her evidence in chief that her deployment of foam was part of efforts to enable police officers to gain access to the West Pole Climber, to arrest her.[511] However, she later gave clear evidence in cross-examination that she 'wasn't there to arrest the climber' and that helping in the arrest of the West Pole Climber was *not* her objective or one of the reasons for which she used force.[512]

306 The State did not press the defence based on s 462A with respect to Sergeant Guthrie's use of force.[513] Again, that is appropriate. The CCTV footage shows that the West Pole Climber had been apprehended by police and brought under their complete physical control, out of the crowd and back to the plastic water barriers by the time Sergeant Guthrie deployed OC foam.

Self-defence as a justification for Sergeant Guthrie's use of OC foam

307 The State contends that Sergeant Guthrie's use of force in deploying OC foam on the plaintiff was justified in defence of others,[514] and it is this defence which must be considered in some detail, given the various ways in which Sergeant Guthrie explained her position in her evidence.

308 Relevantly, Sergeant Guthrie's evidence was that she sprayed the plaintiff and the protesters standing with him with OC foam:

(a) to keep herself safe, as she thought that the plaintiff posed a threat to her

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510 Further, the video footage in evidence shows that much of the jostling of the police around the West Pole, which might have been observed from the stairs, is caused not by protesters pushing against police, but by police pushing against those protesters who were not moving away from the poles, with a few exceptions of individual protesters who pushed back.

511 Transcript 04/03/25, T1083.18-28 (Guthrie XN). See also 05/03/25, T1134.18-21 (Guthrie XXN).

512 Transcript 05/03/25, T1160.13-T1161.08 (Guthrie XXN).

513 Transcript 11/06/25, T12.08-10; T16.25-27 (Submissions).

514 Defendant's Primary Submissions, [42].

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personally;[515]

(b) to keep other officers safe, including police in front of her who she perceived were being pushed by protesters, and police to her left, towards whom who she believed the plaintiff and other protesters may move, and

(c) to bolster a police line and have protesters move away from the police line.

309 Before considering this evidence further, it is relevant to refer to a use of force report completed by Sergeant Guthrie at some time shortly after the IMARC Protest, when she arrived back at a police station. Sergeant Guthrie completed a computer based use of force form with respect to deployment of OC foam on 30 October 2019. Sergeant Guthrie entered the following in the 'Narrative' section of the form:

> During PORT wedge formation members of demonstrator group were pushing, shoving, punching and grabbing at police. Police were trying to gain ground to set up a cordon for a safe arrest of a protestor. Warning given to protestors to stop pushing and OC spray shown. Protestors continued to push and not heed to police warning so large OC foam deployed on multiple protestors to clear them from police. Force worked successfully as protestors fled and nil injuries or exposure to members. [516]

310 The form refers to a 'cordon for a safe arrest of *a* protester' which was the subject of concerted police action. As Sergeant Guthrie gave evidence that she was not aware of any order to arrest a person other than the West Pole Climber,[517] and because it was the arrest of the West Pole Climber for which the direction to use the PORT wedge formation was given, I infer that this reference in the form was to the arrest of the West Pole Climber, and not to any other person.

311 The narrative completed by Sergeant Guthrie in the Use of Force form was not an accurate description of what occurred. It involves at least three material inaccuracies.

(a) First, the video footage (including CCTV and evidence gathering footage) shows that in the period prior to her use of OC foam there was no police wedge, and rather, there was an extended grouping of police between the plastic water

515 Transcript 05/03/25, T1199.02-16 (Guthrie XXN).
516 Use of Force form (Guthrie) dated 30 October 2019 (Exhibit P29).
517 Transcript 05/03/25, T1184.23-27 (Guthrie XXN).

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barriers and the protesters at the West Pole, and to the east of the West Pole.

(b) Secondly, the video footage of the time prior to and while Sergeant Guthrie sprayed the plaintiff, did not show the plaintiff or the protesters next to him pushing, shoving, punching or grabbing at police. There were also no protesters in proximity to Sergeant Guthrie who were doing so.

(c) Thirdly, there was no evidence that a warning was given to the plaintiff or protesters near him to stop pushing, shoving, punching or grabbing at police, whether in the form of body worn camera footage[518] or by the evidence of any officer (including Sergeant Guthrie). I accept Sergeant Guthrie's evidence that she said 'Spray' as or just before she deployed the OC foam, but find that she did not give any other warning to the plaintiff and protesters around him. I find that no such warning was given by any officer, both because of the absence of any evidence to that effect, and also because the plaintiff and those around him were not in fact pushing, but were pressing together near the West Pole, with their heads down and their backs to the police.

312 I also find that it was not an accurate description by Sergeant Guthrie of what she subjectively perceived of the events. I accept that the events were rapidly evolving and to some degree chaotic, so that it would have been difficult for Sergeant Guthrie to ascertain exactly what was happening all around her and then to recall it accurately in completing the Use of Force Form. However, I find that she could not have believed at the time of completing the form she was part of a wedge formation. She was rather at the back of a police line.[519] I find that she did not actually believe, when completing the form that protesters were pushing, shoving, punching or grabbing at police at the time and in the location relevant to her deployment of OC foam. She gave evidence that from what she could see of the protesters on whom she deployed OC foam they were not pushing, shoving, punching or grabbing at police.[520] Her evidence was

518 In particular Exhibit P7, the body worn camera footage of Sergeant Saunders, which showed Sergeant Guthrie spraying from a position next to Sergeant Saunders.
519 Transcript 05/03/25, T1151.15-21; T1166.24-31; T1184.14-17 (Guthrie XXN).
520 Transcript 04/03/25, T1116.04-19; T1117.09-11 (Guthrie XXN).

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instead that the sense of jostling from police around her and the yelling made her think that these protesters were pushing.[521] Sergeant Guthrie also gave evidence that she could not recall giving a warning to the plaintiff and the protesters other than 'Spray', and could not recall giving a warning to stop pushing, shoving, punching or grabbing at police.[522]

Deployment by Sergeant Guthrie was not in defence of herself

313 Turning to the three reasons that Sergeant Guthrie identified in her evidence as reasons for her deployment of OC foam, one which is readily dismissed is that she used the foam in self-defence because she was concerned for her own safety,[523] and she seriously believed that the plaintiff posed a threat to her.[524]

314 The State did not, in closing submissions, contend that Sergeant Guthrie had acted in her own defence. Again, this was an appropriate position for the State to take. I do not accept Sergeant Guthrie's evidence that she feared that the plaintiff posed a threat to her.

315 First, the objective circumstances in which Sergeant Guthrie deployed the OC foam were such as to make it inherently unlikely that she would have feared that the plaintiff could harm her at the time that she deployed OC foam on him, and in the time preceding it. The plaintiff was standing by the West Pole, not moving towards the police, and instead was huddled towards the pole with arms linked with two other protesters. There were two police officers between Sergeant Guthrie and the group that included the plaintiff, and she also had space behind her which enabled her to step back. Although she gave evidence that she was not aware of some aspects of what was in front of her, she accepted in evidence that she could see the top half of the group of people including the plaintiff and did not see them pushing or yelling. Even taking into account the loud and dynamic circumstances around her, there was

521 Transcript 04/03/25, T1117.17-T1118.09 (Guthrie XXN).

522 Transcript 05/03/25, T1167.27-T1168.19 (Guthrie XXN). Sergeant Guthrie said later in cross-examination that she believed she gave a warning to 'stop pushing' but could not remember doing so and said she believed she had done so 'because that's what generally happens': Transcript 05/03/25, T1184.31-T1185.14.

523 Transcript 04/03/25, T1096.15-21 (Guthrie XN).

524 Transcript 05/03/25, T1199.04-11 (Guthrie XXN).

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nothing in the objective circumstances to induce a fear in Sergeant Guthrie that the plaintiff posed a risk to her that called for self-defence. Secondly, I find from the action of Sergeant Guthrie in straining to move forward towards the plaintiff and reaching over the top of other police to spray, when she could instead have moved back, that she did not actually fear that the plaintiff would harm her.

Deployment by Sergeant Guthrie was not necessary or reasonable in response to her perception of the need to defend other police

316 Sergeant Guthrie gave evidence that she believed that other police officers in front of her and to her left were at risk from protesters pushing them or harming them in a 'crowd crush'.

317 I accept that Sergeant Guthrie subjectively believed that the protesters in front of the police were pushing police at some point prior to her deployment of OC foam. This was based on the jostling of police in front of her, the yelling around her, and her observations some minutes before of protesters pushing towards police. I do not accept that she believed that it was the plaintiff and the protesters next to him who were pushing police at the time. She was not specifically aware of the plaintiff,[525] and to the extent that she saw the group of protesters of which he was part, she did not see them pushing.

318 I find that the pushing that she believed was occurring was not particularly forceful or violent. She did not give evidence that the pushing she perceived was of any particular force. The degree to which police were being jostled in front of her or around her as visible on all video footage was not suggestive of any strong pushing against them. When it was put to Sergeant Guthrie in cross-examination that 'pushing is not violent or serious physical confrontation', she gave evidence that it was 'violent and it can be a serious physical confrontation'.[526] However I do not accept that she subjectively believed that the pushing she perceived in the period prior to her deploying spray was a violent and serious physical confrontation. I also do not accept her evidence that she believed that the plaintiff or those with him were contributing

525 Transcript 05/03/25, T1199.28-T1200.05 (Guthrie XXN).
526 Transcript 05/03/25, T1202.05-07 (Guthrie XXN).

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to a 'crowd crush'. They were standing still at the West Pole and making no move towards police or others.

319 Sergeant Guthrie also gave evidence (which the State emphasised)[527] that it was possible for the plaintiff and those with him 'to move forward and crush those members on the ground' to her left. This was entirely speculative, and not based on any objective circumstance at the time.[528] I accept that Sergeant Guthrie believed, in the context of the jostling and yelling around her, and the confusion that this may have created, that some protesters were pushing and created a safety risk, the extent of which was to some degree unpredictable. However there was nothing about the plaintiff's conduct or circumstances that suggested he would move forward or that presented any kind of risk to any of the people around him.

320 I find that Sergeant Guthrie did not believe it was necessary to use the serious and disabling measure of deploying OC foam on the plaintiff in response to the degree of risk she actually perceived to police around her. I have found that she believed that there was some pushing from protesters and police around her, but not from the plaintiff. The deployment of OC foam in response to that belief was an entirely disproportionate response to the circumstances that she perceived, and was not a reasonable response in the circumstances.

321 Further, even if I did accept that Sergeant Guthrie believed there was a risk that the plaintiff and those with him may move forward and crush or harm the police on the ground, there were no reasonable grounds to think that use of OC foam was a necessary, reasonable or proportionate way of trying to protect those police officers. Spraying the plaintiff and other protesters in the face with OC foam when they had police and other protesters around them could have created a greater risk that they

527 Transcript 11/06/25, T28.18-24; T29.06-09 (Submissions).

528 See the discussion in *George v Rockett* referred to at [66]-[67] above of reasonable grounds and what may be left to surmise and conjecture.

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may move in an uncontrolled way and harm someone.[529]

322 The State submitted that there was one additional matter I should take into account in considering self-defence. That was the 'police training as to the wedge… and where the supervisor stands in that wedge… so if OC foam is to be deployed in that instance, it's almost always going to be someone one person back'.[530] This is not, in my view, a relevant matter to consider with respect to Sergeant Guthrie's use of OC foam, as she was not in a wedge formation, and the evidence does not establish that she had any role as a supervisor in a wedge or otherwise. Sergeant Guthrie also gave evidence that she did not think it was an alternative to withdraw 'and leave my members there'.[531] When asked about this in re-examination, she said:

> Well, it's unsafe for my members to be there by themselves, like, as the supervisor it's my responsibility for my members. So if I was to just leave them withdraw by myself I'm not giving what I should be doing as a supervisor to those members. I need to be keeping myself safe and them safe. So if I was to withdraw I would have to withdraw the members as well and given the situation and what was occurring in front of them, and my recollection of what was occurring in front of the police line, withdrawing at that point was not an option specifically as well for the members that were trying to effect the arrest on the ground to the left of me. [532]

323 However, there was no evidence that Sergeant Guthrie had any particular role as a supervisor on 30 October 2019. She was not a supervisor of any of the PORT teams, and was instead a member of the protester extraction team, reporting to Inspector Barras. The individual PORT teams each had sergeants or senior sergeants in the supervisor role who had their own specific responsibilities with respect to the police officers of each team. Inspector Barras gave evidence that he did not give Sergeant Guthrie any direction to advance into the group of protesters or any other direction about the West Pole Climber.[533] I have rejected Sergeant Guthrie's evidence that she

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529 In fact, video footage does show a protester who had been standing with the plaintiff stepping forward towards the police on the ground after being hit with the OC foam sprayed by Sergeant Guthrie (although not contacting the police on the ground): Body worn camera of McKay (Exhibit D25). That actual response, which obviously could not have been known by Sergeant Guthrie prior to deploying spray, is not evidence from which it could be concluded that she should have known it was disproportionate. It does however illustrate the potentially unpredictable effects of use of OC spray.

530 Transcript 11/06/25, T30.25-31.01 (Submissions).

531 Transcript 05/03/25, T1199.12-13 (Guthrie XXN); T1219.06-19 (Guthrie RE-XN).

532 Transcript 05/03/25, T1219.11-23 (Guthrie RE-XN).

533 Transcript 03/03/25, T932.17-30 (Barras XN).

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was instructed by A/Inspector Caldwell to go and bolster the line, as she accepted she did not recall any such instruction and her evidence about the instruction was based on her own reconstruction of what she thought was likely.[534]

324 It was, therefore, not apparent which police officers Sergeant Guthrie regarded herself as supervising, or whether any police officer would have regarded her as being in a position of supervision over them. It was, instead, apparent from Sergeant Guthrie's evidence that she had formed her own views about the need to 'get this [police] line sorted and bolster our presence'.[535] It was also simply to make the plaintiff and others around him move back from a police line that she perceived needed to be established in front of the barriers.[536] I find that Sergeant Guthrie was acting on her own initiative in moving down from her staging point on the MCEC steps to the grouping of police near the West Pole. She could have withdrawn at any time.

Maintaining a police line

325 The State referred in closing submissions to Sergeant Guthrie's intention being to 'help bolster the police line in the context of a physical and chaotic confrontation between police and protesters'.[537] Sergeant Guthrie did not ultimately say that her objective of maintaining a police line was the reason for her use of OC foam, but rather that she felt threatened and that the safety of other police was at risk,[538] however she did refer to an overall objective of maintaining or bolstering a police line. For completeness, I have considered whether the maintenance of a police line in this context could constitute a self-defence justification for Sergeant Guthrie's use of force.

326 Sergeant Guthrie's evidence was that when she went to the West Pole, her objective was to maintain the police line, prevent a potential crowd crush over the top of the officers, and prevent protesters storming the MCEC venue.[539] She described that she considered it necessary to get the line 'sorted', by which she meant to:

534 See [283] above.
535 Transcript 04/03/25, T1093.27-T1094.18 (Guthrie XN).
536 Transcript 04/03/25, T1083.01-10; T1083.18-28; T1086.09-19. (Guthrie XN).
537 Defendant's Primary Submissions, [37].
538 Transcript 05/03/25, T1181.24-30 (Guthrie XXN).
539 Transcript 04/03/25, T1079.29-T1080.14 (Guthrie XN).

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> … have that more structured, so with public order tactics a structured line would be a nice straight line where the members are should to shoulder, toe to toe, so that there is no gaps and that they can be essentially a steadfast wall. But as you can sort of see, the members are all a bit skew-whiff and all over the place because of the chaotic scene in front of them with the protesters. So it's more about trying to get them back into position to hold that police line.
>
> ….
>
> Yes, so the primary mission of me deploying my spray at the crowd that I could see from the back of the police line was to get them to stop the, I guess, aggression, and to move them away from the safe area of police so that police still had that – the police and myself, the line there, still were safe, essentially.[540]

327 Sergeant Guthrie's evidence as to the location and nature of the 'line' that she was seeking to maintain varied through her evidence. This was understandable to some extent in that she was taken in her evidence through her involvement at the West Pole and her objectives and concerns could understandably have changed as time progressed. Sergeant Guthrie's evidence in chief was that she left her position on the stairs as she perceived a risk of 'losing that safe area behind us' and necessary to 'prevent a potential crowd crush over the top of the members, or into storming of the venue essentially'.[541] At that time, there was a police line both in front of and behind the barriers. She also said, consistent with this, that she was seeking to maintain a police line to protect a safe space *behind* her,[542] rather than in front of her where protesters were grouped around the West Pole.

328 Sergeant Guthrie did not give evidence that she believed, that it was necessary to deploy OC foam at the plaintiff in order to prevent officers behind her being harmed, or the MCEC being stormed by protesters. There is no other evidence which could suggest that this was in fact part of her objective. The evidence does not provide any objective basis to suggest there was a risk of a crowd crush behind the barriers or over the police line, or of a storming of the MCEC. It is clear from all video footage that the concern of the protesters was to form a barrier around the East Pole and West Pole and there was no indication in protester behaviour that they were seeking to breach the police line between the forecourt and the building which was supported by the

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540 Transcript, 04/03/25, T1094.03-13; T1095.21-27 (Guthrie XN)
541 Transcript 04/03/25, T1079.29-T1080.14 (Guthrie XN).
542 Transcript 05/03/25, T1167.08-10 (Guthrie XXN).

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water barriers.

329 Sergeant Guthrie also gave evidence that when she moved down towards the West Pole, she was seeking to move the police line *forward*, in the area towards the pole in front of her.[543] She said her view was that 'we really need to get this line sorted and bolster our presence against the pushing of protesters against the line at that point'.[544] There was no evidence of orders specifically to maintain a police line at that point.[545] Rather, I find that the police who were in those positions were there because of the directions to arrest the West Pole Climber, and because of the earlier direction to advance in a wedge on the West Pole for the purpose of that arrest.

Self-defence - conclusion

330 I do not accept that Sergeant Guthrie's use of force by deploying OC foam on the plaintiff was in self-defence of herself or others.

Sergeant Guthrie's deployment of foam was a battery

331 The State has failed to establish any lawful justification for the deployment of OC foam on the plaintiff by Sergeant Guthrie, and it constituted a battery.

The deployment of OC foam on the plaintiff by A/Sergeant Bolzonello

332 A/Sergeant Bolzonello was an Acting Sergeant assigned to PORT at the time of IMARC on 30 October 2019. By that date, he had been an officer of PORT for just over three years, and had received PORT public order training. By the time of the trial, he had been an officer of Victoria Police for eleven years.[546] A/Sergeant Bolzonello was a member of the PORT Blue 401 team and had received the PORT briefing in advance of his deployment at the MCEC for the IMARC event. [547]

333 A/Sergeant Bolzonello's PORT team was involved in the attempts to arrest the East Pole Climber. A/Sergeant Bolzonello gave evidence that a direction was given by a

543 Transcript 05/03/25, T1181.10-23 (Guthrie XXN).
544 Transcript 04/03/25, T1093.27-T1095.02 (Guthrie XN).
545 I note also that use of force to maintain a police line, cordon or formation would only be authorised by s 462A if it is has the necessary connection to effecting, or assisting in effecting an arrest, and not simply to maintain a tactical formation.
546 Transcript 26/02/25, T614.01-08 (Bolzonello XN).
547 Transcript 26/02/25, T621.28-T622.22 (Bolzonello XN); Exhibit P31.

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PORT supervisor to arrest the Climbers as they were descending the poles. He was instructed to hold space at the bottom of the poles so that when the Climbers came down, their arrest could be effected.[548] He said he took a small team of officers to gather around the base of the East Pole.[549] While at the East Pole, protesters were approaching police and he pushed them away from the police line.[550] He was given a command to withdraw from the area over the tactical radio channel, which he and his team followed.[551] Soon afterwards, he received a verbal direction from a senior sergeant to form a wedge and move through the crowd of protesters to the East Pole to arrest the East Pole Climber.[552]

334 A/Sergeant Bolzonello was the supervisor in the middle of the wedge that was then formed at the East Pole.[553] He gave evidence in chief that his team was not advancing through the protester group and the objective of arresting the East Pole Climber was 'in a stalemate with the protest group', and that after a risk assessment, he deployed OC foam on the protesters who subsequently moved away.[554] At around this time, a voice is heard on the body worn camera of A/Sergeant Bolzonello saying 'get back' and then 'we've lost him, we've lost him', which was a reference to the East Pole Climber.[555] A/Sergeant Bolzonello then moved towards the West Pole and the protesters surrounding that pole, with the intention of assisting in the arrest of the West Pole Climber.[556] He approached the West Pole initially behind other police officers, and could see the West Pole Climber on the pole.[557]

335 At approximately 12.32pm, A/Sergeant Bolzonello reached over the top of other police in the wedge formation to spray OC foam towards protesters in the area between him and the West Pole. At 12.32:20pm, a police officer is heard on his body worn camera to say 'Withdraw, withdraw, withdraw'. A/Sergeant Bolzonello appears

548 Transcript 26/02/25, T623.05-T624.06 (Bolzonello XN).
549 Transcript 26/02/25, T624.07-11 (Bolzonello XN).
550 Transcript 26/02/25, T626.15-22 (Bolzonello XN).
551 Transcript 26/02/25, T626.25-T627.17 (Bolzonello XN).
552 Transcript 26/02/25, T629.20-T630.05 (Bolzonello XN).
553 Transcript 26/02/25, T630.22-24 (Bolzonello XN).
554 Transcript 26/02/25, T631.21-632.01 (Bolzonello XN).
555 Body worn camera of Bolzonello (Exhibit P9). See also Statement of Agreed Facts [80].
556 Transcript 26/02/25, T635.29-T636.01 (Bolzonello XN).
557 Transcript 26/02/25, T637.02-05 (Bolzonello XN).

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to have moved to the side closer to the Yarra River, in a line of police with about a metre between them and the protesters. A loud voice is heard saying 'get back, get back, get back'.[558] The protesters in front of him had numerous people, including the police holding the West Pole Climber, behind them. It is unlikely that the protesters could have moved back at that time without potential harm to those behind them.

336 A/Sergeant Bolzonello remained on the east side of the West Pole, and described himself as being in a 'very loose wedge',[559] which can be seen on the CCTV footage as being more of a broad grouping of police on the east facing towards the protesters crowded around the West Pole. A/Sergeant Bolzonello gave evidence that he and other police were not making progress towards the West Pole and was 'again in that stalemate type of situation where we weren't making any progress'.[560] He deployed OC foam on the group of protesters in front of him, and the protesters moved away. He gave evidence that the reason for that deployment was to effect the arrest of the West Pole Climber.[561]

337 At about 12.33pm, the plaintiff, after being sprayed with OC foam by Sergeant Guthrie, put his head down and tried to move in the direction of the Yarra River. He was initially hampered by having his arms linked with other protesters but then moved towards the river, along and in front of the line of police (and not towards police). As he moved in that direction, the body worn camera of a police officer in the grouping of police on the east side of the West Pole shows an arm in police officer uniform reach out and grab the plaintiff's backpack from behind as the plaintiff moved away, which caused the plaintiff to stop momentarily, before the arm of the police officer pushed him forward again.[562] A/Sergeant Bolzonello, from his position in the line of police, sprayed OC foam in the plaintiff's direction as the plaintiff moved past him from his left to his right towards the Yarra River, so that OC foam hit the

558 Body worn camera of Bolzonello (Exhibit P9).
559 Transcript 26/02/25, T636.29-30 (Bolzonello XN).
560 Transcript 26/02/25, T637.09-24 (Bolzonello XN).
561 Transcript 26/02/25, T637.25-T638.02 (Bolzonello XN)
562 Body worn camera of Turner (Exhibit D24).

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plaintiff on the side of the face.[563] This was at approximately 12.33:30pm.[564] At the same time, A/Sergeant Bolzonello's body worn camera records a male voice saying loudly 'Get back, get back, get back'.

338 The plaintiff kept moving in front of police towards the Yarra River. He can then be seen being guided by a person in a high visibility orange vest, through the people standing between the poles and the river watching, towards a grassy space near the walkway along the river.[565]

339 By this time, the few remaining protesters around the West Pole had foam on their clothes and bodies, some were on the ground and others were helping each other move away from the West Pole. Police were watching from both sides of the West Pole.

340 The police around the east and south of the West Pole started retreating to a line in front of the barriers at approximately 12.33:45pm.

341 Later at 12.36pm, after the police had retreated back behind the water barriers, an officer walked along the line of officers where A/Sergeant Bolzonello was standing and told officers to check their equipment and asked whether there were any injuries. At 12.37pm, an officer standing behind the barriers and a line of police near A/Sergeant Bolzonello said 'It's all gone. Mine's empty.' Another police officer said, 'we needed to we needed to'. A/Sergeant Bolzonello said 'Yeah. Well mine's empty. I just was just like ch ch ch ch ch'. He later said 'It had to happen. We weren't getting anywhere, it had to happen'. Another police officer and says 'No injuries?'. An officer, possibly A/Sergeant Bolzonello said 'We didn't make an arrest'. He later says 'Yeah don't fuck with us any more'.[566]

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563 Body worn camera of Bolzonello (Exhibit P9); Evidence gathering footage) (Exhibit D2); Body worn camera of Turner (Exhibit D24); CCTV footage (Exhibit P8); Body worn camera of Schouten (Exhibit P13); Body worn camera of Balvin (Exhibit P16); Mobile phone video filmed by Thomas Battersby (Exhibit P18).

564 Body worn camera of Bolzonello (Exhibit P9); Body worn camera of Turner (Exhibit D24); Body worn camera of Balvin (Exhibit P16).

565 CCTV footage (Exhibit P8).

566 Body worn camera of Bolzonello (Exhibit P9).

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Did A/Sergeant Bolzonello's use of OC foam against the plaintiff constitute a battery?

342 The State admits that A/Sergeant Bolzonello directly sprayed the plaintiff with OC foam.[567] Again, the issue is whether there was a lawful excuse for the use of the OC foam.

343 A/Sergeant Bolzonello gave unequivocal evidence that he had no recollection of deploying OC foam at the plaintiff,[568] an understandable position given the passage of time, and the dynamic and at times chaotic events which formed the context of the deployment. However, he did recall using OC foam twice under the West Pole,[569] and gave evidence that his reason for advancing on the West Pole was to assist in the arrest of the West Pole Climber, which involved getting to the base of that pole.[570] However, he accepted that his evidence as to his reasons, and what he observed at the time, was based on what he believed he 'would have done',[571] and was a reconstruction based on his viewing of the video footage and his own memory.[572] The State contended that in the absence of evidence from A/Sergeant Bolzonello as to his actual perception of the circumstances and of his intentions in deploying OC foam on the plaintiff, it was entitled to make any submission as to the justification for his use of force that it could sustain on the evidence.[573]

344 The State submitted that A/Sergeant Bolzonello's use of force was justified:

(a) in self-defence, on the basis that he had a 'genuine fear for the safety of police members'; and

(b) pursuant to s 462A of the *Crimes Act*, on the basis that it was necessary to assist in effecting an arrest.[574]

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567 Further Amended Defence, [34](i). Defendant's Primary Submissions, [20].
568 Transcript 26/02/25, T645.30-T646.06 (Bolzonello XN); T669.04-14 (Bolzonello XXN).
569 Transcript 26/02/25, T652.31-T653.06 (Bolzonello XN).
570 Transcript 26/02/25, T629.20-31; T653.13-19; T653.28-31 (Bolzonello XN).
571 Transcript 26/02/25, T726.10-13 (Bolzonello XXN).
572 Transcript 26/02/25, T703.02-06 (Bolzonello XXN). The State accepted this: Defendant's Primary Submissions, [50]; Transcript 11/06/25, T32.05-06 (Submissions).
573 Transcript 11/06/25, T31.23-T32.04 (Submissions).
574 Defendant's Primary Submissions, [51]-[53].

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345 The State accepted that A/Sergeant Bolzonello did not give evidence that he sprayed the plaintiff because he believed it was necessary to assist in effecting an arrest. It was submitted that this justification nevertheless applied, and that the Court should be satisfied from the other evidence before it that A/Sergeant Bolzonello had 'two motivating factors in mind when deploying OC foam':

(a) 'he had a genuine fear for the safety of police members and in particular SC Turner who, in the second before OC foam was deployed, was in physical contact with the plaintiff'; and

(b) '(though he himself did not recall it after the passage of 6 years) he was acting as part of the continued effort to arrest the west pole climber by clearing the area under the west pole so that there was a sterile area in which arrests could occur'.[575]

346 These asserted justifications are addressed in turn.

Deployment of OC foam by A/Sergeant Bolzonello not justified in self-defence or defence of other police

347 The State submitted that the Court should find that A/Sergeant Bolzonello believed that the plaintiff ran towards the police line, and was in physical contact with Senior Constable Turner and multiple police officers' safety equipment,[576] justifying deployment of OC foam in their defence.

348 The evidence does not support such a finding.

349 First, A/Sergeant Bolzonello did not give evidence that he had a particular concern for the safety of Senior Constable Turner, or any other individual officer around him. He gave evidence after viewing his body worn camera footage in court, in response to a question as to whether he made an 'assessment' about the plaintiff:

> Only that he was within that sterile area where we'd already created space, and being within the personal space of other police officers, not allowing us room

575 Defendant's Primary Submissions, [51].
576 Defendant's Primary Submissions, [47.2].

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to move.[577]

350 It is unclear whether this evidence was given from recollection, or reconstruction. However I do not accept that it was evidence that A/Sergeant Bolzonello held a concern about any actual risk to the safety of officers. Rather, it reflects an intention to keep a particular space between police and the protesters.

351 Other sources of evidence do not support a finding that A/Sergeant Bolzonello genuinely feared that the plaintiff presented a risk to the safety of police. The body worn camera of A/Sergeant Bolzonello shows that it is Senior Constable Turner who pulled, then pushed the plaintiff away as he was trying to get away after being sprayed with foam by Sergeant Guthrie. A/Sergeant Bolzonello accepted that the footage showed that it was Senior Constable Turner pushing the plaintiff.[578] I accept that the nuances of that movement may not have been appreciated by A/Sergeant Bolzonello given that the events were fast-moving. A/Sergeant Bolzonello could not at the time see as clearly as it is possible for the Court now to observe the events on body worn camera footage. However, there is simply nothing about the plaintiff's movements that suggests he was intending to come into contact with police or their equipment. A/Sergeant Bolzonello accepted that the plaintiff was running into clear space, and was not doing anything violent when he was moving.[579] This is consistent with the video footage. The plaintiff keeps moving with his head down, obviously affected by OC foam and trying to move away through the narrow open area, and not towards the police.

352 Secondly, it was submitted that A/Sergeant Bolzonello intended to 'gain compliance' and guard against the risk that the plaintiff would draw him or others into the crowd.[580] It was not clear from A/Sergeant Bolzonello's evidence or the video footage what direction he could have thought the plaintiff should have been complying with. The only command A/Sergeant Bolzonello appears to have given was in the period

577 Transcript 26/02/25, T658.04-10 (Bolzonello XN).
578 Transcript 26/02/25, T746.12-25 (Bolzonello XXN).
579 Transcript 26/02/25, T745.23-24; T746.22-25 (Bolzonello XXN).
580 Transcript 26/02/25, T616.12-16 (Bolzonello XN); T685.18-19; T711.06-10 (Bolzonello XXN); T772.31-T773.10 (Bolzonello RE-XN).

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preceding the plaintiff trying to leave the West Pole, and was to 'get back'. I do not accept that A/Sergeant Bolzonello believed that by spraying the plaintiff as he moved past him, he would be 'gaining compliance' with a direction to 'get back', nor any other direction. It is also unclear why A/Sergeant Bolzonello was giving orders to 'get back' by the time he deployed OC foam on the plaintiff at 12.33:30pm. From what was occurring around him, a more appropriate response would have been for A/Sergeant Bolzonello to move back or withdraw. For around a minute prior to that time, from about 12.32.20pm onwards, there had been directions given by unidentified police in the vicinity of A/Sergeant Bolzonello to 'withdraw', and by 12.33pm, A/Inspector Caldwell gave a direction on police radio in response to Senior Sergeant Howard's request that police could withdraw if it was unsafe.[581]

353 There is also no conduct of the plaintiff from which I could infer that A/Sergeant Bolzonello believed the plaintiff was seeking to draw him or any other police officer into the crowd. There was no real crowd at that time, as most protesters were moving away from the West Pole or were on the ground affected by OC foam. The plaintiff was crouching and moving away from the West Pole and most of the police, and moving along the front of the group of police to the east of the pole where A/Sergeant Bolzonello was. Nothing about the plaintiff's conduct suggested that he was trying to contact police officers or move them into any space, and there is no evidence from which I could infer that A/Sergeant Bolzonello believed this.

354 I find that A/Sergeant Bolzonello did not perceive any risk to himself or other police officers from the plaintiff and did not deploy OC foam on him in self-defence. I am reinforced in that conclusion by the evidence of the use of force form that he completed on the day, which did not refer to any need to use OC foam in self-defence, or to defend other police officers.[582]

581 See [263] above.

582 Use of Force form (Bolzonello) dated 30 October 2019 (Exhibit P64); Transcript 26/02/25, T750.31-T752.02 (Bolzonello XXN).

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Deployment of OC foam by A/Sergeant Bolzonello not justified in attempting to effect arrest of West Pole Climber

355 A/Sergeant Bolzonello initially gave evidence that his objective in deploying OC foam was to move protesters away 'so that [other] police could effect the arrest'[583] and to disperse the crowd.[584] Later in cross-examination, he said that the deployment of OC foam towards the plaintiff was in defence of the police officers around him, and disavowed any objective of assisting an arrest.[585]

356 The State accepted that A/Sergeant Bolzonello did not have any recollection of his deployment of OC foam on the plaintiff. Nevertheless, the State contended that the Court should make positive findings from the video footage that A/Sergeant Bolzonello's state of mind was that he subjectively perceived that an arrest of the West Pole Climber was still being attempted or effected and the use of force by deploying OC foam was necessary for this reason.[586]

357 A/Sergeant Bolzonello gave evidence that he did not know where the West Pole Climber was at the time he sprayed OC foam,[587] or whether she had been apprehended.[588] He accepted that it was likely that she was in police custody at the time.[589] This is consistent with his evidence that he could see the West Pole Climber as he approached the West Pole, and his evidence, based on reviewing video footage, that he continued to be able see the West Pole Climber when he came nearer to the pole.[590] That is consistent with the fact that the original purpose for him moving on the West Pole was in compliance with the direction to arrest the West Pole Climber. I find that he did see that the West Pole Climber had descended from the pole some time prior to deploying OC foam.[591]

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583 Transcript 26/02/25, T636.09-12; T656.05-09 (Bolzonello XN); T726.10-13 (Bolzonello XXN).
584 Transcript 26/02/25, T646.07-14 (Bolzonello XN).
585 Transcript 26/02/25, T727.15-22 (Bolzonello XXN).
586 Defendant's Primary Submissions, [47]-[48].
587 Transcript 26/02/25, T717.04-11 (Bolzonello XXN).
588 Transcript 26/02/25, T717.25-31 (Bolzonello XXN).
589 Transcript 26/02/25, T723.15-28; T726.03-13 (Bolzonello XXN).
590 Transcript 26/02/25, T642.25-29 (Bolzonello XN).
591 Transcript 26/02/25, T716.07-14; T718.31-T719.02 (Bolzonello XXN). Body worn camera of Bolzonello (Exhibit P9). A/Sergeant Bolzonello is tall, at 6 foot two inches (T699.02 (Bolzonello XXN)). Although

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358 Further, before A/Sergeant Bolzonello deployed OC foam on the plaintiff, different police officers in his vicinity on the east side of the West Pole were saying 'stop spraying'[592] and 'enough, enough'[593]. I find from those statements by police officers, who were in close physical proximity to A/Sergeant Bolzonello, that they were of the opinion at the time that no use of OC foam was necessary to move protesters to effect an arrest. There is no basis on which to find that A/Sergeant Bolzonello had that opinion.

359 I find that at the time that he deployed OC foam on the plaintiff, A/Sergeant Bolzonello was aware that the West Pole Climber was no longer at the West Pole, had been removed by police officers and was under their control. His objective was instead to make the plaintiff 'get back' to create a 'sterile area' between him and protesters, and he deployed foam on the plaintiff because he was 'within the sterile area that we'd already created'.[594] This is consistent with the fact that he said 'get back, get back get, back' at about the time he deployed OC foam on the plaintiff as the plaintiff moved past him, and that he deployed foam in order 'to try and gain compliance out of the protest group to follow direction that was given … to move away and get back'.[595]

360 I conclude from the evidence as a whole that when he deployed OC foam on the plaintiff, A/Sergeant Bolzonello did not have an objective of assisting in the effect of an arrest.

361 It is appropriate to make some observations in light of A/Sergeant Bolzonello's evidence that an arrest would have been complete only after the offender was taken back behind a police line, handcuffed, cautioned and had their rights explained.[596]

362 The State also submitted, relying on that evidence of A/Sergeant Bolzonello, that the

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the body worn camera, which is attached to the police member's chest, does not necessarily show the direction in which the member is looking, I find that his field of vision would have included the West Pole and the protesters in front of it.

592 Body worn camera of Bhutia (Exhibit P15); Body worn camera of Kirk (Exhibit D26).

593 Body worn camera of Saunders (Exhibit P7).

594 Transcript 26/02/25, T662.17-18 (Bolzonello XN).

595 Body worn camera of Bolzonello (Exhibit P9). Transcript 26/02/25, T656.30-T657.07 (Bolzonello XXN).

596 Transcript 26/02/25, T660.15-T661.02 (Bolzonello XN); T670.12-18 (Bolzonello XXN).

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process of arresting the West Pole Climber

> … was not completed until she was cut down, moved behind the safety barriers, handcuffed and cautioned and receiving aftercare. That period of time did not conclude until 12:34:40pm. Sgt Guthrie and A/Sgt Bolzonello's deployment of OC foam occurred before that arrest was complete.[597]

363 The State also relied, for that submission, on the evidence of Inspector Barras, which was to the effect that until processing of a person to identify them has concluded, the arrest is not complete,[598] and the evidence of A/Inspector Caldwell. His evidence did not go that far, in that his view was that the arrest would be complete 'when the person is brought back into a safe area'.[599]

364 It is incorrect, in my view, to interpret s 462A of the *Crimes Act* as permitting use of force in aid of the objective of taking steps for 'processing' an offender after they are under police control. The reference to 'arrest' in s 462A does not, in my view, permit the adoption of any such extended concept of an arrest. The term 'arrest' is not defined in the *Crimes Act,* and is to be understood by reference to the common law meaning.[600] A person may be under arrest as soon as they have been deprived of their liberty and informed of their arrest. There will be a sufficient deprivation of liberty if the person is under the arrester's control.[601] In this case, there was no evidence as to when the West Pole Climber was informed that she was under arrest, but she was plainly safely under the control of police as soon as she was carried past the plastic water barriers, which occurred before A/Sergeant Bolzonello's deployment of spray.

365 More importantly, s 462A permits use of force to effect or assist in effecting an arrest only to the extent that force is believed 'on reasonable grounds to be necessary' and is 'not disproportionate to' the objective of arrest. In a situation such as this where the West Pole climber was under the complete physical control of the police, and not the subject of any interference with that control at the relevant time, there were no reasonable grounds to believe that force in the form of deployment of OC foam on any

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597 Defendant's Primary Submissions, [28].
598 Transcript 03/03/25, T906.21-T907.13 (Barras XN).
599 Transcript 03/03/25, T995.30-T997.14 (Caldwell XN).
600 *Slaveski,* [103]-[104] (Kyrou J, as his Honour then was).
601 *Slaveski*, [106] (Kyrou J).

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person was necessary and not disproportionate to an objective of assisting to effect that arrest. No assistance to effect the arrest was necessary as the plaintiff, and other protesters, were not obstructing the arrest.

366 Even if I accepted the State's submission that A/Sergeant Bolzonello had an objective of assisting in effecting the arrest of the West Pole Climber, as he perceived that she was still in the crowd being carried away by police,[602] use of force by spraying OC foam at the plaintiff as he moved past him was not a necessary or proportionate use of force for that purpose. It was counterproductive. If the objective was to effect the arrest of the West Pole Climber, telling the protesters in front of him to 'get back' and spraying OC foam at them for that same purpose was counterproductive as it had the potential effect of pushing the protesters back onto the crowd where police had been working to arrest her and carry her out of the crowd.

A/Sergeant Bolzonello's deployment of foam was a battery

367 The State has failed to establish any lawful justification for the deployment of OC foam on the plaintiff by A/Sergeant Bolzonello, and it constituted a battery.

'Sterile areas'

368 It is also appropriate in the context of this group proceeding to make some observations on the concept of use of force to maintain a 'sterile area' or 'safe working space' to facilitate the making of an arrest, as those concepts assumed some prominence in the evidence of the witnesses and in the State's submissions.

369 The State submitted that to the extent that the creation of a 'sterile area' or 'safe area' by using force is necessary for a safe arrest, the use of force to create that area is justified by s 462A of the *Crimes Act*.[603] Some of the evidence of police officers suggested a belief that use of force would be justified to create a 'sterile area' or 'safe area' so that arrests which *may* be necessary could take place. For example, Sergeant Guthrie's evidence indicated a belief that it was justified to use force in order to maintain a police 'working space', including through the establishment of a police

602 Although in fact she was by then in police custody near the plastic water barriers.
603 Transcript 11/06/25, T12.18-21 (Submissions); Defendant's Primary Submissions [31]-[35].

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line, even where it was not directly related to a particular arrest objective.[604]

370 In closing submissions, the State made clear that it was *not* contended that, absent a specific arrest objective, the creation of a 'safe area' or 'sterile area' was justified.[605] However in light of the evidence on this issue I make some brief observations.

371 If police have been lawfully directed to arrest a person, or if a police officer has formed a view that a specific lawful arrest is necessary, the use of force which is authorised by s 462A will in my view encompass the use of force necessary (and proportionate to the arrest objective) to create a safe space in which the arrest may occur without injuring the person being arrested, people in the vicinity, or police officers. That space will be the minimum required to ensure safety of police, the arrestee, and third parties, while pursuing the objective of an arrest.

372 With respect to the particular justification of use of force by A/Sergeant Bolzonello, the State submitted that although the West Pole Climber had in fact been apprehended by police at the time of the spray, it was nevertheless justified for him to deploy OC foam to have protesters move away from the pole to create a 'sterile area… so that the arrest could be completed' given that he was not aware at the time whether all elements of an arrest had been completed.[606]

373 I do not accept that submission. The evidence of A/Sergeant Bolzonello is that he was aware by the time he deployed the OC foam on the plaintiff that the West Pole Climber was in police custody, but that he was *not* aware of her circumstances and whether she was surrounded by police or otherwise. In those circumstances, there were no reasonable grounds to believe that the use of force by deployment of OC foam was necessary. To conclude that in a state of uncertainty about whether the arrest had yet been effected or not, it is open to use force because of the possibility that it may assist an arrest, would both undermine the concept of necessity for the use of force, and would also have the effect of undermining the onus of establishing this defence on the

604 See the evidence discussed above at [295], [349, [368]-[378]. See also the similar views of A/Sergeant Bolzonello at Transcript 26/02/25, T657.29-T658.10 (Bolzonello XN).
605 Transcript 11/06/25, T12.21-25; T34.12-17 (Submissions).
606 Defendant's Primary Submissions, [50.3]-[50.4].

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police officer.

374 The State also submitted, based on evidence of Sergeant Lahman,[607] that:

> The use of OC foam is consistent with PORT training if the crowd it was used on was 'actively preventing the police from being able to move forward, so they are hindering police's ability to perform their functions'.[608]

375 The submissions did not identify any limit on the 'functions' which are said to be relevant for this purpose.[609] As a statement of legal proposition, the statement is inaccurate. It is too broad and inadequately specific. There is no general legal justification for police to use force if a person is 'hindering police's ability to perform their functions'. The legal justifications for police to use force are, as set out above at [147] above, the common law authorisations of use of force in self-defence or to prevent a breach or threatened breach of the peace; and the statutory authorisations in the *Crimes Act* in s 462A relating to arrests and s 322K relating to self-defence.

Findings as to what occurred after the Relevant Time Period

Common Question 5: What occurred during any debriefing by Police Officers about the events of the Relevant Time Period at the IMARC Protest?

376 The evidence established that there were debriefs of several kinds about the events in the Relevant Time Period at IMARC. Immediately after the events of the Relevant Time Period, there was at least one 'hot debrief', described in evidence as a type of informal debrief that occurs on site after an incident, as soon as practically possible.[610]

Hot debriefs

377 The Public Order Log and audio and transcript of police radio records A/Inspector Caldwell calling for a hot debrief with Senior Sergeants Vincent and Howard inside

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607 Transcript 06/03/25, T1348.09-18 (Lahman XN).

608 Defendant's Answers to Common Questions, [63].

609 Sergeant Lahman's evidence, in context, was also not limited in terms of functions of arrest or self-defence. He gave evidence as follows: If OC foam were to be deployed in circumstances of a group of police seeking to move forward and being unable to move forward because of a crowd immediately in their area, what would you say about whether or not the use of OC foam would be consistent or not consistent with PORT training?---If the crowd are actively preventing the police from being able to move forward, so they are hindering police's ability to perform their functions, the use of OC spray in that environment would be appropriate. Transcript 06/03/25, T1348.09-18 (Lahman XN).

610 Transcript 20/02/25, T457.01-09 (Tully XN); 03/03/25, T910.04-10 (Barras XXN); T998.19-27 (Caldwell XN); 26/02/25, T664.06-10 (Bolzonello XN).

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the MCEC glass doors at 12.54pm.[611] A/Inspector Caldwell gave evidence that this was the first chance for the officers to get together and discuss what the chronological order of events was, what occurred, and why.[612] The Public Order Log records the following, against the time 12.56pm, in relation to the arrest of the Climbers:

> Hot Debrief conducted by CALDWELL with section SGTS.
>
> Informed of plan conducted with PFC re arrest of protesters on Poles.
>
> - realised plan ended up not being as safe as possible as protesters got aggressive and resisted police
>
> - decided not to use Horses as will be unsafe for all involved
>
> - TACTICAL withdraw as unsafe for members
>
> - told section leaders don't need permission to withdraw if they determine unsafe then to make decision to withdraw
>
> - possible miscommunication between units and GD members, with
>
> - tactical withdrawal
>
> - GD's really good at taking direction
>
> - possible more OC Foam on standby for future protest as OC foam had run out on some section SGTS
>
> - praised efforts for all involved for movement of protesters.[613]

378 A further or continued hot debrief occurred at 12.56pm, with the incoming Inspector for the afternoon shift, Inspector Damien Jones, present as well as to have a handover.[614]

The comments of A/Sergeant Bolzonello

379 A/Sergeant Bolzonello had a discussion with other police officers immediately after the arrest of the West Pole Climber and associated events, which he described as a 'hot debrief'.[615] His body worn camera records a conversation including the following:

> [Bolzonello]: Mine's empty, I just was [cch cch cch which was accompanied by his arm extended moving across his body which I find was intended to

611 Public Order Log (Exhibit P30); Transcript of Radio Call (Exhibit P5); Audio of radio channel 0705 (Exhibit P23) (extract 14).
612 Transcript 03/03/25, T998.15-T999.11 (Caldwell XN).
613 Public Order Log (Exhibit P30).
614 Transcript 03/03/25, T999.26-T1000.13 (Caldwell XN).
615 Transcript 26/02/25, T663.22-T664.13 (Bolzonello XN).

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mimic a spraying action]

[Other police member]: They needed that.

[Bolzonello]: Yeah.

It had to happen.

Don't fuck with us anymore, we've had enough of your shit.

[Other police member]: Anyone affected by spray? No, thankyou.

[Bolzonello]: I was just ccch cch cch cch.[616]

380 A/Sergeant Bolzonello accepted in evidence that his comments were 'unprofessional' and explained that they were made when his adrenaline and emotions were high immediately after the incidents around the East and West Poles, which he described as involving 'a hostile environment'. He apologised to the Court for making them.[617]

381 The plaintiff submitted that A/Sergeant Bolzonello's comments were relevant to assessing his reasons for deploying OC foam against the plaintiff.[618] I do not think that any of A/Sergeant Bolzonello's comments, which included general observations about the protesters and about his use of OC foam, which was deployed on multiple people, sufficiently clearly relate to his deployment of OC foam on the plaintiff to take it into account in assessing his particular reasons for that action. The plaintiff also submitted that the comments made by A/Sergeant Bolzonello were relevant to the claims for aggravated and exemplary damages.[619] I consider A/Sergeant Bolzonello's comments in that context below.[620]

Human Rights Debrief dated 21 November 2019

382 The State submitted that whether or not a human rights debrief occurred, and the contents of any debrief, 'do not advance legal argument in this case, including any *Charter* case advanced'.[621] I have answered this question as Common Question 5 asks generally about debriefs relevant to events in the Relevant Time Period and there is

616 Body worn camera of Bolzonello (Exhibit P9).
617 Transcript 26/02/25, T761.04-07 (Bolzonello XXN).
618 Plaintiff's Primary Submissions, [66(c)], [69].
619 Plaintiff's Primary Submissions, [118], [122].
620 See [624].
621 Defendant's Response to Plaintiff's Answers to Common Questions and Defendant's Answers to Common Questions, [6].

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no reason to exclude a debrief with human rights subject matter.

383 A Victoria Police document titled 'Debrief – Human Rights – IMARC Protests' (the **Human Rights Debrief**) was prepared after IMARC by the Human Rights Portfolio Manager at Victoria Police, John Croker, for the Assistant Commissioner, Luke Cornelius, and the Executive Director of the Legal Services Department of Victoria Police, Finn McRae.[622] Mr Croker was not called to give evidence, but the Human Rights Debrief was put to A/Commander Tully, who gave evidence that he had not seen the debrief document,[623] but was aware of Mr Croker and that his role involved human rights assessments, and that he worked at Victoria Police.[624]

384 This Human Rights Debrief analysed decision making relevant to the prior preparation for and during the IMARC event, primarily by reference to the HRRA, and contained the following relevant observations:

(a) The HRRA is 'only as useful to members if they have seen it and understand how the Charter works and what is required under the[ir] legal obligations'.

(b) Specific and practical guidance on actions which are consistent with human rights that would assist police officers. Under the 'Feedback' section of the Human Rights Debrief, it stated:

> One area that could be strengthened at the planning stage and briefing stages is to more clearly and explicitly talk to thresholds of tolerated behaviour during protests, in order that members can understand where thresholds have been crossed and what they will be justified to do in the protests. For example, during the IMTs there were references to being 'proactive' and preventing the situation from developing/getting out of control, but what this tangibly meant was opaque and did not lend itself to human rights scrutiny in a meaningful way.
>
> More clearly delineating thresholds for intervention would give greater confidence that actions taken during the protests were proportionate and necessary to achieve a legitimate objective.[625]

(c) Instances of dehumanising language and sentiment being used towards

622 Victoria Police IMARC Protests **Human Rights Debrief** dated 21 November 2019 (Exhibit P32).
623 Transcript 21/02/25, T473.23-T474.04 (Tully XN).
624 Transcript 21/02/25, T487.01-07; T488.21 (Tully XXN).
625 Human Rights Debrief (Exhibit P32).

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protesters, which makes it challenging for police officers to respect the human rights of those protesters.

(d) That it is unclear 'from the protests whether frontline members understood how human rights related to their deployment.'[626]

IMARC Debrief conducted on 10 February 2020

385 A/Commander Tully attended a meeting at the State Police Operations Centre, Victoria Police Centre, on 10 February 2020 in which there was a debriefing about the entirety of IMARC across the four day event (the **IMARC Debrief**).[627] The IMARC Debrief was conducted as a group discussion, however, it was not focussed on the events subject to the Relevant Time Period. Matters discussed at the meeting were documented, and included discussions about better categorisation of body worn camera footage, resource allocation and improving the 'staging area'.[628]

386 Under the 'Discussion Points' section of the IMARC Debrief document, there is an 'Operations' subsection which observes that '[f]eedback supported tactics used by specialist units including Mounted and ORU'.[629] It did not identify the source of the feedback. The document also records several matters under the section 'What didn't work well', including resourcing, arrest processing and labelling of body worn camera footage. There was no reference to human rights considerations or protester complaints.[630]

Common Questions relating to police powers at IMARC and police officers' consideration as to their exercise

387 There are a number of Common Questions which raise legal issues arising from the events at IMARC. Common Questions 25A and 26 relate to the specific use of force against the plaintiff and any justifications for it, and have been addressed above by my findings with respect to the use of OC foam by Sergeant Guthrie and A/Sergeant

626 Human Rights Debrief (Exhibit P32).
627 Transcript 21/02/25, T511.17-18; T511.25 (Tully XXN); see generally **IMARC Debrief** conducted on 10 February 2020 (Exhibit P66)
628 Transcript 21/02/25, T500.30-31; T501.06-19 (Tully XXN).
629 IMARC Debrief (Exhibit P66).
630 IMARC Debrief (Exhibit P66).

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Bolzonello.[631]

Common Question 4: What was the source of power for the Police Officers carrying out the Advance and saying the words 'move'?

388 I have found above (at [248]) that when police moved in towards the West Pole in response to the direction to arrest the West Pole Climber, they said 'move' loudly and repeatedly. Common Question 4 raises the source of the power to give that direction to protesters.

389 The State submits:

> The power to give directions to move away from the poles or from the police line was the same as the power to effect the arrest; that is, s 458 of the *Crimes Act*.[632]

390 In support of this submission, the State refers to the evidence of:

(a) Commander Galliott, who referred to the need to have people move to enable police to make an arrest using their powers under ss 458 and 459 of the *Crimes Act*;[633] and

(b) A/Sergeant Bolzonello, who referred to the 'use of force provisions to move protesters away from the area to allow us to effect the arrest'.[634]

391 The State also submitted that to the extent that force was used in the advance, it was authorised pursuant to s 462A of the *Crimes Act* to the extent that the advance was to assist in the arrest of the Climbers; and/or s 322K of the *Crimes Act* and/or the common law to the extent that it was used in self-defence or defence of another.[635] The plaintiff did not agree with this submission, but focussed his submissions on the subjective understanding of police as to what source of power they were using.[636] As

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631 **Question 25A:** Did Police Officers use force against the Plaintiff as pleaded in the Amended Statement of Claim? **Question 26:** Was any use of force by Police Officers on the Plaintiff lawfully justified?

632 Defendant's Answers to Common Questions, [41].

633 Transcript 05/03/25, T1234.20-T1235.13 (Galliott XN).

634 Transcript 26/02/25, T640.26-T641.08 (Bolzonello XN).

635 Defendant's Answers to Common Questions, [40].

636 Plaintiff's Response to Defendant's Answers to Common Questions and Plaintiff's Answers to Common Questions, [27]-[32].

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a matter of the legal source of power, I consider that it is correct that s 462A and self-defence sources of power authorised the police to move through the crowd, subject to the compliance with the terms of those sections as to the necessity, proportionality and, in the case of s 322K, reasonableness of any use of force in the circumstances. Most protesters were not behaving in a way which would justify use of force pursuant to ss 462A or 322K, but it was evident from video footage that there were some instances of protester behaviour that may have justified *some* degree of use of force.[637]

392 The State submitted (and the plaintiff accepted) that the police were not exercising or purporting to exercise a power to give a 'move on' direction pursuant to s 6 of the *Summary Offences Act*, as this power is not available in the context of a protest.[638] This was also consistent with the evidence, as no police officer gave evidence that they considered the move on power was available to them. This is clearly correct. Section 6(1) of the *Summary Offences Act* provides power for a police officer to give a direction to a person or persons in a public place to leave the public place, or part of it, if the police officer suspects on reasonable grounds that:

> (a) the person is or persons are breaching, or likely to breach, the peace; or
>
> (b) the person is or persons are endangering, or likely to endanger, the safety of any other person; or
>
> (c) the behaviour of the person or persons is likely to cause injury to a person or damage to property or is otherwise a risk to public safety.

393 Section 6(4) makes it an offence to contravene such a direction without reasonable excuse. However, s 6(5) provides that s 6 does not apply to:

> … a person who, whether in the company of other persons or not, is –
>
> (a) picketing a place of employment; or
>
> (b) demonstrating or protesting about a particular issue; or
>
> (c) speaking, bearing or otherwise identifying with a banner, placard or sign or otherwise behaving in a way that is apparently intended to

637 It is inappropriate to identify any particular instances given that evidence was not directed to specific instances of protester behaviour or police behaviour towards protesters other than those that related to the plaintiff and the general police tactics in responding to the direction to arrest the Climbers.

638 Defendant's Answers to Common Questions, [42]; Plaintiff's Response to Defendant's Answers to Common Questions and Plaintiff's Answers to Common Questions, [30].

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publicise the person's view about a particular issue.

394 The circumstances in s 6(5)(b) and (c) applied to the IMARC Protest, given that protesters were protesting about particular issues[639] and were identifying with the banner strung up by the Climbers, which stated 'Blockade IMARC for Climate Justice'.

395 There was, however, no agreement about what the source of power used by police was to advance on the crowd and direct them to 'move'. The plaintiff submits that the evidence of the relevant police officers demonstrates that the police 'could not clearly and consistently identify the power that they considered that they were exercising at the IMARC Protest'.[640]

396 The plaintiff refers to the differences in the way the evidence of A/Inspector Caldwell, Inspector Barras, Commander Galliott, A/Sergeant Bolzonello and Sergeant Guthrie addressed the issue of the police advance and directions by police to 'move', and submitted that the differences in evidence indicated that the police did not in fact know or turn their mind to the power they were using. I do not accept that this is a well-founded criticism. In several cases, the officers were not actually involved in saying 'move' or directing the advance, and for that reason were not asked about any subjective view as to the source of power to do those things, and rather made more general observations about the source of power to give directions to move.[641]

397 A/Inspector Caldwell's evidence was that police were not using a particular power to direct people to 'move' but were 'telling the crowd move, it's a public order tactic in saying "move" to let the crowd know police are moving through'.[642]

398 The terms of Common Question 4, which are 'what was the source of power' for police officers to carry out the advance and say 'move' rather than what individual officers

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639 Including the conduct of mining companies, which was the subject of speeches during the day, and environmental issues including land rights, climate change and climate justice which were raised in chants and displayed on hand held posters.

640 Plaintiff's Response to Defendant's Answers to Common Questions and Plaintiff's Answers to Common Questions, [31].

641 Commander Galliott, Inspector Barras and A/Inspector Caldwell gave this more general evidence about the basis on which such directions could be given: Transcript 05/03/25, T1234.20-T1235.10 (Galliott XN); 03/03/25, T902.26-31 (Barras XN); T993.05-11 (Caldwell XN).

642 Transcript 03/03/25, T993.05-11 (Caldwell XN).

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thought the source of power was, involve a question of mixed fact and law, in that the legal powers need to be considered against the general conduct of the police at the IMARC event, but they do not call for an answer as to what individual officers thought. The plaintiff did not submit that the police officers did not have *any* source of power to move on the crowd and direct them to 'move'.

399 I am satisfied that the police direction to protesters to 'move' was, as described by A/Inspector Caldwell, both an appropriate police public order tactic when moving through a crowd, and an act which is, to the extent that it is an act necessarily preparatory to effecting an arrest, authorised by the arrest power in s 458 of the *Crimes Act*.

400 To the extent that the police advance on the poles and movement towards protesters, following the direction to arrest the Climbers, involved physical use of force by police in pushing against protesters or moving them aside with their hands, the source of the power to do so was s 462A of the *Crimes Act*, so long as any use of force in the advance was both necessary and proportionate to the objective of effecting the arrests.

Common Question 9(a): Assessments by PORT Tactical Commander or commanding officers about the risk of harm or injury to any protestors in giving the directions, orders and instructions

Superintendent Trimble and the decision to arrest

401 The plaintiff submits that there is no evidence that Superintendent Trimble considered the risk of harm to protesters when deciding that the Climbers should be arrested, and that he left consideration of that risk for A/Inspector Caldwell as the PORT Tactical Commander with the role of implementing the direction.[643] The State disputed that position on the basis that there was evidence that Superintendent Trimble, when giving the direction to arrest, considered the risk to protesters beneath the Climbers and the possibility that they may climb the poles again.[644]

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643 Plaintiff's Response to Defendant's Answers to Common Questions and Plaintiff's Answers to Common Questions, [71], referring to Transcript 20/02/25, T858.03-15 (Trimble XXN).

644 Defendant's Response to Plaintiff's Answers to Common Questions and Defendant's Answers to Common Questions, [24], referring to Transcript 28/02/25, T817.09-16; T820.20-24; T824.31-T825.10; T826.03-09 (Trimble XN); T847.16-17 (Trimble XXN).

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402 Superintendent Trimble's evidence was that in deciding whether to require the arrest of the Climbers, he was concerned that they had climbed with 'the one anchor point'[645] and they 'were going to fall on the people below them'.[646] He completed notes during the course of the day, not contemporaneously with the events but progressively as the day went on. In those notes he recorded 'two climbers - safety of person under as they only hanging by 1 pt. skills of climbers poor'.[647] He said that his concern as to the Climbers climbing the poles again was not specifically a safety consideration.[648]

403 The West Pole Climber was seized by police as soon as she was low enough on the West Pole for police to reach her, and she was carried by them and was within their control from the moment she was cut from the pole. It was accepted by Superintendent Trimble that the Climbers did not pose any risk to the public once they were down from the poles.[649]

404 There was no evidence that Superintendent Trimble specifically considered the risk of harm to protesters (or the Climbers) from the police activity that may be necessary to effect the arrests when he gave the direction.

405 The absence of consideration by Superintendent Trimble of the potential harm to persons that may arise in the course of arresting the Climbers when he made his decision to direct their arrest is striking given his concern with the risk posed by the Climbers being up the poles. The evidence does not provide a strong foundation for a view that the Climbers posed more than a theoretical risk of harm to members of the public, or to police officers, while up the poles or while descending them. The Climbers were up the poles for about 25 minutes before the direction to arrest was made.[650] If Superintendent Trimble did in fact regard the Climbers as posing any

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645 Transcript 28/02/25, T820.20-22 (Trimble XN).

646 Transcript 28/02/25, T819.16-18 (Trimble XN).

647 Superintendent Trimble Diary Notes (Exhibit P55). Superintendent Trimble gave evidence that he had experience in climbing, which informed his concern about a single anchor point having been used: Transcript 28/02/25, T817.13-T818.16 (Trimble XN). However, no notice had been given that any reliance would be placed on his opinion as to the methods used by the Climbers and I do not consider it appropriate to rely on his evidence as expert opinion.

648 Transcript 28/02/25, T847.16-17 (Trimble XXN).

649 Transcript 28/02/25, T847.15-21(Trimble XXN).

650 Transcript 28/02/25, T841.02-20 (Trimble XXN).

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realistic danger of that kind, it may have been expected that he would direct the Climbers not to proceed as they climbed up the poles, or potentially given a direction to maintain a clear area under the poles for safety reasons. No such direction was given.[651]

A/Inspector Caldwell

406 A/Inspector Caldwell considered the risks of certain courses of action in implementing Superintendent Trimble's decision to arrest. He considered the option of establishing a police line to push the crowd back so that police could take charge of the whole area, and assessed it as involving a high element of risk which could, with a hostile crowd, make the situation more dangerous.[652] A/Inspector Caldwell also assessed the risk to police officers and protesters in giving the order to tactically withdraw from the East Pole. He considered that it was safer for protesters and for police to tactically withdraw because they had been circled by protesters.[653]

407 A/Inspector Caldwell gave evidence that he was aware that the order to advance on the East Pole in a wedge made it possible that there would be physical confrontation with the protesters and that police would use force in response. He accepted that the direction to advance in a wedge was likely to escalate tension and create a safety risk for police and protesters, and that part of the risk assessment is that there may be crowd crush. I accept that he did consider the risks at the time, as he explained that these risks were why he instructed police to advance in a wedge rather than a straight line.[654]

408 A/Inspector Caldwell accepted that there was a potential risk of harm to about 80 people (the protesters) for an arrest of a person who posed no ongoing safety risk for a non-violent offence with no damage to property. He rejected the proposition that

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651 The evidence of A/Inspector Caldwell, who had a good overview of the events given his physical location and his communications with more senior and more junior officers, was that he was not aware of any direction to the Climbers that they should descend, nor that any people below the two poles should move until they had descended and there were the efforts to arrest them. Transcript 03/03/25, T1012.19-28 (Caldwell XXN).

652 Transcript 03/03/25, T979.11-21 (Caldwell XN).

653 Transcript 04/03/25, T1028-10-21 (Caldwell XXN).

654 Transcript 04/03/25, T1029.03-17; T1030.01-17; T1032.30-T1033.15 (Caldwell XXN).

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this made the response disproportionate.[655] However, it was not clear whether he made that assessment at the time of the events or subsequently.

409 The video footage showed that there may have been a risk of harm to the West Pole Climber or other persons under and around the pole after a police officer sprayed her with OC foam while she was on the West Pole. This caused her to have evident problems in opening her eyes to see, and caused difficulties as she tried to descend and then extract herself from the harness and ropes, given that she was using her hands both to untie herself and to try and remove foam from her face. A/Inspector Caldwell did consider this risk of harm to the West Pole Climber at the time she was descending. He gave the direction 'Don't spray while he's climbing' in relation to the West Pole Climber on police radio at 12.31:24pm,[656] because he 'didn't want someone being sprayed climbing a pole because [he] thought that's unsafe on that person and everyone around them'.[657] Inspector Barras also accepted that the Climbers posed no safety risk once they had descended from the poles.[658]

Inspector Barras

410 Inspector Barras considered the risk of using the jackknife to cut the tape slings on the West Pole Climber's ropes and harness, and assessed that its design with a non-exposed blade would not present a risk to the West Pole Climber or anybody else.[659]

Common Question 9(b): What assessments did the PORT Tactical Commander or commanding officers make about any infringement of any protestors' Charter rights in giving the directions and/or orders and/or instructions?

411 Superintendent Trimble said that he had been trained to consider matters including the rights of protesters, cultural considerations relating to categories of protesters, and the interests of delegates going to IMARC and members of the public in the area.[660] He did not give evidence about specifically considering infringement of the protesters' *Charter* rights when make the decision to arrest the Climbers and giving the direction

655 Transcript 04/03/25, T1040.13-21 (Caldwell XXN).
656 Transcript of Radio Call (Exhibit P5); Audio of radio channel 0705 (Exhibit P23).
657 Transcript 03/03/25, T991.04-19 (Caldwell XN).
658 Transcript 03/03/25, T914.11-17 (Barras XXN).
659 Transcript 03/03/25, T903.29-T904.12 (Barras XN).
660 Transcript 28/02/25, T827.13-T828.24 (Trimble XN).

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to arrest.

412 A/Inspector Caldwell gave evidence that he knew he was required to consider directions which would have the effect of dispersing protesters as this would be inconsistent with the *Charter* rights to freedom of assembly and freedom of expression.[661] He said he also considered whether use of the wedge formation was the least restrictive option to arrest the Climbers and concluded that it was a 'short limitation' to the human rights of the protesters.[662] He considered tactical disengagement from the West Pole as an alternative option to a continued advance on the pole, but considered that this could have resulted in the West Pole Climber getting away, and was satisfied that the police were close enough at the West Pole to apprehend the West Pole Climber.[663]

413 The parties did not identify evidence of any other police officers considering infringements of *Charter* rights to protest.

Common Question 9(c): What assessments did the PORT Tactical Commander or commanding officers make about the nature of the offences committed by the Climbers?

414 The evidence was that there was discussion about the nature of the offences that the Climbers had committed, and that a direction was given by A/Inspector Caldwell over the police radio for the arrest of the Climbers for trespass. However, the State contended that Superintendent Trimble directed that the Climbers be arrested 'for the offences of trespass and conduct endangering', with the 'main offence' and his 'biggest concern' being conduct endangering.[664] Superintendent Trimble did not identify whether he was referring to the offence of 'conduct endangering life' in s 22 of the

661 Transcript 03/03/25, T1002.12-23 (Caldwell XXN).
662 Transcript 04/03/25, T1050.02-14 (Caldwell XXN).
663 Transcript 04/03/25, T1047.23-T1048.05 (Caldwell XXN).
664 Defendants Response to Plaintiff's Answers to Common Questions and Defendant's Answers to Common Questions, [21], referring to Superintendent Trimble's evidence at Transcript 28/02/25, T812.25-31; T814.01-04 (Trimble XN); T858.03-09 (Trimble XXN); T819.15-19; T820.23-28 (Trimble XN) and T846.16-25 and T848.07-08 (Trimble XXN), and T819.15 (Trimble XN); Transcript 04/03/25, T1065.19-21 (Caldwell RE-XN).

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Crimes Act[665] or 'conduct endangering persons' in s 23 of the *Crimes Act*.[666]

415 The audio recording of the radio call referred to a direction given by A/Inspector Caldwell that the Climbers were to be arrested for the offence of trespass, and did not refer to the offence of conduct endangering.[667] A/Inspector Caldwell took the view that trespass was the offence for which the Climbers were to be arrested.[668] This was consistent with the Public Order Log, which referred to the arrest being directed 'for trespass'.[669]

416 Superintendent Trimble gave evidence that in the discussion with the PFSU officers and A/Inspector Caldwell, he was advised that the Climbers had committed the offence of trespass.[670] I find that this advice was given by one of the PFSU officers.

417 I find on the basis of the contemporary notes which were taken on the day, and the evidence of Inspector Barras and A/Inspector Caldwell, that advice was given by a PFSU officer that the offence of trespass was complete, and that other possible offences, including conduct endangering life or persons and public nuisance, were considered and discussed. However, no advice was given that any offence other than trespass was complete.[671] There was no record in the Public Order Log being maintained by A/Inspector Caldwell's staff officer of any direction to arrest for conduct endangering. The evidence called by the State also does not provide any explanation as to why, if Superintendent Trimble or others in fact held a concluded view that the Climbers should be arrested for 'conduct endangering', there was no

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665 Section 22 states:
Conduct endangering life
'A person who, without lawful excuse, recklessly engages in conduct that places or may place another person in danger of death is guilty of an indictable offence.'

666 Section 23 states:
Conduct endangering persons
'A person who, without lawful excuse, recklessly engages in conduct that places or may place another person in danger of serious injury is guilty of an indictable offence.'

667 Transcript of Radio Call (Exhibit P5); Audio of radio channel 0705 (Exhibit P23); Transcript 03/03/25, T1014.08-12 (Caldwell XXN). This was not disputed: Transcript 28/02/25, T850.03-T854.11. See [220] above.

668 Transcript 03/03/25, T1020.02-03 (Caldwell XXN).

669 Exhibit P30 at 12.40pm.

670 Transcript 28/02/25, T820.16-28 (Trimble XN); Transcript 03/03/25, T897.22-T898.05 (Barras XN).

671 Transcript 03/03/25, T897.22-T898.26 (Barras XN); T976.12-22; T977.14-16 (Caldwell XN).

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direction to arrest for that offence.[672]

Common Question 10(a): What alternatives to use of OC foam were generally available to Police Officers at the IMARC Protest?

418 The alternatives to use of OC foam at the IMARC Protest which were *available* to police officers included use of the operational safety equipment, in particular the baton or a firearm (although no police witness suggested either piece of equipment would have been an appropriate weapon to use). The operational safety equipment carried by the police at the event is described at [184]-[186] above.

419 The tactics which were alternatives to use of OC foam which were available to police officers at the IMARC event were those set out in the *Operational safety and the use of force* VPM.[673] This requires all officers to:

(a) abide by the law in any use of force, including ss 462A and 322K of the *Crimes Act*;

(b) consider the Operational Response Principles and the SAFE TACTICS mnemonic, discussed above at [123]-[125]; and

(c) consider their OSTT training, which is depicted through the Tactical Options Model referred to at [126] above.

420 The tactical alternatives to use of OC foam were those set out in the *Tactical Options Model*, which include having a police presence, establishing a cordon and managing it, negotiation, firearm, baton, conducted energy device (taser), empty hand tactics, using 'other weapons' and tactical disengagement.[674] PORT officers also had level 2 crowd control equipment.[675] The determination of which of those options was

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672 The offences of conduct endangering life and conduct endangering persons require that there be an appreciable risk, or more than a remote or mere possibility, of death or serious injury: *R v Lam* [2006] VSCA 162, [11] (Ashley JA, Redlich JA and Bell AJA agreeing); *R v Abdul-Rasool* (2008) 18 VR 586, 591 [19(2)]; 596-597 [43]-[45] (Redlich JA, Chernov JA and King AJA agreeing); *R v Wilson* [2005] VSCA 78, [17] (Batt JA, Buchanan and Vincent JJA agreeing).

673 Exhibit P2.

674 Exhibit P2.

675 Exhibit P10. The nature of that equipment was redacted from the relevant document on the basis of public interest immunity, and was not said by either party to be relevant for the purposes of this proceeding.

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realistically available and appropriate involved consideration of whether it would be lawful and consistent with the *Charter*, determined in practice by applying the PLAN mnemonic referred to at [116] above.

Common Question 10(b): What alternatives to arresting the climbers when they descended were generally available to Police Officers at the IMARC Protest?

421 The State submits that it is appropriate first to consider Superintendent Trimble's own evidence as to his direction, made as Police Forward Commander, to arrest the Climbers. The State refers to his evidence that while he gave some consideration to not arresting the Climbers, ultimately he considered that they had committed offences and wanted them arrested,[676] and submits that this decision 'was open to him and the existence of potential alternative decisions does not of itself render the use of force by police effecting or assisting in those arrests unlawful'.[677]

422 The State submits that subject to that proviso, the alternatives to arresting the Climbers when they descended the poles were:

(a) To scale the poles to reach the Climbers and bring them down before they made their own decision to descend. Superintendent Trimble gave this alternative option a 'fleeting' consideration, but ultimately considered it to be too time consuming because it would require search and rescue resources which were in Williamstown and would also require a sterile area.[678]

(b) Tactical disengagement: Superintendent Trimble did not consider disengaging because he wanted the Climbers arrested in order to ensure that they could be identified. He also said that the PORT Tactical Commander did not advise him at any stage that the Climbers' arrest could not be effected. [679]

(c) Doing nothing in response to the Climbers' activity: Superintendent Trimble did not regard this as a suitable option as he considered that the Climbers may

676 Transcript 28/02/25, T824.18-25; T824.31-T825.13 (Trimble XN).
677 Defendant's Answers to Common Questions, [51].
678 Transcript 28/02/25, T826.10-24 (Trimble XN).
679 Transcript 28/02/25, T826.10-24 (Trimble XN).

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climb at the IMARC Protest again, which might cause risk to people below.[680]

423 Superintendent Trimble gave evidence that he considered a number of matters in deciding to give the direction that the Climbers be arrested. He said he 'slightly' considered not directing that the Climbers be arrested, but concluded that he 'wanted them arrested for public order purposes'.[681] He considered that they may climb back up again if they were not arrested, and could fall on someone if they did.[682] He also discussed whether the Climbers could be arrested up the poles, but was advised by other officers that it would be too dangerous.[683]

424 Superintendent Trimble was entitled to give the direction to arrest that he gave at the time that he did. There was no dispute that the Climbers had, at least, committed the offence of trespass. However, Common Question 10(b) is what alternatives to the direction to arrest were available. One alternative would have been to wait until later in the Climbers' descent to give the direction to surround the pole to effect an arrest. At the time, the Climbers had completed unfurling the banner, a protest organiser had explained that the events were over for the day, and protesters were dispersing: see [213] above. It took around ten minutes for the Climbers to descend, and they were doing so slowly. Even waiting for half of that time may have meant that there were significantly fewer protesters in the vicinity, and there were many police close by who could move quickly on the pole to effect the arrests. Such an arrangement would have required communications between Superintendent Trimble and the senior police on site, as well as decisions by A/Inspector Caldwell as to the timing of effecting the arrest, but those communications were possible over police radio.

425 The possibility of waiting for some minutes to direct the arrest was not expressly put to Superintendent Trimble or A/Inspector Caldwell, but the fact that the protesters were moving away at about the time of the direction to arrest was put to

680 Transcript 28/02/25, T826.02-09 (Trimble XN).
681 Transcript 28/02/25, T824.18-25 (Trimble XN).
682 Transcript 28/02/25, T818.28-T819.02; T825.07-10; T826.02-09 (Trimble XN).
683 Transcript 03/03/25, T899.02-27 (Barras XN).

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Superintendent Trimble and he said he could not recall it.[684]

426 If the possibility of waiting to arrest the Climbers had not been clear to police at the time of the original direction by A/Inspector Caldwell to police to arrest the Climbers, once the situation between the East Pole had become chaotic, was visibly involving the use of OC foam, and had not succeeded in effecting the arrest of the East Pole Climber, there was an opportunity to consider whether a different approach should be taken to the West Pole Climber. An alternative was undoubtedly to order a tactical withdrawal from the West Pole. Although that was not Superintendent Trimble's preference, it was an alternative that would have avoided having to engage directly with the many protesters around the West Pole, and the further potential for use of OC foam against protesters. That may have meant that the West Pole Climber would escape. It equally may have been possible, given the very large numbers of police on site, and that there was only one arrest to be effected by that time, to apprehend her before she escaped. It may also have been possible to take steps to arrest the West Pole Climber at a later date, given that Victoria Police already had some intelligence as to her identity: see [224] above. A/Inspector Caldwell agreed that it would have been an option, having regard to the intelligence that identified the Climbers and the video footage that was taken, to arrest them later,[685] although this would have taken more time.

427 The fact that there had been an earlier tactical engagement from the East Pole directed when A/Inspector Caldwell and other officers considered there was a risk to police officers' safety demonstrated that tactical engagement was possible, even if it was not the preferred option.

428 Relevant in considering the tactical withdrawal was the nature of the offence for which the direction to arrest had been given, being the summary offence of trespass. It was not a violent offence and it was not said in evidence that there had been any damage to property caused by the Climbers. A reason given by Superintendent Trimble for his

684 Transcript 28/02/25, T840.25-28 (Trimble XXN).
685 Transcript 03/03/25, T1019.13-24 (Caldwell XXN).

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view that it was necessary to arrest the Climbers was the risk that they 'would have climbed again, caused more public order issues… We didn't know whether they had other ropes or anything, so I wanted them arrested and charged'.[686] Although Superintendent Trimble referred to 'more' public order issues, he did not identify public order issues that he considered had already been created by the Climbers. As I have observed above, the IMARC Protest appeared to be relatively peaceful during the time that the Climbers were up the poles, and during their descent until the direction to arrest was given, and there was no evidence given about any specific conduct of the Climbers which caused any public disorder. Senior police had observed, as recorded in the Public Order Log in connection with the Climbers, that the protesters were 'not disrupting anything'.[687] Superintendent Trimble did refer to his concern that they may fall onto the people below them,[688] and it may have been for this reason that he considered it to be a 'public order issue'.

429 A further alternative would have been not to direct an arrest of the Climbers, or rescinding the direction to arrest them when the crowd response became hostile to the arrest. This was a realistic option given that it would have been consistent with the instruction in the *Crowd control* VPM Procedures and Guidelines, which states in relation to the power of arrest:

> Minor offences should be ignored in the interests of containing the overall situation. However, take appropriate action to prevent conduct involving violence to people or damage to property [689]

430 That option to exercise discretion not to arrest for low level offences, if appropriate to facilitate a peaceful protest, was also noted in the HRRA.[690] It was accepted by A/Inspector Caldwell that the Climbers were not engaged in violent conduct or

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686 Transcript 28/02/25, T818.29-T819.02 (Trimble XN).

687 Public Order Log dated 30 October 2019 (Exhibit P30), 'Decision 14' under heading 'Decision – Supporting Rationale'.

688 Transcript 28/02/25, T819.15-18 (Trimble XN).

689 Exhibit P38.

690 See paragraph [111] above. The HRRA (Exhibit P47) made the following observation, in relation to the freedom of movement *Charter* right in s 12: 'Police should exercise discretion towards lower level offending to allow a peaceful protest (i.e. only execute arrest powers where offences are serious, seek guidance from PFSU and TAC Commander.)

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damaging property.[691] In these circumstances declining to arrest or rescinding the order to arrest the Climbers for the offence of trespass, a summary offence would appear to be sanctioned both by the *Crowd control* VPM. Superintendent Trimble's evidence was that he considered this, but rejected it on the basis that the Climbers may climb at the IMARC Protest again, which might cause risk to people below.[692] I accept that this was a consideration motivating Superintendent Trimble. However, I find that it cannot have been a very strong concern in circumstances where as the Climbers ascended the poles, and were up them over a 25 minute period, there was no direction from police that they descend,[693] nor measures taken to maintain a clear space below the poles.

Question 24: Were the Police Officers acting in concert and/or pursuant to direction as part of a collective use of force against the Plaintiff?

431 The evidence was that the police officers who were seeking to arrest the Climbers were responding to the order given over police radio by A/Inspector Caldwell at the direction of Superintendent Trimble,[694] which to arrest them for trespass. The evidence was also that the role of the Forward Commander in giving an arrest order to the PORT Commander was limited to requiring an arrest and the method by which the person would be arrested was a matter for the PORT Tactical Commander to determine and implement,[695] and that in fact Superintendent Trimble did not give any direction as to the tactics to be used in arresting the Climbers.[696]

432 The evidence was consistent in establishing that as a matter of training and general instruction, decisions to use force are made and justified by individual officers.[697] Further, the evidence was clear that Sergeant Guthrie and A/Sergeant Bolzonello had in fact both made their own decision to deploy OC foam on the plaintiff.[698]

433 The plaintiff acknowledges that the uses of force against him by Sergeant Guthrie and

691 See [408] above.
692 Transcript 28/02/25, T826.02-09 (Trimble XN).
693 Transcript 28/02/25, T841.09-16 (Trimble XXN).
694 For example the evidence of A/Sergeant Bolzonello, see [333] above.
695 Transcript 18/02/25, T823.13-26 (Trimble XN).
696 Transcript 28/02/25 T824.06-07; T826.25-27 (Trimble XN).
697 Transcript 28/02/25 T831.03-12 (Trimble XN). See also [122] and [238] above.
698 See [434]-[436].

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A/Sergeant Bolzonello were individual decisions, but submits that they 'occurred as part of, and in the context of, the Advance which was ordered by A/Inspector Caldwell and was a coordinated move against the group of protestors of which the Plaintiff was part'.[699] I do not accept that submission.

434 Sergeant Guthrie was not part of any wedge formation or other coordinated advance. I have also found that she was not acting pursuant to any orders given to her by A/Inspector Caldwell, but was acting on her own initiative in moving towards the West Pole.[700]

435 Although A/Sergeant Bolzonello was part of a coordinated wedge formation which moved on the East Pole, when he moved on the West Pole it was part of a 'very loose wedge' only.[701] This may have been action that A/Sergeant Bolzonello regarded as being broadly pursuant to the original directions given by A/Inspector Caldwell to arrest the Climbers, to hold space at the bottom of the poles for that purpose, and the later verbal direction to advance on the East Pole in a wedge formation.[702] However, by the time that A/Sergeant Bolzonello and other police were on the east side of the West Pole, facing protesters, they were no longer in wedge formation or an organised advance formation. Further, in a period of around a minute before A/Sergeant Bolzonello deployed his OC foam on the plaintiff, an officer among the group of police officers around him said 'withdraw, withdraw' at about 12.32:20pm, and Senior Sergeant Howard, who was directing the 400 units, had stated over the radio shortly afterwards that 'we need to get our guys out of there'.[703] An unidentified officer had said at 12.32pm 'enough … stop spraying … no more spray'.[704]

436 I find that by this time, which was around half a minute prior to A/Sergeant Bolzonello deploying OC foam, there was no directive or order requiring that officers

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699 Plaintiff's Response to Defendant's Answers to Common Questions and Plaintiff's Answers to Common Questions, [147].

700 See [283] above.

701 See [336] above.

702 See [333] above. A/Sergeant Bolzonello did not recall an instruction from A/Inspector Caldwell specifically, but from a PORT supervisor in relation to the arrest of the Climbers.

703 See [263] above.

704 Body worn camera of Bhutia (Exhibit P15); Body worn camera of Kirk (Exhibit D26).

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move against the group of protesters of which the plaintiff was part, and certainly no direction to use OC foam. He made his own decision to do so.

437 The evidence overall suggests a lack of clarity around directions and orders at the time of the advances on the West Pole. The debrief conducted by A/Inspector Caldwell after the events at 12.56pm is recorded in the Public Order Log as acknowledging 'possible miscommunication between units and GD [general division] members with tactical withdrawal'.[705]

438 I also find that there was, in fact, no coordinated move by the police against the protesters including the plaintiff at the time A/Sergeant Bolzonello sprayed. Given the evidence that in the minutes preceding his deployment of OC foam, police officers in his vicinity are heard over body worn camera telling police officers not to spray there was plainly no coordinated view that it was appropriate to use force against the protesters remaining at the West Pole at the time.

439 The answer to Question 24 is, therefore, 'no'.

Claims for relief under the *Charter*

440 The Common Questions include six questions[706] raising issues about the application of the *Charter* to the conduct of police officers at IMARC, including whether police officers limited the plaintiff's *Charter* rights, whether police officers' conduct was incompatible with those rights, or whether police officers failed to give proper consideration to *Charter* rights. The plaintiff seeks declarations reflecting the findings on these questions.

441 The first question Common Question 18, relates to whether police officers were acting as public authorities, and were required to abide by s 38 of the *Charter*, when planning for and policing the IMARC Protest. I have answered 'yes' to both parts of that question for the reasons addressed above at [80]-[81].

Common Question 19: Does the Plaintiff have a right to seek relief or remedy in

705 Public Order Log (Exhibit P30) entry at 12.56pm.
706 Common Questions 18-23.

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this proceeding under s 39(1) of the *Charter* and if so for what 'acts' or 'decisions'?

442 Section 39 of the *Charter* provides for the circumstances in which a person may seek any relief or remedy on a ground based on unlawfulness arising because of a breach of the *Charter*. Section 39(1) and (2) states:

> **39 Legal proceedings**
>
> (1) If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.
>
> (2) This section does not affect any right that a person has, otherwise than because of this Charter, to seek any relief or remedy in respect of an act or decision of a public authority, including a right –
>
> (a) to seek judicial review under the **Administrative Law Act 1978** or under Order 56 of Chapter I of the Rules of the Supreme Court; and
>
> (b) to seek a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence.

443 Section 39(1) is recognised to be an enabling provision.[707] However, it permits a person to seek relief or a remedy only if the conditions identified in s 39(1) are established,[708] and in that sense, states exhaustively the circumstances in which a person may seek relief or a remedy on a ground of unlawfulness arising because of the *Charter*.

444 The plaintiff seeks that the Court make various declarations as to the legal effect of the deployment of OC foam by Sergeant Guthrie and A/Sergeant Bolzonello against him. The first declaration sought is that the acts of those officers constituted an unlawful battery of the plaintiff. The State accepts that if the plaintiff is successful in establishing one or both batteries, a declaration could be made, but only against the State, and could not be made against any named police officer.[709]

445 The remaining declarations sought by the plaintiff relate to breaches of the *Charter*. They are that:

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707 ***Goode** v Common Equity Housing Ltd* [2014] VSC 585, [25] (Bell J).
708 *Director of Housing v Sudi* (2011) 33 VR 559, 569 [96] (Warren CJ); *Goode*, [29] (Bell J).
709 Defendant's Primary Submissions, [59].

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(a) the deployment of OC foam on the plaintiff was an act incompatible with, and so breached, the plaintiff's human rights under ss 10(b), 12 and 16(1) of the *Charter*, in breach of s 38(1) of the *Charter*;

(b) the deployment of OC foam on the plaintiff was the result of prior decisions of Sergeant Guthrie and A/Sergeant Bolzonello to use force in the form of OC foam against the plaintiff, which unlawfully failed to properly consider the plaintiff's human rights under ss 10(b), 12 and 16(1) of the *Charter*, in breach of s 38(1) of the *Charter*; and

(c) the decision of A/Inspector Caldwell to order the immediate arrest of the Climbers for trespass by way of the advance, being the causal precursor to the decisions and acts of Sergeant Guthrie and A/Sergeant Bolzonello to carry out an unlawful battery on the plaintiff, and his failure to revise that decision or order a tactical withdrawal, unlawfully failed to properly consider the plaintiff's human rights under ss 10(b), 12 and 16(1) of the *Charter*, in breach of s 38(1) of the *Charter*. [710]

446 Each of these declarations relate to the actions of individual police officers. The only defendant to this proceeding is the State, the proceeding having been brought pursuant to the 'police tort claim' provisions in the *Victoria Police Act.* Although the officers whose conduct constituted the battery gave evidence, none are parties to the proceeding.

447 The State submits that declarations can only be made against the State of Victoria, as the defendant, rather than against individual police officers, since they are non-parties.[711] It submits that declarations relating to *Charter* breaches cannot be made against the State as the defendant, as it is not a 'public authority' for the purposes of

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710 Plaintiff's Primary Submissions, [167]. These are more specific declarations than those originally pleaded in the prayer for relief in the Amended Statement of Claim.

711 Defendant's primary submissions , [59]. The State relies on *State of Victoria v Sutton* (1998) 195 CLR 291, 316-317 [76]-[78] (McHugh J). Justice McHugh relevantly observed at [77]: 'The rules of natural justice require that, before a court makes an order that may affect the rights or interests of a person, that person should be given an opportunity to contest the making of that order. Because that is so, it is the invariable practice of the courts to require such a person to be joined as a party if there is an arguable possibility that he or she may be affected by the making of the order.'

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s 38 and has no relevant *Charter* obligations.[712] A further reason is identified by the State as to why the declaratory relief identifying *Charter* breaches on the part of individual police officers (who, as the State accepts, are 'public authorities' for the purposes of the *Charter*)[713] is not available pursuant to s 39(1) of the *Charter*. It is said that there is no relevant non-*Charter* based claim available against the police officers, given the restrictions in the *Victoria Police Act* on making police tort claims against individual officers. The State also contends that even if that submission was wrong, the declarations sought relating to *Charter* breaches are not available pursuant to s 39(1) of the *Charter* because they do not relate to the same acts or decisions as the non-*Charter* claim identified by the plaintiff, being the acts of battery. Finally, the State submitted that as a matter of substance, there were no relevant breaches of s 38 of the *Charter*, because the relevant officers made no 'decisions' of a kind to which the *Charter* applies.

448 The plaintiff submits that the individual police officers are not parties to this proceeding only because he was prevented from joining them by reason of the *Victoria Police Act* provisions relating to police torts. The plaintiff contended that declarations can nevertheless be made relating to the individual police officers responsible for the unlawful batteries as they are not 'strangers to the proceeding', and a declaration made in the terms sought would not expose them to any personal liability.[714] The plaintiff contends that given the claim in damages for battery, and the relief sought of a declaration that the police officers were responsible for the battery, it is open to say that the plaintiff may seek a remedy or relief against the police officers as public authorities otherwise than because of the *Charter*.[715] The plaintiff also contends that the acts and decisions the subject of the *Charter* based declarations that he seeks are, as required by s 39(1) of the *Charter*, the same as those on which the unlawful battery claim relief is based, or are sufficiently related to the acts comprising the battery.[716]

712 Defendant's Primary Submissions, [60].
713 *Charter*, s 4(1)(d).
714 Plaintiff's Primary Submissions, [162]-[163].
715 Transcript 12/06/25, T282.02-06; T294.19-23 (Submissions).
716 Transcript 12/06/25, T294.14-T295.22 (Submissions).

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449 A question arises as to the scope of any relief which can be given pursuant to s 39(1) of the *Charter*, in the context of a proceeding alleging commission of police torts, brought directly against the State, rather than individual police officers.

The effect of Division 8, Part 4 of the *Victoria Police Act*?[717]

The statutory regime applicable to police tort claims

450 At common law, police officers are personally liable in respect of tortious acts or omissions committed during the exercise of their duties, and the State is not vicariously liable for their tortious conduct. This position was based historically on the significant degree of individual discretion that police have with respect to the exercise of their duties.[718]

451 The common law position has been altered by statute in Victoria, first by s 123 of the *Police Regulation Act 1958* (Vic),[719] which provided immunity from personal liability for police members for anything necessarily or reasonably done or omitted to be done in good faith in the course of his or her duty as a member of the police force.

452 In *Victoria v Horvath*, the Court of Appeal identified the rationale for this position as follows:

> However, the very nature of those duties and the circumstances under which they may need to perform them render police members peculiarly vulnerable to civil suit. They are regularly called upon to make extremely difficult decisions as to the proper course to be adopted in the course of performing their important role in our community and, sometimes, in circumstances where the opportunity for mature or deliberate reflection may not be possible. Unless freed of unnecessary apprehension when going about their tasks in an appropriate fashion, their ability and preparedness to do so could be significantly reduced.[720]

453 The ***Victoria Police Act** 2013* (Vic) commenced in December 2014 and was intended to 're-enact and modernise the law relating to the governance and regulation of

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717 This part of the judgment responds also to **Common Question 27**: 'If the Court finds that the Police Officers used unlawful force against the Plaintiff, should the Court order declaratory relief, and against whom?'

718 *Enever v The King* (1906) 3 CLR 969, 977 (Griffith CJ); ***Victoria v Horvath*** (2002) 6 VR 326, 343-344, [42]-[44] (Winneke P, Chernov and Vincent JJA); *Kirkland-Veenstra v Stuart* (2008) 23 VR 36, 42 [28] (Nettle JA, Warren CJ agreeing).

719 *Police Regulation Act 1958* (Vic) s 123, as at 2 April 2000.

720 *Victoria v Horvath*, 343 [42].

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Victoria Police'.[721] It introduced new provisions relating to liability of police officers for torts arising from the performance of their duties.

454 The effect of Division 8 of Part 4 of the *Victoria Police Act* is that the State is liable for police torts (unless the relevant conduct was serious and wilful misconduct), and police officers are not personally liable for the tort. Police tort claims are to be brought against the State, and not against police officers, and except in limited circumstances, police officers cannot be joined to proceedings in which police tort claims are made.

455 The reasons for this were identified in the Second Reading Speech for the Victoria Police Bill 2013:

> The nature of policing duties leaves police officers particularly vulnerable to being sued for torts such as negligence, assault, battery, false imprisonment and malicious prosecution. Without an express legislative scheme, police officers and PSOs are personally liable at common law.
>
> The bill creates greater certainty and clarity for all parties involved in tort claims involving police and PSOs.
>
> …
>
> The bill requires plaintiffs to bring all police tort claims against the state of Victoria only. Individual police officers or protective services officers may only be named in proceedings if the state denies liability. This sensible mechanism is already successfully in place in NSW. It gives plaintiffs certainty, in the vast majority of cases, that if their claim is made out the state will be liable. It also protects police and PSOs from the unnecessary stress of being named in lengthy court proceedings in the circumstances where these members were just doing their job.
>
> Consistent with interstate schemes, the bill does not give police officers or PSOs a blank cheque to abuse their office. The state may deny liability if the conduct giving rise to the tort was serious and wilful misconduct. This means that serious misconduct by police which is deliberate, which extends beyond recklessness, or culpable or gross negligence and which is done with a knowledge that risk of injury or loss may occur, may fall within the concept of serious and wilful misconduct.
>
> If a court finds that the conduct amounts to a police tort but the state's defence of serious and wilful misconduct is made out, the police officer or PSO will be personally liable for the payment of damages. However, to ensure that a plaintiff is not left with the state's costs bill, the state will have no right to seek

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721 *Victoria Police Act*, ss 1(a), 2.

costs against the plaintiff in these circumstances. [722]

456 Section 74 in Division 8 of Part 4 of the *Victoria Police Act* provides:

> **74 Liability of the State for police torts**
>
> (1) Subject to this section, the State is liable for a police tort.
>
> (2) Subject to subsection (5), the State is not liable for a police tort if the State establishes on a police tort claim that the conduct giving rise to the police tort was serious and wilful misconduct by the police officer of protective services officer who committed the police tort.
>
> (3) If a police officer or protective services officer commits a police tort for which the State is liable, the officer —
>
> (a) is not liable to any person for the police tort; and
>
> (b) is not liable to indemnify, or to pay any contribution to, the State in respect of the liability incurred by the State.
>
> (4) Subject to subsection (5), the State is not liable for a tort committed by a police officer or protective services officer that is not a police tort.
>
> (5) Subsections (2) and (4) do not apply to a claim brought in reliance on Part XIII of the **Wrongs Act 1958.**

457 'Police tort' and 'police tort claim' are defined by ss 72 and 73, which relevantly provide:

> **72 What is a police tort**?
>
> (1) For the purposes of this Act, a ***police tort*** is a tort committed by a police officer or protective services officer in the performance or purported performance of the officer's duties.
>
> ….
>
> (4) For the purposes of subsection (1), it is irrelevant whether the tort is committed by the police officer or protective services officer alone or jointly or severally with any other person.
>
> **73 What is a police tort claim?**
>
> (1) For the purposes of this Act, a ***police tort claim*** is a claim for damages or other relief in respect of an alleged police tort.
>
> (2) A ***police tort claim*** includes —

[722] Second Reading Speech for the Victoria Police Bill 2013: Victoria, *Parliamentary Debates*, Legislative Assembly, 16 October 2013, 3613 (Wells, Minister for Police and Emergency Services).

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(a) an action for damages under Part III of the **Wrongs Act 1958** in respect of an alleged police tort; and

(b) a counterclaim for damages or other relief in respect of an alleged police tort committed by a police officer or protective services officer that is made by a person in a legal proceeding brought by the officer against that person; and

(c) any other prescribed action, claim or proceeding in respect of an alleged police tort.

(3) To avoid doubt, subsection (2) does not limit what is a police tort claim.

458 The plaintiff's claim, being an allegation of battery made against police officers for their conduct in the course of their policing duties at the IMARC Protest, is plainly a police tort claim.

459 Section 75 provides for the way in which a police tort claim may be made against the State, and limits the circumstances in which a police tort claim can be made against a police officer. It states, relevantly:

75 How can police tort claims be made?

(1) Except as otherwise provided by this Division, if a person wishes to make a police tort claim, the person must make it against the State and not against the police officer or protective services officer who allegedly committed the police tort.

(2) A person who makes a police tort claim (other than a counterclaim) against the State may seek to have the police officer or protective services officer who allegedly committed the police tort joined to the proceeding only if the State pleads in its defence to the claim that —

(a) the State would not be liable for the alleged tort, if proven, because of section 74(2); or

(b) the alleged tort, if proven, would not be a police tort.

460 In this proceeding, the State has not pleaded either defence referred to in s 75(2) and remains the sole defendant to the police tort claim. In these circumstances, and as recognised by the plaintiff,[723] the effect of the statutory scheme is that it is not open to join the individual police officers to the proceeding.

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723 Plaintiff's Primary Submissions, [161].

Availability of declaration naming police officers as responsible for a police tort

461 One consequence of the statutory scheme applicable to police torts is that the plaintiff, in seeking declarations identifying Sergeant Guthrie and A/Sergeant Bolzonello as officers who were responsible for battery, and declaring that individual police officers have breached *Charter* provisions, is seeking declarations against persons who are not party to the proceeding. The State submits that it would be contrary to procedural fairness to make declarations in those circumstances. The plaintiff contends that in circumstances where the State has protected the interests of the officers in the conduct of the defence, there is no procedural fairness barrier to the making of the declarations. I consider this issue below. First, however, there are first legal issues arising from the 'police tort claim' provisions of the *Victoria Police Act*, and from the terms of s 39(1) of the *Charter* as to whether, putting aside procedural fairness considerations, it is open to grant declaratory relief in the terms sought by the plaintiff in the context of a police tort claim.

462 Section 39(1) of the *Charter* provides that the circumstances in which a person '*may* seek [a] relief or remedy on a ground of unlawfulness arising because of this Charter' are where:

> …*otherwise* than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful…[724]

463 The parties did not dispute that a declaration is a 'remedy' for the purposes of s 39(1).

464 The question for determination is whether the plaintiff may, independently of the *Charter*, 'seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful'. The plaintiff contended that taking into account the police tort claim provisions of the *Victoria Police Act*, it remains open for a person to seek a declaration that an individual police officer has committed a tort.[725] It was submitted that this would be the non-Charter based relief or remedy in respect of an unlawful act or decision of a public authority (the police officer).[726]

724 *Charter*, s 39(2). Emphasis added.
725 Transcript 12/06/25, T279.27-T280.04 (Submissions).
726 Transcript 12/06/25, T278.02-05 (Submissions).

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which is the s 39(1) precondition for the *Charter* based relief.

465 An application for a declaration or damages for a police tort will constitute a 'police tort claim' in that it is a 'a claim for damages *or other relief* in respect of an alleged police tort' within the scope of s 73(1) of the *Victoria Police Act*. Section 75(1) has the consequence that it would not be open to commence a proceeding claiming a declaration against a police officer that they have committed a police tort. However, the plaintiff says that it would be possible, in the context of a proceeding against the State pursuant to s 75 of the *Victoria Police Act*, for a Court to make a declaration that an individual police officer has committed a tort, notwithstanding that the police officer is not a party to the proceeding. The plaintiff contends that this would not be precluded by s 75(1).

466 This is not, in my view, correct for two reasons.

467 *First*, the police tort claim provisions in the *Victoria Police Act*, properly construed, do not permit a person to seek the remedy of a declaration that a particular police officer is responsible for a tort by reason of conduct done in the course of his or her duties. Nor does it leave open the potential for a Court to make such a declaration, notwithstanding the very broad jurisdiction this Court has to make declarations.[727]

468 Section 75(1) states the general position that a person who wishes to make a police tort claim 'must make it against the State and not against the police officer… who allegedly committed the police tort'. A police tort claim is defined relevantly by s 73(1) as 'a claim…for relief...in respect of an alleged police tort'. A claim for a declaration that a police officer has committed a tort is a claim for relief in respect of an alleged police tort, and is thus a 'police tort claim' within the meaning of s 73(1).

469 The question is then whether seeking the relief of a declaration that a specific police officer has committed a tort is a claim made '*against* the police officer…who allegedly

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[727] See for example *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 4; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 581-582. See also *Supreme Court Act 1986*, s 36 which provides that 'A proceeding is not open to objection on the ground that a merely declaratory judgment is sought, and the Court may make binding declarations of right without granting consequential relief.'

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committed the police tort', within the meaning of s 75(1). The plaintiff accepts that this is the issue, but contends a claim for 'a declaration isn't 'against' anybody necessarily'.[728] In my view, a claim for such a declaration would be made 'against' the police officer in the sense intended by the *Victoria Police Act.* A declaration must relate to the determination of specific legal controversies.[729] It will constitute a conclusive or final resolution of a controversy as to the legal interest, obligation or right of a person the subject of the declaration.[730] The making of a declaration that a person has committed a tort involves a statement as to their legal status with respect to the subject matter of the declaration. It affects their legal interests. If such a declaration is claimed with respect to a specific person, it is properly characterised, in my view, as being claimed 'against' them. A claim for a declaration that a police officer has committed a tort is, in my view, precluded by the language of s 75(1), which states that a person wishing to make a police tort claim *must* make it against the State 'and *not against the police officer*…who allegedly committed the police tort'.

470 The plaintiff submits that because the making of a declaration does not necessarily impose liability, it would not be inconsistent with the provisions in the *Victoria Police Act* assigning liability to the State.[731] That is not, in my view, to the point. The clear intention of Division 8 of Part 4 of the *Victoria Police Act* is to prevent police officers not only from being exposed to liability for police torts (s 74(3)), but also to prevent them being exposed to police tort *claims*, which must be made against the State and not against the police officer (s 75(1)).[732]

471 I consider that to claim a declaration that a specific police officer has committed a tort is properly regarded as a claim 'against' that police officer and is therefore precluded

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728 Transcript 12/06/25, T283.12-16 (Submissions).

729 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 582.

730 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 355-356 [45]-[49] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

731 Transcript 12/06/25, T284.23-30; T285.08-29 (Submissions).

732 The Explanatory Memorandum to the Victoria Police Bill 2013 states that clause 75(1) 'requires police tort claims to be brought against the State and *prohibits them being made against the police officer or protective services officer concerned.*' (At 32, emphasis added). The Second Reading Speech for the Victoria Police Bill 2013, extracted at [455] above, makes clear that an intention of the bill is relevantly to protect police officers 'from the unnecessary stress of being named in lengthy court proceedings in the circumstances where these members were just doing their job'.

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by s 75(1), even if the declaration does not have the effect of imposing liability for that tort. It has an effect on the legal status of the police officer in that they will be declared by the Court to have committed the tortious act. It may have other legal consequences such as disciplinary and reputational consequences. In substance, it is a claim 'against' that officer.[733]

472 *Secondly*, although it is said that a declaration could be made naming a police officer in a police tort claim against the State without the police officer being a party to the proceeding, that would be quite exceptional. The rules of procedural fairness dictate that in general, a declaration should not be made unless the person the subject of the declaration is party to the proceeding. In *State of Victoria v Sutton*[734] Justice McHugh summarised the position with respect to orders affecting the rights of a person:

> The rules of natural justice require that, before a court makes an order that may affect the rights or interests of a person, that person should be given an opportunity to contest the making of that order. Because that is so, it is the invariable practice of the courts to require such a person to be joined as a party if there is an arguable possibility that he or she may be affected by the making of the order.

473 The authorities are to the effect that the same position applies in the case of declaratory relief. In *Secretary, Department of Education v Derikuca*[735] the New South Wales Court of Appeal observed that a Court 'would be slow to make a declaration about the effect of a contract involving persons not before the Court in the absence of good reason to do so.'[736] The Court referred to High Court and Full Federal Court authority to the effect that a person is a necessary party to litigation if the orders sought have a direct

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733 The provisions of the *Victoria Police Act* which prohibit claims being made against police officers for police torts other than in limited circumstances distinguish the statutory regime from those which protect a legal person or entity against liability only. In *Heery v Criminal Justice Commission* [2001] 2 Qd R 610, the relevant statutory regime was the *Criminal Justice Act 1989* (Qld), in which s 101 provided that an act or omission by the Criminal Justice Commission or any commissioner or officer of the commissioner did not render the commission, or any person liable to any claim if the act was done in good faith and without negligence for the purpose of the discharge of the functions and responsibility of the commission. The judge at first instance, White J, made declarations that use of a listening device had not been approved or authorised by the Commission in accordance with s 82 of the *Criminal Justice Act 1989* (Qld). The Court of Appeal held that s 101 provided a defence to the Commission against liability, but did not oust the jurisdiction to make declarations: 618-620, [21]-[30] (Thomas JA, Davies JA and Douglas J agreeing).

734 (1998) 195 CLR 291, 316, [77].

735 [2023] NSWCA 94.

736 [2023] NSWCA 94, [81] (Kirk JA, Simpson AJA and Basten AJA agreeing at [104] and [105]).

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effect on their legal rights and liabilities.[737] Similar observations as to the inappropriateness of granting declaratory relief which directly affects the rights or legal interests of non-parties have been made in other contexts.[738] The concept of what 'directly affects' rights or liabilities of a third party involves some complexity. However, I consider that it is clear that it is broader than a declaration imposing legal liability on a person and extends to an effect that may impact the exercise of legal rights or existence of legal liability.[739]

474 The plaintiff relied, in support of the submission that declarations could be made naming police officers who are not party to the proceeding, on two cases in which declarations had been made referring to a person who was not a party to the proceeding,[740] and also two cases in which findings were made that a person had breached *Charter* rights, although no declaration was sought nor made.[741] None of the

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737 [2023] NSWCA 94, [79]. See to similar effect the observations of Elliot J in *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 31)* [2022] VSC 164, [42].

738 *Boyd v Thorn* [2016] NSWSC 588, [19] (White J) (potential effect on proprietary interests); *China First Pty Ltd v Mount Isa Mines Ltd* [2019] 3 Qd R 173, 181 [28], 182 [37], 183 [43] (Gotterson JA, Fraser JA and McMurdo JA agreeing); *Electricity Supply Association of Australia Ltd v Australian Competition and Consumer Commission* (2001) 113 FCR 230, 264-266 [133]-[137] (Finn J) in which his Honour noted in addition to the advisory nature of the declarations sought, that the declarations related to contractual rights and obligations of consumers and suppliers, in circumstances where no consumer or supplier was seeking or opposing the declaratory relief in the application: [133].

739 See, for example, *China First Pty Ltd v Mount Isa Mines Ltd* [2019] 3 Qd R 173, [48]-[60] (Gotterson JA, Fraser JA and McMurdo JA agreeing).

740 Plaintiff's Primary Submissions, [164]. Referring to ***Certain Children*** *v Minister for Families and Children* ***(No 2)*** (2017) 52 VR 441 ***Wotton*** *v State of Queensland (No 5)* [2016] FCA 1457. *Certain Children (No 2)* related to decisions of the Governor in Council to declare certain prison facilities to be a remand centre and a youth justice centre, and also involved sought to restraining defendants (being Ministers and the Secretary to the Department of Health and Human Services) and the Secretary's delegates from detaining children in the relevant facilities. John Dixon J made a declaration that a decision of a specific person who was the delegate of the defendant Secretary was unlawful.
Wotton involved a claim under the ***Racial Discrimination Act*** *1975* (Cth) based on acts of members of the Queensland Police Service. The respondents were the State of Queensland and the Commissioner of the Queensland Police Service, who was described at [2] as being 'sued as Commissioner and as representing the members of the QPS who engaged in the conduct impugned by the applicants'. Justice Mortimer (as her Honour then was) made declarations that named police officers had contravened s 9(1) of the *Racial Discrimination Act*.

741 *Bare v Independent Broad-Based Anti-Corruption Commission* (2015) 48 VR 129 (***Bare v IBAC***) and *DPP (Vic) v* ***Kaba*** (2014) 44 VR 526. In *Kaba*, Justice Bell upheld a ruling of a Magistrate that police officers who were not named defendants had breached Mr Kaba's *Charter* rights and International Covenant on Civil and Political Rights. Justice Bell quashed the Magistrate's decision on other grounds. No declaratory relief was given in the proceeding.

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authorities involved police tort claims.[742] None involved tort claims.

475 The cases in which declarations were made involved features which make them inapt to establish the proposition that declarations may be made regarding the conduct of named individuals who were not party to the proceedings. One of the cases relied upon involved delegates of named parties with statutory functions.[743] The other, ***Wotton v*** *State of* ***Queensland (No 5)***,[744] did involve declarations being made against officers of the Queensland Police Service for contraventions of the *Racial Discrimination Act 1975* (Cth), but in circumstances where the Commissioner of the Queensland Police Service had been sued both in the capacity of Commissioner and as a representative of the individual officers of the Queensland Police Service.

476 A case relied on by the plaintiff as involving findings, rather than the making of a declaration, about a non-party, was the appeal judgment *Bare v Independent Broad-Based Anti-Corruption Commission* (***Bare v IBAC***).[745] However, the delegate had been a defendant at first instance and there were particular reasons, referred to in the Court of Appeal's judgment, why the delegate was no longer named as a respondent in the appeal.[746]

477 The authorities are to the effect that it is unlikely that a Court would make a

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742 In two other cases involving police tort claims brought against the State of Victoria, no declarations were made. In *Gebrehiwot v Victoria (Ruling No 2)* [2019] VCC 1229 the plaintiff claimed assault, battery and false imprisonment against the State, based on acts of police officers. The plaintiff also pleaded that the police officers had failed to give proper consideration to his human rights as required by s 38 of the *Charter*. He initially sought both damages and declarations that the acts of the police officers were unlawful: [14]. Declaratory relief was not ultimately pursued: *Gebrehiwot v Victoria* [2020] VSCA 315, [24]. This was apparently on the basis that the jury had not upheld his claims relating to the police: at [91]. In *Cruse*, Richards J found that the conduct of unnamed police officers had amounted to an assault and battery, and awarded damages to the plaintiff, but declarations were not sought.

743 *Certain Children (No 2)* (2017) 52 VR 441, 607-608; *Bare v IBAC* (2015) 48 VR 129.

744 [2016] FCA 1457.

745 (2015) 48 VR 129. The judge at first instance dismissed an application for judicial review of a decision of a delegate of the Director, Police Integrity, who was alleged to have failed to give proper consideration of Mr Bare's rights. See [1]; [15]. The delegate was a named defendant in the primary proceeding: *Bare v Small* [2013] VSC 129. No declarations were made.

746 The Court of Appeal explained that IBAC had sought leave to have the names of the particular delegates whose decisions were impugned removed from the proceeding, which was approved and their names were subsequently removed: (2015) 48 VR 129, 157 [70], footnote 42 (Warren CJ). The reasons do not disclose why the delegate's name was removed from the appeal, but I infer it was because the Director's office had been abolished and IBAC was taking the place of the Director in the appeal. See (2015) 48 VR 129, footnote 1.

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declaration that a person had committed a tort if that person was not a party to the relevant proceeding, in anything other than the most exceptional circumstances. Such a declaration would have a relevant effect on the legal interests of a person and, absent some extraordinary circumstance, should not be made if the person is not party to the proceeding. The plaintiff validly observes that there is, in a case such as the present, an artificiality to making detailed findings as to whether the acts of particular officers constituted an unlawful battery of the plaintiff, but declining to make a declaration stating that those officers were responsible for an unlawful battery of the plaintiff. However it is, in my view, the consequence of the particular statutory regime that has been enacted in Division 8 of Part 4 of the *Victoria Police Act*. It may be that in certain circumstances it would be appropriate to avoid naming specific police officers in police tort claims.[747] However, the State did not contend that this was such a case.

478 The plaintiff also submitted that it was inappropriate for the Court to approach this issue by 'putting the *Victoria Police Act* on top of [the *Charter*]'[748] to give rise to a restrictive construction of the relief available under the *Charter*. I do not accept that this is an appropriate characterisation of the relevance of the *Victoria Police Act* to this question. It is plain that the *Charter* is beneficial legislation which should be construed by taking into account its overarching purpose of protecting and promoting human rights.[749] However, s 39 is expressed in terms which quite clearly engage more than one legal regime, whether statutory or the common law. There must be, as a condition of any *Charter* based claim, an ability for the person to seek *otherwise than because of the Charter* relief or a remedy in respect of an act or decision of a public authority. In understanding whether the person may in fact seek a remedy or relief independent of the *Charter*, it is essential to understand any legal limitations imposed on the availability of that remedy or relief, including limitations imposed by statute such as those imposed by the *Victoria Police Act*. This is not to give that legislation any greater

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747 See for example *Cruse*, [1], [8] and footnote 5, in which the police officers who were involved in the arrest and assault of the plaintiff were not named, because of their roles in the Joint Counter Terrorism Team, the Special Operations Group and NSW Tactical Operations Group.

748 Transcript 12/06/25, T290.19-29 (Submissions).

749 *Charter*, s1(2). See *Momcilovic v The Queen* (2011) 245 CLR 1, 28 [1] (French CJ); 202 [519] (Crennan and Kiefel JJ).

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degree of importance than the *Charter*, but is simply a part of applying the *Charter* according to its terms.

479 The plaintiff submitted that an interpretation of s 39 which would preclude relief based on *Charter* unlawfulness in cases involving police tort claims was not intended by Parliament, given that it could prevent a litigant from bringing *Charter* breaches in the context of 'a case of police brutality' before the Courts.[750] It is true that this interpretation will limit the cases in which *Charter* breaches by individual police officers will be the subject of declaratory or other relief available pursuant to s 39. However, that is not a factor that supports any different construction of this section. The limitation on the potential for remedies or relief relating to *Charter* breaches in the context of police tort claims is a function of the interaction of s 39(1) with the provisions of the V*ictoria Police Act*. The *Victoria Police Act* provisions plainly evince a Parliamentary intention to limit the ability to bring tort claims against individual police officers, in order to provide police protection not only from personal liability for tort claims, but from the stress of being engaged in Court proceedings in circumstances arising out of them performing duties connected with their role.[751] It is consistent with this intention, and not implausible, that the scope to bring *Charter* based claims against police may also be limited.

480 Secondly, this construction does not shield police generally from accountability, nor diminish the effect of the *Charter* other than as necessarily arises from the effect of the police tort claims provisions of the *Victoria Police Act*. Outside of police tort claims, proceedings could be brought against police for contravention of statutory obligations including those imposed by equal opportunity and anti-discrimination legislation,[752] or judicial review proceedings.

481 For the above reasons, I consider that it is not open to make the declarations the plaintiff seeks, that Sergeant Guthrie and A/Sergeant Bolzonello breached *Charter*

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750 Transcript 12/06/25, T275.24-28 (Submissions).

751 Second Reading Speech for the Victoria Police Bill: Victoria, *Parliamentary Debates*, Legislative Assembly, 16 October 2013, 3613 (Wells, Minister for Police and Emergency Services). See [455] above.

752 See for example *Goode*, [45] (Bell J); see also *Wotton v Queensland (No 5)*.

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provisions.

The act or decision the subject of Charter relief must be the same as that for non-Charter relief

482 The State contended that it is sufficient, to dispose of the *Charter* questions, to determine that there is no non-*Charter* claim validly made, so that s 39(1) does not apply. I agree that if I am correct in my conclusion above, the other argument raised by the State with respect to the application of s 39(1) does not arise. However, in the event that I am wrong in the conclusion that declaratory relief based on *Charter* contraventions is not available, I will briefly deal with the State's submission. That contention is that the acts and decisions referred to in the declarations sought by the plaintiff are different from the acts of deploying OC foam which form the basis of the battery claim, so that even if the plaintiff could seek a remedy on non-*Charter* grounds based on the acts or decisions of the police officers as public authorities, the *Charter* breaches identified in the declarations are not based on those acts or decisions.

483 Section 39(1) provides that where a person may seek 'any relief or remedy in respect of an act or decision' otherwise than because of the Charter, the person may seek 'that relief or remedy' on a Charter ground. It is established that in applying s 39(1), these words have the effect that the 'impugned acts or decisions … must be same for both the *Charter* and non-*Charter* relief'.[753]

484 The declarations sought by the plaintiff are first, that 'the deployment of OC foam by Sergeant Guthrie and Acting Sergeant Bolzonello on the plaintiff constituted an unlawful battery of the plaintiff'.[754] For the purposes of s 39(1), this would be the non-*Charter* relief. The declaratory relief based on *Charter* grounds sought by the plaintiff is as follows.

(a) A declaration that the act of deployment of OC foam was an act incompatible with, and so breached, the plaintiff's human rights under ss 10(b), 12 and 16(1) of the *Charter*, in breach of s 38(1). I accept that this would be relief based on the

753 *Goode,* [44]-[45] (Bell J).
754 Plaintiff's Primary Submissions, [167(a)(i)].

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same act, being the deployment of OC foam.

(b) A declaration that the act of deployment of OC foam 'was the result of a prior decisions of each of Sergeant Guthrie and A/Sergeant Bolzonello…to carry out an unlawful battery on the plaintiff, [which]…unlawfully failed to properly consider the plaintiff's human rights' under the *Charter*, in breach of s 38(1).[755] I do not accept that a prior 'decision' to deploy OC foam, to the extent that it can be separated from the act of deployment of the OC foam, is the same 'act or decision' as that on which the first proposed declaration is based. The premise of this proposed declaration is that the decision to deploy OC foam is separate from the act of deployment (which is independently the subject of the first declaration). 'Acts' and 'decisions' are identified as quite separate matters in s 38(1) of the *Charter,* attracting different obligations. The first, substantive limb of s 38(1) provides that it is unlawful for a public authority to act in a way that is incompatible with a human right. The second, procedural limb, renders it unlawful when making a decision to fail to give proper consideration to a human right. The decision to act, and the act itself, are thus materially different aspects of conduct for the purposes of s 38(1), and for the purposes of s 39(1) of the *Charter* which also distinguishes between an 'act *or* decision'. I do not accept that the fact that an act may be regarded as the 'result of' a prior decision makes it the same impugned act or decision for the purposes of s 39(1).

(c) A declaration that 'the decision of A/Inspector Caldwell to order the immediate arrest of the Climbers for trespass by way of the advance, being the causal precursor to the decisions and acts of Sergeant Guthrie and A/Sergeant Bolzonello to carry out an unlawful battery on the plaintiff, and his failure to revise that decision or order a tactical withdrawal, unlawfully failed to properly consider the plaintiff's human rights…'.[756] The decision of A/Inspector Caldwell is even further removed from the acts of deployment of OC foam by Sergeant Guthrie and A/Sergeant Bolzonello. It is the decision of

755 Plaintiff's Primary Submissions, [167(a)(iii),(b)].
756 Plaintiff's Primary Submissions, [167(b)].

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an entirely different person. The plaintiff did not make any real submission that this satisfied the requirement that the act or decision be the same, other than to say that it was open to make the claim because s 39(1) refers to any relief or remedy 'in respect of' an act or decision.[757] While the words 'in respect of' are words of wide connection,[758] they are not so wide that they would render a decision made by one person, materially removed in time, the same as the act of another person, even if there is some causal relationship. For the avoidance of doubt, I do not in any case accept that A/Inspector Caldwell's decisions were relevantly causally related to two officers' use of OC foam, given the clear evidence that they each made an independent decision to use force.[759]

485 Given these conclusions, even if it is wrong to conclude that relief cannot be sought pursuant to s 39(1) because no relevant non-*Charter* based relief is sought, it remains the case that only one of the declarations sought on *Charter* grounds relates to the same act as the act that is the subject of the non-*Charter* remedy. That is the proposed declaration that the deployment of OC foam by Sergeant Guthrie and A/Sergeant Bolzonello was an act incompatible with, and so breached the plaintiff's human rights under ss 10(b), 12 and 16(1) of the *Charter*. I consider that issue below, so that factual findings have been made in the event that my conclusion on the legal question, as to whether relief at all is available pursuant to s 39(1), is wrong.

486 The unavailability of the other *Charter* based declarations is, in my view, sufficiently clear that it is inappropriate to consider the conduct the subject of those declarations. One consequence of this is that it is unnecessary to address the parties' arguments about whether the *decision* to deploy OC foam is distinct from the act of deploying it,

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757 Transcript 12/06/25, T295.31-T296.03 (Submissions).

758 In *State Government Insurance Office (Q) v Rees* (1979) 144 CLR 549, 561, Mason J said: 'The expression "in respect of" denotes a relationship or connexion between two things. In *State Government Insurance Office (Queensland) v Crittenden* [(1966) 117 CLR 412 at 416] Taylor J quoted, with evident approval, the remarks of Mann CJ in *Trustees Executors & Agency Co Ltd v Reilly* [[1941] VLR 110 at 111], "The words 'in respect of' are difficult of definition, but they have the widest possible meaning of any expression intended to convey some connexion or relation between the two subject-matters to which the words refer." The same view was taken later in *Club Motor Insurance Agency Pty Ltd v Sargent* [(1969) 118 CLR 658]. But, as with other words and expressions, the meaning to be ascribed to "in respect of" depends very much on the context in which it is found.'

759 See paragraph [432]-[436] above in relation to the answers to Q24.

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and attracts the procedural obligation in s 38(1) of the *Charter*.[760] This is both a complex and important issue and although in many cases it may be appropriate to express views on issues that may arise in the event that conclusions that a trial judge makes are incorrect, I consider that it is inappropriate to express views on this issue in the present case.[761]

487 My conclusions on relief have an impact on the extent to which it is appropriate to answer Common Questions 20 to 23.

488 Common Questions 20 and 21 relate to whether 'police actions or decisions at the IMARC Protest in relation to the use of force against the Plaintiff in the Relevant Time period limit any *Charter* rights of the Plaintiff'; and if so, what actions or decisions limited which *Charter* rights.

489 I have concluded above that it is not open to grant the relief sought in the form of declaratory relief with respect to claims that police actions or decisions were unlawful by reference to the *Charter*. I have concluded, secondly, that if I am wrong about that, the only declaratory relief sought by the plaintiff which relates to the same act as the non-*Charter* relief he seeks is the declaration that the deployment of OC foam by Sergeant Guthrie and A/Sergeant Bolzonello on the plaintiff was an act incompatible with the plaintiff's human rights, and in breach of s 38(1) of the *Charter*. I consider that this is the only issue on which I should make factual findings, as it is the only issue which has, in my view, a realistic possibility of leading to the grant of relief if my conclusions above are wrong. I will not consider any other police actions or decisions for the purposes of Common Questions 20 and 21.

490 Common Questions 22 and 23 relate to whether:

(a) decisions of police officers in the planning of the police response to the IMARC Protest or during the IMARC Protest in the Relevant Time Period in relation to

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760 See Plaintiff's Primary Submissions, [128]-[136]; Defendant's Reply Submissions filed 29 May 2025, [25]-[32].

761 It would arise if I am firstly, wrong in concluding that there is no non-*Charter* relief that may be sought, and secondly, wrong on the issue of whether the act or decision is the same for the *Charter* relief and the non-*Charter* relief claims.

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use of force against the plaintiff failed to give proper consideration to his *Charter* rights; and

(b) acts of police officers in planning the police response to the IMARC Protest or during the IMARC Protest in the Relevant Time Period in relation to use of force against the plaintiff were incompatible with his *Charter* rights.

491 I consider it is inappropriate to answer these Common Questions with respect to any act or decision other than the acts of Sergeant Guthrie and A/Sergeant Bolzonello in deploying OC foam on the plaintiff. It will answer Common Questions 20, 21, and 23 only as modified by reference to those limitations.[762]

Common Questions 20 and 21: Did Sergeant Guthrie and A/Sergeant Bolzonello's actions limit the Plaintiff's *Charter* rights, and did s 7(2) authorise such limitations?

492 The plaintiff submits that the acts of the police officers deploying OC foam on him engaged and limited his rights under ss 10(b), 12 and 16(1) of the *Charter*.

Did the batteries limit the s 10 right to protection from inhuman or degrading treatment?

493 Section 10 of the *Charter* relates to the protection from torture and cruel, inhuman or degrading treatment. It provides:

> **10 Protection from torture and cruel, inhuman or degrading treatment**
>
> A person must not be —
>
> (a) subjected to torture; or
>
> (b) treated or punished in a cruel, inhuman or degrading way; or
>
> (c) subjected to medical or scientific experimentation or treatment without that person's full, free and informed consent.

494 The plaintiff submits that the right in s 10(b) to protection from cruel, inhuman or degrading treatment is potentially engaged and limited when police use excessive force, such as in the deployment of OC foam, because it 'results in deliberate infliction

[762] As Question 22 relates exclusively to 'decisions' of police officers failed to give proper consideration to the *Charter* rights of the plaintiff, and I have determined that it is not open to seek relief relating to decisions of any police officer (including Sergeant Guthrie and A/Sergeant Bolzonello), that question is not addressed.

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of severe, rapid and debilitating pain and psychological panic on the subject to gain compliance, with a risk of serious injury or death.'[763]

495 The plaintiff refers to *Bare v IBAC*[764] as an example of where excessive police force was found to engage the s 10(b) *Charter* right. In that case, the Court of Appeal rejected an argument that s 10(b) imports an implied right to investigation of a complaint by the appellant of excessive police force (including spraying him with OC foam). However, Tate JA accepted that this conduct may engage the s 10(b) right, and so required the person exercising a statutory power to determine whether to independently investigate the incident to give proper consideration of the right.[765]

496 The State submits that even if the deployment of OC foam was a battery, that finding would not be sufficient to warrant a finding of cruel, inhuman or degrading treatment, as it does not meet the minimum level of severity to limit or breach the right in s 10(b).[766] The State notes the authority to the effect that treatment may be considered 'degrading' if it humiliates or debases a person, causes fear, anguish or a sense of inferiority.[767] It also submits, based on international authorities, that for conduct to constitute 'inhuman treatment', it must 'reach a minimum level of severity manifesting in bodily injury or intense physical or mental suffering';[768] and that 'cruel' treatment must be conduct that would 'shock the community conscience'.[769]

497 In ***Certain Children*** *v Minister for Families and Children* ***(No 2)***,[770] John Dixon J considered the authorities relating to s 10(b), in particular relating to the threshold for the engagement of the right. His Honour held:

> The scope of the s 10(b) right is conditioned by a minimum standard or

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763 Plaintiff's Primary Submissions, [138(a)].

764 (2015) 48 VR 129.

765 *Bare v IBAC*, 203 [235]; 224 [293]. Note that IBAC conceded that if the assault on the appellant had occurred as he alleged, it could reasonably be described as a breach of the right to be free from cruel, inhuman or degrading treatment recognised in s 10(b) of the *Charter*: 217 [274].

766 Defendant's Reply Submissions, [11].

767 ***Kracke*** *v Mental Health Review Board* (2009) 29 VAR 1, 120 [561] (Bell J).

768 Defendant's Reply Submissions, [8], relying on *A v United Kingdom* (1998) 27 EHRR 611, [20]; *Ireland v United Kingdom* (1978) 2 EHRR 25, [167]; *Becciev v Moldova* (2007) 45 EHRR 11, [38] and [39].

769 Defendant's Reply Submissions, [8], relying on ***Attorney-General v Taunoa*** [2006] 2 NZLR 457, [144]; [225]; *Taunoa* v *Attorney-General* [2008] 1 NZLR 429.

770 (2017) 52 VR 441 (***Certain Children (No 2)***).

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> threshold of severity or intensity that can manifest in bodily injury or physical or mental suffering. It is the combination of the adjectives in s 10(b) that defines the prohibited treatment or punishment … The assessment of the minimum threshold is relative and depends on all the circumstances of the case, including the duration of the treatment, its physical or mental effects, and the sex, age and state of health of the alleged victim.[771]

498 I find that the deliberate deployment of OC foam on the plaintiff constituted cruel, inhuman or degrading treatment, within the meaning of s 10(b) of the *Charter*. It caused severe pain to the plaintiff, even if it was not long lasting, as well as both physical and mental suffering, as I find below. The OC foam was first deployed on him when he was standing still, creating no risk to police or other persons, in the context of him exercising his rights to protest. It was then deployed again when he was trying to move away from the first spray of OC foam (as intended by Sergeant Guthrie when deploying it) and was seriously incapacitated by the effects of the OC foam. These aspects of the batteries involved elements of humiliation of the plaintiff and in addition to causing him severe pain, caused him fear.

499 Although the State referred to international jurisprudence as to the distinct meaning of the individual adjectives in s 10(b) (that is, cruel, inhuman, or degrading) it may not be necessary to identify which of the adjectives in s 10(b) apply to particular conduct in order to conclude that there has been a limitation of the rights in s 10(b).[772] The preferable approach may be to acknowledge that it is a 'compendious expression of a norm'.[773] I am satisfied that both batteries are properly characterised as degrading treatment, and also that they comfortably fall within a norm prohibiting 'cruel, inhuman or degrading' treatment which is incompatible with a person's humanity.

Did the batteries limit the s 12 right to freedom of movement?

500 Section 12 of the *Charter* relates to the right to freedom of movement. It provides:

> **12 Freedom of movement**
>
> Every person lawfully within Victoria has the right to move freely within

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771 *Certain Children (No 2)*, 519 [250].

772 I note the comments of John Dixon J in *Certain Children (No 2)*, that it is the combination of the adjectives in s 10(b) that defines the prohibited treatment or punishment: at [250]. See also *Attorney-General v Taunoa*, [82]-[83] (Elias CJ).

773 *Attorney-General v Taunoa*, [82] (Elias CJ).

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Victoria and to enter and leave it and has the freedom to choose where to live.

The parties' submissions

501 The plaintiff contends that the 'decisions and actions' of the Sergeant Guthrie and A/Sergeant Bolzonello engaged the s 12 right,[774] and submits:

> This right is limited when police require protesters to move from a particular location. The right may reasonably be limited so as to allow for the lawful arrest of a person, to prevent a breach of the peace or a continuing trespass.[775]

502 The plaintiff notes that the police guidance, referred to in the Human Rights Debrief, is to the effect that 'police should exercise discretion towards lower level offending to allow a peaceful protest (i.e. only execute arrest powers where offences are serious…)'.[776] Guidance to that effect is also stated in the *Crowd control* VPM Procedures and Guidelines, which relevantly states at Part 7.5:[777]

> **Arrests**
>
> If it is necessary to make arrests, follow these guidelines:
>
> …
>
> - Minor offences should be ignored in the interests of containing the overall situation. However, take appropriate action to prevent conduct involving violence to people or damage to property.

503 The plaintiff submitted that the acts of Sergeant Guthrie and A/Sergeant Bolzonello in deploying OC foam on him limited his rights under s 12, because the spray was deployed to force him to move away from his position under the West Pole.[778] The plaintiff submits that the right of freedom of movement 'logically incorporates the idea of being able to move into and remain in a particular place' and that 'the deployment of OC spray, which had the absolute intended effect of getting [the plaintiff] to leave where he was standing while he was protesting, engaged and limited his freedom of movement.'[779]

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774 Plaintiff's Primary Submissions, [148]-[149].
775 Plaintiff's Primary Submissions, [138(b)]; [149]-[150]; [153]; [156].
776 Plaintiff's Primary Submissions, [138(b)]. The plaintiff referred to that guidance in Exhibit P32, which was the Human Rights Debrief.
777 Exhibit P38.
778 Plaintiff's Primary Submissions, [138].
779 Transcript 12/06/25, T252.03-08; T252.27-30 (Submissions).

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504 The State submits that the right to freedom of movement in s 12 relevantly protects the right to liberty of movement within Victoria.[780] It contends that this limitation is not concerned with 'the unrestrained movement of a person at a single location but rather with movement within and throughout' Victoria. In support of that construction, the State refers[781] to consideration by the United Nations Human Rights Committee of article 12 of the International Covenant on Civil and Political Rights (**ICCPR**), on which s 12 of the *Charter* is based.[782] Article 12 relevantly provides:

> (1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> …
>
> (3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

505 In General Comment 27 of the United Nations Human Rights Committee, the Committee makes the following observations on article 12(1):[783]

> The right to move freely relates to the whole territory of a State, including all parts of federal States. According to article 12, paragraph 1, persons are entitled to move from one place to another, and to establish themselves in a place of their choice. The enjoyment of this right must not be made dependent on any particular purpose or reason for the person wanting to move or to stay in a place. Any restrictions must be in conformity with paragraph 3.

506 The State notes that the references to the ability to move 'from one place to another' and the ability for people to 'establish themselves in a place of their choice' make it clear that the right in article 12 is concerned with 'movement within and throughout the territory',[784] and by analogy, it is 'clear that the right is not concerned with the unrestrained movement of a person at a single location, but rather with movement

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780 Defendant's Reply Submissions, [12]-[13] citing *Kracke*, 124 [588] (Bell J); *Kaba*, 560 [118] (Bell J).

781 Defendant's Reply Submissions, [14]-[15].

782 Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Thomson Reuters, 2nd ed, 2019) [CHR.12.40], 106.

783 United Nations Human Rights Committee, *General Comment No 27: Freedom of movement (article 12)*, 67th sess, 1783 mtg, UN Doc CCPR/C/21/Rev.1/Add.9 (1 November 1999) [5].

784 Defendant's Reply Submissions, [15].

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within and throughout the State'.[785]

507 The State submits that the right in s 12 was not limited as the plaintiff 'did not give evidence to the effect that his movement was affected…or that he was prevented from moving freely. In particular, he was not prevented from moving freely within Victoria within the sense met by s 12'.[786]

Consideration – s 12 does protect freedom of movement in and around a particular place

508 In *Director of Public Prosecutions (Vic) v* ***Kaba***,[787] Bell J described the scope of the right to freedom of movement in s 12 of the *Charter* as follows:

> Under the Charter, all persons likewise possess the right to freedom of movement, as they do under the common law…[s]ection 12 provides that "[e]very person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live", reflecting Art 12(1) of the ICCPR.[788]

509 Section 12 has been interpreted to be engaged in a range of circumstances, including most relevantly to the present case:

(a) police powers to stop motor vehicles and require the name and address of the driver (*Director of Public Prosecutions (Vic) v Kaba)*;[789]

(b) requirements that a child for whom the Secretary was the guardian live in a specific residential facility for 12 months (*Re Beth)*;[790] and

(c) limitations imposed by parole orders or bail conditions (*Woods v Director of Public Prosecutions)*.[791]

510 In ***Temoannui*** *v Ford,*[792] Chief Justice Higgins considered s 13 of the ***Human Rights***

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785 Transcript 11/06/25, T93.19-30 (Submissions).
786 Defendant's Reply Submissions [16]; Transcript 11/06/25 T94.01-05 (Submissions).
787 (2014) 44 VR 526.
788 *DPP (Vic) v Kaba*, (2014) 44 VR 526, 559 [113].
789 (2014) 44 VR 526, 559-560, [113]-[118] (Bell J). See also *Kerr v Attorney-General* [1996] DCR 951 in which the District Court of New Zealand held that the right to freedom of movement in the *New Zealand Bill of Rights Act 1990* (NZ) was breached by police in unlawfully stopping the plaintiff at a road block and telling him he could not pass for 10 minutes.
790 (2013) 42 VR 124, 171 [201] (Osborn JA).
791 [2014] VSC 1, [8]-[9] (Bell J).
792 (2009) 231 FLR 216; [2009] ACTSC 69 (***Temoannui).***

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***Act** 2004* (ACT), which is in similar terms to s 12 of the *Charter*,[793] in the context of the appellant's conviction on a charge of contravening a police officer's direction to move on from a public place. His Honour referred to s 28(1) of the *Human Rights Act* which stipulates that human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society, and observed:

> It follows from those provisions that it can be seen as reasonable to prevent public disorder by removing from a public place persons who are or are reasonably likely to be engaging in public disorder. However, the extent to which persons are to be restricted from exercising their statutory right to freedom of movement and association must be the minimum necessary to achieve that objective.[794]

511 Chief Justice Higgins, interpreting the scope of the power to give a move on direction consistently with the *Human Rights Act*, concluded that the conviction and penalty were wrongly imposed and should be set aside.[795] His Honour also observed:

> It should be added that, in a free and democratic society a citizen is permitted to act in and to move about in public places without police interference unless such interference is warranted by law. The move on power is but one example of such a justification. A citizen is permitted not to respect a limit on his or her freedom of movement that is not imposed lawfully. If a police officer, for example, required a citizen to stop and show gestures of respect to that officer, even if it would be courteous to do so, it would not warrant arrest if the citizen declined to do so. The Act itself recognises the right to political protest. A police officer may well be offended by the affront to public order such a protest might pose. That does not entitle the officer to arrest and detain such a person without a real threat to persons or property (see *Ball v McIntyre* (1966) 9 FLR 237 and *Forbutt v Blake* (1981) 51 FLR 465).[796]

512 Taking the language of s 12 and the above authorities into account, I do not see a basis to construe s 12 as being concerned only with 'movement within and throughout' Victoria', and to exclude protection from restriction on movement at a single location in Victoria, as contended by the State. Section 12 confers the right 'to move freely within Victoria'. This includes movement not only between places in Victoria, but within places and locations in Victoria. There will be *de minimis* examples of restriction of movement which may not be protected by s 12. However, the s 12 right of freedom

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793 Section 13 of the *Human Rights Act* states: 'Everyone has the right to move freely within the ACT and to enter and leave it, and the freedom to choose his or her residence in the ACT.'

794 *Temoannui*, [29].

795 *Temoannui*, [41].

796 *Temoannui*, [42].

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of movement does, in my view, extend to protecting a person's right to move into a place or part of a place, and also to stay and not be moved from that place, subject only to lawful limitations which can be justified pursuant to s 7(2). Freedom of movement within public places is, as recognised by Higgins CJ in *Temoannui*, an important feature of a free and democratic society, subject only to lawful limitations. The common law has long recognised a right to personal freedom of movement in public places.[797] A broad construction of s 12 is consistent with this.

513 That conclusion is, in my view, also consistent with the international law rights on which s 12 of the *Charter* was based. Article 12 of the ICCPR is plainly focussed on movement 'within a territory' as that is the express language of the provision. However, it is not limited to movement around the territory, as opposed to movement in particular places. The Human Rights Committee General Comment acknowledges that art 12(1) is concerned with a person's right to 'establish themselves in a place of their choice' and enjoyment of this right through 'wanting to move *or to stay* in a place'.[798]

514 I find that the plaintiff's s 12 right to freedom of movement was limited by the batteries of Sergeant Guthrie and A/Sergeant Bolzonello. Although the State submits that there is no basis for that finding, as the plaintiff did not give evidence to the effect that OC foam affected his movement, it is plain from all of the evidence, and in particular the video footage, that it did – as soon as he was struck by the OC foam deployed by Sergeant Guthrie, he moved away rapidly. When struck again by OC foam deployed by A/Sergeant Bolzonello, the plaintiff continued to move away, until he was by the Yarra River where volunteers were providing aftercare. The plaintiff submits that it was the officers' intention to make him move away. I accept that this is the case, but it is not necessary for the plaintiff to establish that there was an intention to make the plaintiff move in order to establish that his rights under s 12 have been limited.

515 The plaintiff was in a particular place, the forecourt of the MCEC, which is accessible

797 See the discussion by Bell J in *DPP (Vic) v Kaba* (2014) 44 VR 526, 550-552, [79]-[85].

798 United Nations Human Rights Committee, General Comment 27: Article 12 (Freedom of Movement), [5] (emphasis added).

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to all members of the public, for the purpose of a protest. He was for a period in a particular part of that place, under the West Pole. The deployment of OC foam by Sergeant Guthrie and A/Sergeant Bolzonello caused him to move from that place. The nature of the act which made him move, the deployment of OC foam, was such that it would be necessary for him to take steps to remove the foam and resulted in him moving to and staying for a period at another part of the area where he could be assisted for that purpose. The limitation on his freedom of movement was not *de minimis*, and limited his s 12 rights.

Did the batteries limit the plaintiff's s 16 right to peaceful assembly?

516 Section 16(1) of the *Charter* relates to the right to peaceful assembly. It provides:

> **16 Peaceful assembly and freedom of association**
>
> (1) Every person has the right of peaceful assembly.
>
> (2) Every person has the right to freedom of association with others, including the right to form and join trade unions.

517 The plaintiff submits that s 16(1) 'is connected to the right to gather for a common purpose and protest' and can only be 'justifiably limited where protesters act contrary to law, or if there is no other way to avoid a breach of the peace'.[799] The plaintiff notes that the PORT Tactical Plan provided for a least restrictive approach to this right, in saying that '[g]enerally at protests…police will only limit an assembly or association in so far as to ensure there are no breaches of peace and or serious offences committed'.[800]

518 The State submits that:

> The plaintiff's evidence was that he was assembled for a long period with other protesters at the protest. He was not prevented from attending the protest or required to leave the protest.[801]

519 The State also contends that the plaintiff's purpose in standing at the West Pole was to protect the West Pole Climber from the police, and to deliberately obstruct the

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799 Plaintiff's Primary Submissions, [138(c)], referring to the discussion in Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Thomson Reuters, 2nd ed, 2019) 159-161.

800 Exhibit P10.

801 Defendant's Reply Submissions, [20].

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police from making an arrest, so that his activity at the West Pole was 'not a peaceful attempt to assemble in the sense protected by the right in s 16(1).'[802] The State accepts that an individual 'who remains peaceful in their own intentions and behaviour retains the protection of the right even where there is sporadic violence or unlawful acts by other members of the assembly'.[803]

520 I find that the plaintiff's right of peaceful assembly was limited by the two deployments of OC foam. The plaintiff was engaged with others in protest against IMARC. He was at the relevant time standing around the West Pole, with other persons who were also protesting. He had his arms linked with other protesters. He was not physically or verbally violent or aggressive to any police officer nor any other person, and was standing relatively still in a stance that could be described as passive resistance.[804] The deployments of foam which caused him to rapidly leave the area stopped him from that protest activity.

521 I do not accept the State's submission that the plaintiff was not prevented by the batteries from attending the protest or required to leave the IMARC Protest. It is true that the plaintiff was able to protest unimpeded for hours on the morning of the protest. However, the two deployments of OC foam on the plaintiff directly led him to leave the protest area to try to remove the OC foam from his eyes, skin and hair, and recover from being sprayed. It also resulted in the plaintiff leaving the MCEC site and returning home.

522 I do accept, as the State submits, that the plaintiff intended to protect the West Pole Climber from police, and I have also found that the plaintiff initially had the purpose of protecting her from being arrested when he moved to the West Pole.[805] I have, however, not accepted that he was in fact obstructing the arrest at the time he was sprayed with OC foam, nor in fact at any time. I do not accept that his activities were

802 Defendant's Reply Submissions, [20].
803 Defendant's Reply Submissions, [18].
804 The importance of recognising passive resistance as generally not warranting use of force is recognised by Victoria Police in the *Operational safety equipment* VPM, Part 5 'Use of OSE'. (Exhibit P3). It states that officers 'should not use OC aerosols when a person is only passively resisting e.g. simply hanging limp or refusing to comply with instructions only'.
805 See [272]-[275] above.

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such as to take his conduct outside the scope of peaceful assembly.

523 Any question of whether the plaintiff was acting in a way that would justify lawful intervention, such as an intention to protect the West Pole Climber from arrest, would relate to whether the limits on his right of peaceful assembly were justified. The State has not made out its defence that there were lawful justifications for the two deployments of OC foam, so there can be no question of a lawful and justifiable limitation on the plaintiff's right of peaceful assembly.

Common Question 23: Did Sergeant Guthrie and A/Sergeant Bolzonello act in a way which was incompatible with the *Charter* rights of the plaintiff?

524 Section 38(1) of the *Charter*, as applied to the acts of a public authority, requires an assessment of whether any limitation on human rights caused by the act was justified in accordance with the requirements of s 7(2) of the *Charter*. If the limitation cannot be justified, the act is 'incompatible with a human right' within the meaning of s 38(1).[806]

525 Section 7(2) of the *Charter* provides:

> A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—
>
> (a) the nature of the right; and
>
> (b) the importance of the purpose of the limitation; and
>
> (c) the nature and extent of the limitation; and
>
> (d) the relationship between the limitation and its purpose; and
>
> (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

526 It is established that a limitation on a human right is not capable of meeting the requirements of s 7(2), and thus constitute a reasonable and justifiable limit, if the limitation is unlawful.[807]

527 The parties take essentially the same position as to the effect in this case of the

806 *DPP (Vic) v Kaba* (2014) 44 VR 526, 647 [468] (Bell J).

807 *Thompson v Minogue* (2021) 67 VR 301, [58] and [70] (Kyrou, McLeish and Niall JJA); *DPP (Vic) v Kaba* (2014) 44 VR 526, [468] (Bell J).

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requirement that any limitation must be a lawful limitation. In summary, if the use of force the subject of the battery claim is not found to be legally justified, there can be no reasonable and justifiable limit on the plaintiff's rights under the *Charter*.

528 The plaintiff submits that:

> The Court's finding as to whether or not action of the police officers in using OC foam against the Plaintiff was lawfully justified (involving an assessment of the reasonableness and proportionality of use of force) would likely practically resolve the question as to whether the actions of Sergeant Guthrie and A/Sergeant Bolzonello unjustifiably limited and so breached the Plaintiff's human rights which were limited by use of OC foam.[808]

529 The State submits that if its primary position that there was no battery and limitation of the plaintiff's rights is rejected, and the Court finds the plaintiff's rights were limited, 'the compatibility of that limit will be determined by the results of the plaintiff's battery claim'.[809]

530 I have concluded that there was no lawful justification for the deployment of OC foam on the plaintiff by Sergeant Guthrie and A/Sergeant Bolzonello. In these circumstances, the limitation of the plaintiff's rights caused by the acts of battery cannot satisfy the requirements of s 7(2) of the *Charter*. The acts were, therefore, incompatible with the plaintiff's *Charter* rights and contravened s 38(1) of the *Charter*.

The plaintiff's injuries[810]

531 The plaintiff pleads that the unlawful deployment of OC foam caused him the following physical and psychological injuries:

(a) acute burning of skin and eyes for hours, and, in the days following the incident, trouble focussing, blurry vision, extreme itchiness, irritation, sensitivity to light, redness and pain;

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808 Plaintiff's Primary Submissions, [150].

809 Defendant's Reply Submissions, [3.1].

810 The parties identified Question 28 as a question specific to the plaintiff: 'Should the Plaintiff be awarded damages and, if so, for what amount, and under what heads of damages?'

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(b) musculoskeletal injury to the spine and shoulders; and

(c) distress, fear and psychiatric injury.[811]

Physical injury

532 The plaintiff submits that the evidence establishes that as a result of the two deployments of OC foam, he suffered the following injuries:

> acute physiological effects of OC foam on the eyes, skin and mucus membranes of the respiratory tract leading to burning of the skin and eyes for hours. In the days following the event, the Plaintiff had trouble focussing, blurry vision, extreme itchiness, irritation, sensitivity to light, redness and pain.[812]

533 The plaintiff gave evidence that upon being sprayed with OC foam and the foam being on his face and skin for a moment, it caused a burning sensation. The OC foam went into his eyes which caused him excruciating pain. The oiliness of the foam caused it to move around his eyeballs which made it feel like razor blades or knives were in his eyes.[813] When the plaintiff opened his eyes, his vision was blurry and he could not see. The plaintiff described the pain he experienced as 'debilitating'[814] and 'extreme',[815] and 'the most excruciating pain that I've ever experienced'.[816] The pain continued while he was receiving treatment from volunteers at the grassy area near the Yarra River, across from the MCEC. His eyes were closed tightly and it felt like they were 'on fire and…getting cut up', and any sort of movement of his eyes further exacerbated that feeling. As he also had foam in his hair, it continued to run down with his sweat into his eyes which would cause a recurrence of the 'cutting' sensation, and an involuntary sort of spasming to occur.

534 The plaintiff remained at the grassy area for about an hour. As he was being cleaned up from the foam, there was some relief, however the foam from his hair would run back into his eyes and 'it would happen all over again'.[817] Since the plaintiff's vision

811 Further Amended Statement of Claim, [3(e)].
812 Plaintiff's Primary Submissions, [74(a)].
813 Transcript 18/02/25, T147.20-T148.05 (Plaintiff XN).
814 Transcript 18/02/25, T147.16-T148.23 (Plaintiff XN).
815 Transcript 18/02/25, T152.04 (Plaintiff XN).
816 Transcript 18/02/25, T152.11-12 (Plaintiff XN).
817 Transcript 18/02/25, T152.04-07 (Plaintiff XN).

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was affected from the effect of OC foam in his eyes, he could not ride his bicycle to leave the IMARC Protest, and his girlfriend at the time picked him up.[818] After he returned home, he took a shower to wash the foam out of his hair and off his skin. This caused the OC foam to get into the vapours of the shower and made him feel like he was choking.[819] Additionally, the warm water on his skin made his skin feel burnt, and the OC foam continued to get back into his eyes and caused searing pain.[820] For some days after 30 October, he felt like there was something gritty in his eyes and was sensitive to light.[821]

535 The plaintiff was not challenged in cross-examination on his description of the effect of the OC foam and the pain he experienced. I accept his evidence as an accurate account of his physical effects from the OC foam. It was an account of effects which was consistent with the description of the effects of OC foam in the OC Manual. I observed from the video evidence the large volume of OC foam which was sprayed on the plaintiff's face, in his eyes and in his hair.

Psychological injury

536 The plaintiff gave evidence that after the events at the MCEC, he would be reminded of them again by things such as the smell of certain cleaning products or going past the MCEC. In respect of the psychological impact the incident had on the plaintiff, he said:

> …there's good days, there's bad days. On a bad day I'm completely debilitated, I'm in bed, I'm not sleeping, I'm restless, I'm feeling unmotivated, I'm feeling depressed and overwhelmed. And then on a good day I'm trying to get on with it and trying to compose myself and get on with life.[822]

537 The plaintiff gave evidence that the events at the MCEC had an impact on his sleep, including restlessness and nightmares or the feeling of re-living the incident in abstract ways. His mood had been affected by 'feeling debilitated and not motivated,

818 Transcript 18/02/25, T152.14-26 (Plaintiff XN).
819 Transcript 18/02/25, T153.03-20 (Plaintiff XN).
820 Transcript 18/02/25, T152.20-T153.27 (Plaintiff XN).
821 Transcript 18/02/25, T154.13-23; T155.02-11 (Plaintiff XN).
822 Transcript 18/02/25, T160.26-31 (Plaintiff XN).

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overwhelmed, sometimes socially withdrawn'.[823] His work, including his volunteer work with the Melbourne Activist Legal Support, and creative outlets including music 'were affected but…[was] also…a place of support'.[824] He also felt a hypervigilance and anxiety in crowds.[825] The plaintiff said that the experience at IMARC had:

> …made me want to avoid protests and avoid doing certain work. There is work with Melbourne Activist Legal Support as a volunteer doing various things and if a case involves OC spraying I would avoid it just because it's triggering or difficult to work on.[826]

538 The plaintiff did not seek formal mental health assistance in response to the incident as he had:

> … a good support network of friends and I know someone who is a psychologist who has been very helpful with CBT and other methods of, you know, trauma and recovery.[827]

539 Both parties called expert psychiatric evidence on the question of the psychological harm suffered by the plaintiff, by reason of the deployment on him of OC foam at the IMARC Protest. The plaintiff tendered a report of Dr Steven Adlard, a consultant psychiatrist.[828] The State tendered a report of Dr Timothy Entwisle, a consultant psychiatrist.[829] The State also tendered a Determination and Reasons for Determination of the Medical Panel, which examined the plaintiff in connection with this proceeding on 21 January 2025.[830]

540 The plaintiff gave evidence about his history which was consistent with the accounts he provided to both Dr Adlard and Dr Entwisle. He gave evidence that he grew up in Newcastle with his loving parents, which was an 'unremarkable childhood' until his mother passed away when he was 13 years old.[831] He accepted that he had experienced depressive symptoms from some time prior to 2012 when he saw a GP,

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823 Transcript 18/02/25, T162.04-07 (Plaintiff XN).
824 Transcript 18/02/25, T162.07-13 (Plaintiff XN).
825 Transcript 18/02/25, T162.04-31 (Plaintiff XN).
826 Transcript 18/02/25, T162.23-28 (Plaintiff XN).
827 Transcript 18/02/25, T163.09-12 (Plaintiff XN).
828 Expert report of Dr Steven Adlard dated 9 July 2024 (Exhibit P57) (**Dr Adlard Report**), 1.
829 Expert Report of Dr Timothy Entwisle dated 7 November 2024 (Exhibit D6) (**Dr Entwisle Report**); Supplementary Expert Report of Dr Timothy Entwisle dated 27 November 2024 (Exhibit D7) (**Second Dr Entwisle Report**).
830 **Medical Panel Determination** and Reasons for Determination dated 30 January 2025 (Exhibit D13).
831 Transcript 18/02/25, T164.12-17 (Plaintiff XN).

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but has not seen a psychologist.[832] At that time, he was experiencing low mood following a relationship breakdown which occurred shortly after he had moved to Melbourne from Newcastle. He was feeling socially isolated and overwhelmed, and was experiencing housing and finance difficulties at the time. He was also grieving the loss of his mother. The plaintiff also saw a GP for his low mood in 2014.[833] He had been involved in a prior incident in 2014 when he was arrested by police while filming a protest in his work as a documentary filmmaker.[834] He was arrested again in 2016 while filming a protest (which charges were later withdrawn).[835] He later brought separate civil claims against Victoria Police for these two events.[836] The evidence was that the first settled. In the context of that claim, he was assessed by psychiatrist Associate Professor Paoletti in February 2016, who concluded that the plaintiff 'suffers from a mixed state of anxiety and existential depression' which he categorised as Unspecified Depressive Disorder and Unspecified Anxiety Disorder for the purposes of the Diagnostic and Statistical Manual of Mental Disorders (**DSM**).[837] In 2019, the plaintiff was prescribed beta blockers for what he described as performance anxiety in the context of doing presentations and public speaking.[838] He accepted in evidence that some of his depressive feelings relate to his concerns about the environment and society.[839] The plaintiff gave evidence that he had lived in Berlin for some years around 2017 or 2018 to 2019, had experienced 'a period of good recovery' and was 'feeling well and good' about himself.[840]

541 The plaintiff said that 'things…[had] gotten worse' after the IMARC incident, including negatively affecting his motivation and ability to do certain work, wanting to avoid protests and 'feeling unsafe around police'.[841] He gave evidence that his mood was 'usually fine', but that there were episodes of depressed mood and feelings

832 Transcript 18/02/25, T197.16-23 (Plaintiff XXN).
833 Transcript 18/02/25, T163.26-T164.02; T165.12-24 (Plaintiff XN); T200.08-201.16 (Plaintiff XXN).
834 Dr Entwistle Report (Exhibit D6) 1.
835 Dr Entwistle Report (Exhibit D6) 1.
836 Transcript 18/02/25, T194.03-17 (Plaintiff XXN); Exhibit D6, 1.
837 Medical Report of Associate Professor Paoletti dated 18 February 2016 (Exhibit D14) 8.
838 Transcript 18/02/25, T165.25-T162.04 (Plaintiff XN).
839 Transcript 18/02/25, T202.17-T203.29 (Plaintiff XXN).
840 Transcript 18/02/25, T160.03-12 (Plaintiff XN).
841 Transcript 18/02/25, T166.05-22 (Plaintiff XN).

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of being deflated and lacking motivation.[842]

542 Dr Adler and Dr Entwisle opined about the impact the events at IMARC had on the plaintiff's mental health, in the context of evidence about his past mental health history.

543 Dr Adlard concluded that the plaintiff has a chronic Adjustment Disorder with mixed anxiety, depressed mood and features of traumatisation.[843] Dr Adlard found that the plaintiff has some post-trauma features from the IMARC event, but that his presentation did not meet the diagnostic criteria from Post Traumatic Stress Disorder.[844] He acknowledged that the plaintiff 'had features of anxiety and depression at various times throughout his life prior to the [IMARC] event.'[845]

544 Dr Adlard observes that the plaintiff had 'some residual, fairly minimal psychiatric symptoms prior to the 2019 incident' which consisted of periodic anxiety when doing oral presentations, and an anxious mood, but was of the opinion that the plaintiff's overall functioning prior to the incident 'appeared quite good.'[846] He concludes that the plaintiff developed his current psychiatric condition from the October 2019 incident.[847] On the plaintiff's prognosis, Dr Adlard says that despite that the impact of the event giving rise to the plaintiff having anxiety, depressive and post-trauma symptoms for some time, he overall 'expects him to have a reasonably good prognosis'. He notes that 'his prognosis would potentially worsen if he is involved in a protest in the future where he is jostled/pushed/sprayed with OC foam by the police'.[848] Dr Adlard states that he did not think it is necessary for the plaintiff to see a psychiatrist, but 'would benefit from seeing a psychologist to learn skills to manage his anxiety and allow him to articulate and discuss his concerns'.[849] Dr Adlard

842 Transcript 18/02/25, T160.23-31 (Plaintiff XN); Transcript 18/02/25, T205.25-31 (Plaintiff. XXN) This was consistent with the history given by the plaintiff to Dr Adlard (Dr Adlard Report, (Exhibit P57), 4-5) and Dr Entwisle (Dr Entwisle Report, (Exhibit D6), 6) and to the Medical Panel: (Medical Panel Determination, (Exhibit D13)), 4.
843 Dr Adlard Report, 11.
844 Dr Adlard Report, 10.
845 Transcript 20/02/25, T356.20-29, T365.11-T366.11 (Adlard XXN).
846 Dr Adlard Report, 10.
847 Dr Adlard Report, 10-11.
848 Dr Adlard Report, 12.
849 Dr Adlard Report, 11-12.

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suggests that around 12 to 15 sessions across 12 to 15 months would suffice and that the cost would be between $3,500 - $5,000.[850]

545 Dr Entwisle diagnosed the plaintiff with Residual Post Traumatic Stress Disorder and Persistent Depressive Disorder (Dysthymia).[851] Dr Entwisle attributes 40% of the plaintiff's symptoms related to these conditions as related to his early developmental losses, in particular the death of his mother when he was young, but also attributes 40% to the IMARC incident.[852] He attributes the remaining 20% to external factors including relationship breakdowns and a period of homelessness.[853] Although Dr Entwisle agreed with some elements of Dr Adlard's diagnosis, he considered that it did not take into account the significance of the plaintiff's early loss of his mother.[854] Dr Entwisle opines that the source of his depressive symptoms includes 'underlying unresolved issues from his childhood experience and the loss of his mother at such an early age'.[855] Dr Entwisle considers the plaintiff's mother's death had an 'obvious and significant impact' and that 'such losses are known to later render children prone to mental health problems'.[856] He also concluded that the plaintiff 'appeared pre-occupied with matters to do with the environment and the sense of injustice that flows from his experience with Police in a variety of settings', and that he 'very much impresses as someone who is trapped in the past and in the process, is committed to saving the environment'.[857] Dr Entwisle concluded that the plaintiff's prognosis is guarded including in 'the context of his battle of saving the environment'.[858] It was not clear from Dr Entwisle's reports exactly how the plaintiff's concerns on environmental issues were clinically relevant. In re-examination at trial, Dr Entwisle said that the plaintiff's level of commitment to or concern about the environment 'put him at risk for the kind of things that have happened to him' and sat 'side by side'

850 Dr Adlard Report, 11-12.
851 Dr Entwistle Report, 7.
852 Dr Entwistle Report, 9.
853 Second Dr Entwisle Report, 1.
854 Dr Entwisle Report, 8.
855 Dr Entwisle Report, 8.
856 Dr Entwisle Report, 5.
857 Dr Entwisle Report, 7-8.
858 Dr Entwisle Report, 8-9.

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with his psychological condition.[859]

546 The Medical Panel Determination tendered by the State determined that the degree of psychiatric impairment resulting from injury to the plaintiff did not satisfy the threshold level for the purposes of the *Wrongs Act*. The Medical Panel stated in its conclusions for Reasons for Determination:

> The Panel considered that by the time of the October 2019 incident, the claimant had not fully recovered form past episodes of an adjustment disorder with mixed anxiety and depressed mood, continuing to have some residual symptoms of persistent anxiety.
>
> The Panel considered that the October 2019 incident had precipitated a further episode of an adjustment disorder with mixed anxiety and depressed mood, with features of traumatisation. The Panel considered that over the subsequent five years there had been some improvement but not full resolution of this disorder.
>
> The Panel therefore concluded that the claimant now suffers from a chronic adjustment disorder with mixed anxiety and depressed mood, with features of traumatisation, potentially caused in the manner alleged in the claim.[860]

The parties' submissions as to the plaintiff's injuries

547 The State submits that the plaintiff's 'precise diagnosis is immaterial', as the diagnoses all inhabit the same part of the categories in the DSM relating to depression and anxiety.[861] The State contends that the important issue is the extent to which the plaintiff's psychological condition is attributable to pre-existing conditions or causes that are not compensable in this proceeding.[862] It relies on Dr Entwistle's precise attribution of only 40% of the plaintiff's symptoms arising from the IMARC incident with the remainder attributed to pre-existing factors. The State submits that Dr Adlard was imprecise with respect to causation of the plaintiff's condition, in excluding 'some of his impairment'.[863] The State also contends that Dr Adlard's report is limited in value on the basis that the plaintiff's report of the IMARC incident was 'inaccurate and self-serving' because he 'did not tell Dr Adlard that he linked arms with other protesters under a pole intentionally to hold space between the climber and police

859 Transcript 28/02/25, T805.11-17; T806.16-23 (Entwisle ReXN)
860 Medical Panel Determination (Exhibit D13), 8.
861 Defendant's Primary Submissions, [86].
862 Defendant's Primary Submissions, [86]-[87].
863 Defendant's Primary Submissions, [89].

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activity', and that Dr Adlard did not watch any video footage of the incident.[864] The State contends generally that the plaintiff has given a self-serving account, which is relevant to the assessment of loss and damage. It contends that the plaintiff minimised or mischaracterised his actions , because:

(a) in his account to Dr Adlard and the Medical Panel, and when he wrote a letter to the Police Conduct Unit complaining of being sprayed with OC foam, he 'makes no reference to him deliberately linking arms with other protesters in order to hold space';

(b) he did not inform the Medical Panel, Dr Adlard or Dr Entwistle that he 'disassociated' during the IMARC events, and his evidence that he was fearful or experienced distress during the events 'is wholly inconsistent with the footage'; and

(c) he 'downplayed his protest participation despite the significant evidence before the Court about his activism'.[865]

548 The State also relies on the fact that Associate Professor Paoletti's 2016 report confirmed the existence at that time of pre-existing factors.[866] The State contends that the Court should accept Dr Entwisle's assessment and conclude that the plaintiff's depressive and anxiety symptoms 'are a consequence of negative worldviews about the environment which in turn motivate his activism and journalism work', and that his presentation 'reflects [his] underlying personality traits and attitudes, rather than the effects of 30 October 2019'.[867]

549 The plaintiff relies on the evidence of Dr Adlard that the IMARC incident caused the plaintiff to develop 'a chronic Adjustment Disorder with mixed anxiety and depressed mood and features of traumatisation',[868] which was wholly the effect of the incident.[869]

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864 Defendant's Primary Submissions, [88]-[89].
865 Defendant's Primary Submissions, [94].
866 Defendant's Primary Submissions, [89]-[91].
867 Defendant's Primary Submissions, [92].
868 Dr Adlard Report, 11.
869 Transcript 19/02/25, T357.25-31 (Adlard XXN).

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It is submitted that the State bears the 'evidentiary onus of disentangling any unrelated condition to the Plaintiff's *prima facie* injury, loss and damages from the torts committed against him'.[870]

550 Neither the plaintiff nor the State addressed in any detail in their submissions how the findings that were sought in relation to the degree of responsibility borne by the State for the plaintiff's psychological injuries, having regard to the evidence relating to pre-existing conditions, ultimately affected the way in which the plaintiff's claims for general and special damages were to be assessed.

Consideration – the extent of the plaintiff's injuries

The State's criticism of the plaintiff's 'self-serving' account

551 It is first convenient to address the State's criticisms of the plaintiff as having given a self-serving account of his actions at the IMARC Protest, summarised at [547] above. These criticisms are, in my view, not relevant to the assessment of the plaintiff's injuries, First, the State's own expert witness accepted that the plaintiff has a psychological condition which is, at least in part, caused by the IMARC incident. Secondly, most of the examples of what was said to be self-serving evidence relate to the IMARC events, rather than the plaintiff's evidence as to his injuries. The criticisms are also, for the most part, misconceived in substance.

552 First, the criticism that the plaintiff did not inform the medical experts, or Victoria Police in his letter of complaint, that he had linked arms with other protesters and held space at the pole suggests that there was something inappropriate or unlawful about him doing so. I have found that there was not. The State did not press any submission that the plaintiff hindered the attempts to arrest of the West Pole Climber. There was no evidence that any police officer advised the plaintiff that he was hindering the police.[871] The State also did not press any contention that the plaintiff was involved in any activity that was breaching the peace. Although I have found that the plaintiff

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870 Plaintiff's Primary Submissions, [101], referring to *Purkess v Crittenden* (1965) 114 CLR 164; *Watts v Rake* (1960) 108 CLR 158 and *SB v State of New South Wales* (2004) 13 VR 527 with respect to the evidentiary onus.

871 See my findings at [272] above.

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initially moved to the West Pole to protect the Climber from being apprehended, and was aware that police wanted to arrest her, the evidence has not established that he hindered that arrest. It has, instead, established that he was standing fairly still, other than being jostled, and was not pushing police, rather he had his arms linked with other protesters. There was nothing unlawful about him linking arms with other protesters. There is also nothing so notable about that action that the failure to refer to it in his statements to the medical experts and the complaint to police affects the plaintiff's credit or is otherwise relevant to the assessment of his injury.

553 Second, the submission that the plaintiff's evidence of feeling disassociated or distressed while he was under the West Pole was self-serving is inconsistent with the video footage and is also not well founded. I have accepted that his demeanour and posture, once surrounded by police and protesters at the West Pole, was consistent with being anxious about his situation and not inconsistent with disassociating or disconnecting from the events.[872]

554 The submission that the plaintiff 'downplayed his protest participation despite the significant evidence before the Court about his activism'[873] is carries unfortunate overtones insofar as it may imply that participation in protests or activism is in some way discreditable or inappropriate. The plaintiff, as with every other person in Victoria, has a right of peaceful assembly, protected by s 16 of the *Charter* and recognised by other relevant laws such as the protest related exception to the move on powers in s 6(5) of the *Summary Offences Act*. There was no evidence, and it was not suggested in cross-examination, that the plaintiff's protest and activist activity had been anything other than lawful and peaceful. The plaintiff was in any event candid about his protest activity and his activist history. He gave evidence in chief that he was a filmmaker and freelance journalist who documented protests, and was a volunteer at Melbourne Activist Legal Support.[874] The plaintiff readily accepted in

872 See my findings at [278]-[279] above. The plaintiff also submits that he had in fact spoken of dissociating, which was referred to in the Letter of Instructions to Dr Adlard dated 26 June 2024 (Exhibit P56) at [9.8], a matter which was not raised in cross-examination.

873 Defendant's Primary Submissions, [94.].

874 Transcript 18/02/25, T139.09-19 (Plaintiff XN); T194.06-24 (Plaintiff XXN).

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cross-examination that he had participated in protests, as well as attended as a journalist to document them.[875]

The role of pre-existing factors

555 The plaintiff referred to the State's evidentiary onus with respect to the effect of pre-existing conditions. The State did present evidence on those pre-existing conditions, being the expert reports of Dr Entwisle, and the report of Associate Professor Paoletti.

556 Although the plaintiff gave evidence that he had experienced a period of recovery in the period before October 2017,[876] the evidence did not establish that he had recovered from any relevant pre-existing conditions at that time. The plaintiff's expert, Dr Adlard did also accept that there were some residual psychiatric symptoms prior to the IMARC incident, although minor.[877]

557 In *SB v State of New South Wales*,[878] Redlich J (as his Honour then was) discussed the principles relevant to assessing injury in the context of pre-existing conditions, in the context of assessment of injury in a negligence claim (footnotes in original):

> The defendant must accept the plaintiff as it found her at the time of breach. The plaintiff's pre-existing psychiatric condition rendered her susceptible to an aggravation of that condition. So long as the defendant's conduct triggered the plaintiff's subsequent condition and its causative effects remained present as a factor explaining her ongoing signs and symptoms, the defendant must assume responsibility.[879]
>
> The defendant will not be liable for such portion of the plaintiff's disability or incapacity as was wholly or partly traceable to causes in which the injuries sustained through her father's conduct played no part…the defendant bore the evidential burden discussed in *Watts v Rake*[880] of disentangling the causes of the plaintiff's disability and incapacity to exclude the defendant's breach of duty as a contributory cause. This evidential burden was further elucidated by the High Court in *Purkess v Crittenden*[881] and again in the recent decision of *Shorey v PT Ltd*.[882] It is not enough for the defendant merely to demonstrate the existence of a pre-existing psychiatric condition in the plaintiff. The pre-existing condition and its probable effects or relationship to the present disability or incapacity must be the subject of evidence establishing with some

875 Transcript 18/02/25, T183.31-T184.17, T194.06-24 (Plaintiff XXN).
876 Transcript 18/02/25, T160.03-12 (Plaintiff XN).
877 Second Dr Entwistle Report, 1.
878 (2004) 13 VR 527.
879 ***Shorey*** *v PT Ltd* (2003) 197 ALR 410 at 420, [45] per Kirby J.
880 (1960) 108 CLR 158.
881 (1965) 114 CLR 164.
882 *Shorey* at 420, [45].

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reasonable measure of precision what the pre-existing condition was and what its future effects were likely to be.[883]

558 The State, by the expert's report of Dr Adlard, did provide opinion evidence identifying, in terms of percentages, the extent to which the pre-existing conditions and the IMARC incident contributed to the plaintiff's current psychological condition, expressed by reference to percentages. It was limited, however, in the extent to which it enabled a finding as to what the future effects of the pre-existing condition would be, absent the batteries, or that the impact of the batteries could be excluded as a cause. Rather, in attributing some degree (40%) of causal impact to the IMARC events, it acknowledged that this could not be excluded as a material cause of the plaintiff's current psychological state.[884] The evidence relied on by the State does not demonstrate that the plaintiff's injuries were traceable to causes in which the batteries played no part.

559 The expert evidence, as a whole, is to the effect that the plaintiff was a person with a pre-existing history of depression and anxiety, which manifested episodically. I conclude from the evidence that he was susceptible to depression and anxiety being triggered by stressful life events, such as his past experience of homelessness, relationship breakdowns, and the prior incidents with the police in 2014 and 2016. The plaintiff's pre-existing condition with depression and anxiety features made him susceptible to that condition being exacerbated or aggravated. I find that the batteries the plaintiff experienced at the IMARC event caused an exacerbation of the plaintiff's depression and anxiety based conditions, and are a material causative factor for that injury.

Common questions relating to damages

560 The plaintiff seeks damages for the two instances of unlawful battery, including damages for future medical expenses and non-economic loss, and both aggravated and exemplary damages.[885] The parties also identify several questions relating to relief

883 (2004) 13 VR 527, 609-610 [543]-[544].

884 *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506, 514 (Mason CJ); see also *Cruse* at [193] (Richards J).

885 Further Amended Statement of Claim, Prayer for Relief A.

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as Common Questions.

561 The State contends that the plaintiff's damages claims are subject to and limited by Parts VB and VBA of the *Wrongs Act* relating to damages for personal injury and for non-economic loss. Common Questions 16 and 17 are directed to this issue.

Common Question 16: Does s 28LC(2)(a) of the *Wrongs Act 1958* (Vic) apply to the torts of assault and battery as pleaded in this proceeding?

562 The State denies that the plaintiff is entitled to recover damages for non-economic loss, as the claim is precluded by s 28LE of the *Wrongs Act*, and because the plaintiff's claim is not of a kind which is excluded from the operation of Part VBA of the Act.[886]

563 Part VBA of the *Wrongs Act* provides the thresholds for the recovery of damages for non-economic loss. 'Non-economic loss' is defined as 'any one of more of the following':

(a) pain and suffering;

(b) loss of amenities of life;

(c) loss of enjoyment of life;

...

564 Section 28LE in that Part restricts recovery of damages for non-economic loss and provides:

> **28LE Restriction on recovery of damages for non-economic loss**
>
> A person is not entitled to recover damages for non-economic loss in any proceeding in a court in respect of an injury to a person caused by the fault of another person unless the person injured has suffered significant injury.

565 Section 28LF stipulates the categories of injury other than a psychiatric injury which constitute a 'significant injury' for the purposes of Part VBA. Relevantly, it refers to an injury in respect of which an assessment has been made of the degree of impairment of the whole person by an approved medical practitioner as satisfying the threshold level, unless a Medical Panel has made a determination as to the threshold level.[887]

886 Defence to Amended Statement of Claim dated 23 January 2025, [47].

887 *Wrongs Act*, s 28LF(1)(a) and (b).

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566 The plaintiff was assessed by a Medical Panel on 30 January 2025 as not satisfying the significant injury threshold. The Medical Panel determined with respect to the plaintiff that 'the degree of psychiatric impairment resulting from the injury to the claimant alleged in the claim does not satisfy the threshold level'.[888] That determination must be accepted by the Court as a determination that the injury is not a significant injury.[889]

567 The only avenue by which the plaintiff can recover damages for non-economic loss is, therefore, if he establishes that Part VBA does not apply to his claim. Section 28LC provides that Part VBA 'applies to claims for the recovery of damages for non-economic loss, except claims that are excluded by subsection (2) or (3)'. Relevantly to the plaintiff's claim, s 28LC(2)(a) provides:

> (2) This Part does not apply to the following claims for the recovery of damages for non-economic loss—
>
> (a) a claim where the fault concerned is, or relates to, an **intentional** act that is done with intent to cause death or injury or that is sexual assault or other sexual misconduct;…[890]

568 'Fault' is defined as including an act or omission. 'Intentional' is not defined for the purposes of Part VBA. The plaintiff contends that s 28LC(2)(a) applies to his claim for damages, because it was pleaded that the tortious acts giving rise to the claim for damages were done, and the acts were in fact done, intentionally and with an intent to cause injury to the plaintiff.[891]

569 The parties both accept that the s 28LC(2)(a) requirement that the fault concerned in the claim for damages is, or relates to, an 'intentional' act, requires that the plaintiff establish two intentions, both an intention to do the act, and an intention to cause death or injury on the part of the wrongdoer.[892] This accurately reflects the limited authority on this issue. In *State of Victoria v* ***Thompson***[893] this issue was not discussed,

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888 Exhibit D13 (Medical Panel Determination / Certificate).

889 *Wrongs Act*, s 28LZH(2) (see also s 28LZO which confirms that it is the intention to limit the jurisdiction of the Court in this respect).

890 Emphasis added.

891 Further Amended Statement of Claim, [39A]; Plaintiff's Primary Submissions, [82].

892 Defendant's Primary Submissions, [72]; Plaintiff's Primary Submissions, [77].

893 (2019) 58 VR 583.

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but it is implicit in the Court of Appeal's findings that there must have been an intent to do the act and an intention to cause death or injury.[894] In *Snell v State of Victoria (Department of Education and Training)*,[895] Justice Kenny discussed *Thompson* in explaining her conclusion that the requirements of s 28LC(2)(a) would apply when there is a subjective or actual intention to cause injury, even if the elements of the offence do not involve an intention to cause injury. Her Honour noted in that case that the tort of battery involves an intention to make contact with the complainant's body, and does not require proof of an intention to cause injury.[896] In that case (which was am interlocutory application to determine whether the applicant was required to serve a copy of a certificate of assessment under s 28LT of the *Wrongs Act*, or whether s 28LC(2)(a) applied), there was no pleading of an actual intent to cause injury. Justice Kenny observed (emphasis added):

> Even if there were such an allegation in the applicant's proposed pleading, there would remain **the question whether the words "intent to cause injury or death" in s 28LC(2)(a) of the *Wrongs Act* require an actual, subjective intent, with the consequence that intention in some amplified sense (whether subjective or objective) is not enough to engage the provision.** Since neither party addressed this issue directly, it suffices to note that, after referring to *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362; 347 ALR 405; [2017] HCA 34 (see at [15]–[17] (Kiefel CJ, Nettle and Gordon JJ), [32], [39], [42] (Gageler J) and [60] (Edelman J)), the New South Wales Court of Appeal held in *Dickson v Northern Lakes Rugby League Sport & Recreation Club Inc* [2020] NSWCA 294; 103 NSWLR 658 *('Dickson')* that the same words used in a very similar provision of the *Civil Liability Act 2002* (NSW) required a subjective or actual intention: *Dickson* at [8]–[9] (Basten JA); [19] (White JA); and [186] (Simpson AJA). An intent to cause injury could not be established by recklessness or foresight of an inevitable consequence of conduct or the like...[897]

570 In *Kaplan v State of Victoria (No 2)*, Mortimer J (as her Honour then was) accepted the submission that there are two intentions which must be proved for s 28LC(2)(a) to be engaged: 'intention to do the act, and intention to cause the injury'.[898]

571 Against the background that the parties accept that s 28LC(2)(a) requires the plaintiff to establish that the officers both intended to do the act which constituted the battery

894 (2019) 58 VR 583, 591 [37]- [39] (Beach, Osborn JJA and Kennedy AJA).
895 (2022) 404 ALR 1, 12-13, [40]-[42].
896 (2022) 404 ALR 1, 13, [40].
897 (2022) 404 ALR 1, 15-16, [46].
898 [2022] FCA 679, [17] (Mortimer J).

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(or fault, for the purposes of s 28LC(2)) and intended to cause injury, the State contends that:

(a) the effects of OC foam on the plaintiff were not an 'injury' within the meaning of Part VBA of the *Wrongs Act*; and

(b) an intention to cause injury on the part of Sergeant Guthrie and A/Sergeant Bolzonello is not established on the evidence.

Does an 'injury' under the Wrongs Act encompass temporary physical effects such as the effect of OC foam?

572 Section 28LB of the *Wrongs Act* defines 'injury' broadly, as follows:

> ***injury*** means personal or bodily injury and includes—
>
> (a) pre-natal injury; and
>
> (b) psychological or psychiatric injury; and
>
> (c) disease; and
>
> (d) aggravation, acceleration or recurrence of an injury or disease;…

573 The State submits:

> The Court should conclude that the temporary effects of OC spray, as set out in the OC manual, and/or as alleged to have been experienced by the plaintiff, do not constitute an 'injury' within the meaning of Part VBA of the *Wrongs Act*. Those transitory effects of pain and discomfort and distress are what Sgt Guthrie and A/Sgt Bolzonello can be understood to have thought of as the likely effects of OC foam, but they are not an 'injury' in the relevant sense.[899]

574 The plaintiff argues that the definition of injury will include a temporary injury such as the effects of OC foam experienced by the plaintiff.[900] The plaintiff relies on *Summers v Director of Housing*[901] where John Dixon J observed with respect to the definition of 'injury' in s 28LB of the *Wrongs Act* that 'the term injury is not to be narrowly construed.' His Honour observed in that case that:

> The potential breadth of the notion of 'injury' under Part VBA is controlled by its definition in s 28LB, the limitations on the application of Part VBA in s 28LC,

899 Defendant's Primary Submissions, [81].
900 Plaintiff's Primary Submissions, [80].
901 [2012] VSC 395, [51], [54]. See Transcript 12/06/25, T205.19-T206.06 (Submissions).

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and the causal connection stipulated in s 28LE.[902]

575 The plaintiff referred to the understanding of injury and damage at common law, as expressed by Windeyer J in *Teubner v Humble*.[903] His Honour said:

> Broadly speaking there are, it seems to me, three ways in which a personal injury can give rise to damage: First, it may destroy or diminish, permanently or for a time, an existing capacity, mental or physical: Secondly, it may create needs that would not otherwise exist: Thirdly, it may produce physical pain and suffering.[904]

576 The plaintiff also relies on the observations of Byrne AJA in *Linfox Transport (Aust) Pty Ltd v Toohey*[905] as to the 'traditional' meaning of 'injury' in the context of personal injury claims being 'an identifiable physiological change' to a body part. It is relevant to observe that in addition to that observation, Byrne AJA also stated that it 'is not sufficient that there be simply a loss or diminution of its function'.[906]

577 The State submits that on its proper construction, 'injury' for the purposes of Part VBA of the *Wrongs Act*, should be construed more narrowly, having regard to the statutory context, and by reason of the legislative purpose of Part VBA. It notes that Part VBA of the *Wrongs Act* was the second of three tranches of a legislative response to a crisis 'in the affordability and availability of several key insurance products'.[907] It is submitted that the Second Reading speech for the Bill relating to the introduction of Part VBA shows that:

(a) The intention was to implement a threshold to determine a claimant's entitlement to general damages for non-economic loss, except for claims concerning sexual assault or misconduct, and that threshold was to act as a 'gateway' provision and 'pre-litigation procedure' to determine whether a claimant's injuries enabled them to recover general damages.[908]

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902 [2012] VSC 395, [51] (John Dixon J).
903 (1963) CLR 491.
904 (1963) CLR 491, 505 (McTiernan J agreeing at 499).
905 [2004] VSCA 233, [17] (Byrne AJA, Buchanan JA agreeing at [1] and Phillips JA agreeing at [2]).
906 [2004] VSCA 233, [17].
907 Defendant's Primary Submissions, [80] referring to Victoria, Parliamentary Debates, Legislative Assembly, 30 October 2003, 1421-1429, 1421.
908 Second Reading Speech for the Wrongs and Limitation of Actions Act (Insurance Reform) Bill 2003, Victoria, Parliamentary Debates, Legislative Assembly, 21 May 2003, 75.

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(b) The aim was to reduce the level of general damages paid in respect of minor injury negligence claims in response to 'serious issues…with the functioning of our system of insurance', and to 'balance the rights of people to have access to the courts to sue for personal injuries and the need for access to affordable insurance'.[909]

578 I consider that these aspects of the extrinsic materials, and the Parliamentary intention that they establish, does not call for a narrow interpretation of the concept of 'injury'. Part VBA did introduce a gateway and a threshold for the concept of injury in the case of claims to which that Part applies. That threshold is the restriction imposed by s 28LE, that a person is not entitled to recover damages for non-economic loss in any proceeding in respect of an injury to a person caused by the fault of another person 'unless the person has suffered *significant* injury'. The pre-litigation procedure is the process by which an assessment or determination is made, to determine whether it is a significant injury or not.

579 However, the requirement of significant injury and the processes for determining whether an injury is a significant injury do not apply if the fault by which the injury was caused 'is, or relates to, an intentional act that is done with intent to cause death or injury or that is sexual assault or other sexual misconduct'.[910] Such intentional acts done with intent to cause injury or death or acts relating to sexual misconduct are the 'claims concerning sexual assault or misconduct' which the Second Reading Speech observed were outside the scope of Part VBA, and were therefore not the subject of the intention to exclude more minor injury claims.

580 I also do not accept that 'injury' should be construed as requiring more than a temporary injury. The definition of injury in s 28LB does not include any such limitation. The question of whether an injury is temporary or otherwise may be relevant in the assessment of whether an injury is a 'significant injury'. That arises

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909 Defendant's Primary Submissions, [80.3] referring to Second Reading Speech for the Wrongs and Limitation of Actions Act (Insurance Reform) Bill 2003, Victoria, Parliamentary Debates, Legislative Assembly, 21 May 2003, 73.

910 *Wrongs Act*, s 28LC(2)(a).

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because s 28LF, which defines 'significant injury', engages the concept of the 'degree of impairment', and 'impairment' is defined to mean 'permanent impairment'.[911] That is not, however, a restriction that applies to the primary concept of 'injury' as defined by s 28LB.

581 The issue raised by the State's submission is whether the impact of the batteries on the plaintiff, as established by the evidence, constitutes 'injury' for the purposes of Part VBA. Relevantly that depends on whether they are 'personal or bodily injury' as defined by s 28LB, which includes 'psychological or psychiatric injury'. The meaning of 'injury' in this context is informed by the ordinary meaning of the word 'injury' which, as recognised by the authorities relied on by the plaintiff, include physiological changes[912] that are not *de minimis*.[913]

582 In *Hamilton v New South Wales (No 13)*,[914] Campbell J in the New South Wales Supreme Court considered the meaning of 'injury' in the *Civil Liability Act 2002* (NSW) in the context of a battery claim arising from the arrest of the plaintiff by police. His Honour considered whether the word 'injury' connoted any particular degree of severity, and referred to the authority of *State of New South Wales v Ibbett*, in which Spigelman CJ in the New South Wales Court of Appeal held that injury should be given its 'natural and ordinary meaning'.[915] Justice Campbell concluded:

> There would be no doubt that the infliction of a deliberate blow accompanied with the intention to cause some injury even of a temporary nature would be sufficient. I can see no reason why the deliberate infliction of physical violence intended to cause pain and submission to the will of the police officer is not an intent to cause injury within the meaning of the Act.[916]

583 In *Kaplan v State of Victoria (No 8)*[917] Mortimer CJ accepted that an injury of temporary duration and effect could constitute an injury for the purpose of s 28LC(2)(a) of the

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911 *Wrongs Act*, s 28LB.

912 *Linfox Transport (Aust) Pty Ltd v Toohey* [2004] VSCA 233, [17] (Byrne AJA, Buchanan agreeing at [1] and Phillips JJA agreeing at [2]).

913 See for example *Zey v State of New South Wales (No 2)* [2024] NSWDC 289, [235]-[237], citing *Williams v The Queen* (1978) 140 CLR 591, 602 (Murphy J) in the context of a technical trespass to land.

914 [2016] NSWSC 1311.

915 ***Hamilton*** *v New South Wales (No 13)* [2016] NSWSC 1311, [190]-[191], referring to *State of New South Wales v Ibbett* (2005) 65 NSWLR 168, 170 [11] (Spigelman CJ).

916 *Hamilton*, [193].

917 [2023] FCA 1092.

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Wrongs Act. Her Honour held, in the context of a student being punched in the stomach by other students, that:

> There is no evidence those injuries were debilitating for very long: after some time on the floor, he managed to go to the office and complain. He did not give any evidence about what, if any, longer lasting physical effects he suffered. Nevertheless, he suffered, I accept, considerable pain from being punched in the stomach on more than one occasion during this incident.[918]

584 Her Honour concluded that the student was entitled to damages for non-economic loss for injury by reason of the exception in s 28LC(2)(a).

585 These authorities reinforce my conclusion that the reference to injury in Part VBA and specifically s 28LC(2)(a) includes temporary injury.

586 I find that the deployment of OC foam on the plaintiff did cause physiological changes of such a kind which constitutes injury. These were the physiological effects on the plaintiff's eyes of causing severe pain and on the plaintiff's skin by causing the burning sensation and later sensitivity.[919]

Did the officers have the relevant intention to injure the plaintiff?

587 To satisfy the requirements of s 28LC(2)(a), it is necessary that the plaintiff plead that the tortfeasor actually intended to cause injury.[920] The intent to cause injury will not be established merely by proving recklessness or foresight of the inevitable consequence of the act.[921]

588 The plaintiff pleaded that the uses of OC foam were intentional acts done with the intention to cause injury to him.[922] He submits that the evidence establishes that Sergeant Guthrie and A/Sergeant Bolzonello intended to cause injury.[923]

589 The State submits that there is no evidence that the officers 'actually or subjectively

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918 [2023] FCA 1092, [1654] (Mortimer CJ).

919 See also OC Manual (Exhibit P1) Part 3.1, which refers to this effect. It also refers to the involuntary response of the eyes closing as 'blepharism' [scil blepharospasm].

920 *Snell*, 13 [44] (Kenny J).

921 *Snell*, 13-14 [46].

922 Further Amended Statement of Claim, [31(b)(iii)]; [35(c)].

923 Plaintiff's Primary Submissions, [82].

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intended to cause injury to the plaintiff in deploying OC', on the basis that:[924]

(a) Sergeant Guthrie's evidence was that when she sprayed the group of protesters including the plaintiff, she was not targeting the plaintiff and her intention was not to cause injury, but to 'get a change of shape' and a 'change of behaviour'.[925] She wanted to 'get the group of protesters to move out of the area and start complying with what the police were requesting', which included 'to stop the pushing and crowd crush situation that was potentially going to occur'.[926] Although she accepted that the physiological reaction caused by OC foam was the tool she used to obtain the behaviour change, she rejected that she had an intention to harm the plaintiff.[927]

(b) A/Sergeant Bolzonello accepted that OC foam causes the physical and psychological effects identified in the OC Manual, but gave evidence that it was not the aim of his deployment to cause such an effect.[928] Instead his intention was to 'gain compliance' and guard against the risk that he perceived that the plaintiff could have drawn other police officers into the crowd. [929]

590 The plaintiff submits that this approach 'wrongly conflates "intent to cause injury" with overall motivation or purpose', and that characterising the ultimate motivation 'does not detract from the relevant intent to cause injury as a step to accomplish the underlying objective'.[930] The plaintiff refers to the decision of the New South Wales Court of Appeal in *State of New South Wales v* ***Madden***[931] in which the Court considered the question of what constitutes an 'intent to cause injury' for the purposes of

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924 Defendant's Primary Submissions, [77].
925 Defendant's Primary Submissions, [77.1], referring to Transcript 05/03/25, T1142.11-15 (Guthrie XXN).
926 Defendant's Primary Submissions, [77.1], referring to Transcript 05/03/25, T1142.30-T1143.12 (Guthrie XXN).
927 Defendant's Primary Submissions, [77.1], citing Transcript 05/03/25, T1142.17-26 (Guthrie XXN).
928 Defendant's Primary Submissions, [77.2] citing Transcript 26/02/25, T682.25-31; T683.31-T684.06 T684.11-15 (Bolzonello XXN).
929 Defendant's Primary Submissions, [77.2]. citing Transcript 26/02/25, T685.18-19; T711.06-10 T772.30-T773.10 (Bolzonello XXN).
930 Plaintiff's Primary Submissions, [84].
931 (2024) 113 NSWLR 509.

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s 3B(1)(a) of the *Civil Liability Act 2002* (NSW).[932] The case related to a claim of false imprisonment and battery arising from the unlawful arrest and detention of the plaintiff. Chief Justice Bell held:

> In detaining and then arresting the respondent, SC Darnton's subjective intention *was* to deprive the respondent of her liberty. Had this been done lawfully, no question of liability would have arisen. The primary judge's conclusion that the detention and arrest was not lawful removed a defence or justification that would otherwise have been lawful. The subjective intention of the police officer remained clear. Contrary to submissions advanced by the State, it did not need to be put to SC Darnton that his intention *was* to deprive the respondent of her liberty. That was self-evident.
>
> So also it was to conflate subjective intent with motivation or purpose to submit, as the State did, that SC Darnton's purpose was to enforce the law. In fact, that purpose was given effect by depriving the respondent of her liberty. That was exactly what SC Darnton intended. Where this was not justified, the deprivation of 'liberty' amounted to an injury within the meaning of s 3B(1)(a).[933]

591 The plaintiff submits that this authority suggests that a finding of lack of legal justification for unlawful force will of itself lead to the conclusion that there was 'intent to cause injury'.[934] I am not persuaded that this is necessarily so. *Madden* related to claims including false imprisonment and battery, where the deprivation of liberty itself was held to be the 'injury' for the purposes of s 3B(1) of the *Civil Liability Act 2002* (NSW). The New South Wales Court of Appeal accepted that once it was established that the police officer intended to deprive the plaintiff of her liberty, in circumstances where the detention and arrest was not lawful, that intention was sufficient to also encompass the intention to cause the injury of deprivation of liberty. A battery requires proof of a purposeful application of force without consent, but not necessarily any intention to injure,[935] as well as an absence of legal justification. Proof of the

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932 That section states, relevantly:

3B Civil Liability excluded from Act

(1) The provisions of this Act do not apply to or in respect of civil liability (and awards of damages in those proceedings) as follows –

(a) civil liability of a person in respect of an intentional act that is done by the person with intent to cause injury or death or that is sexual assault or other sexual misconduct committed by the person…

The section refers to certain parts of the Act that do apply to this civil liability which are not relevant for present purposes.

933 *Madden*, 547 [151]-[152] (Bell CJ, Leeming JA agreeing at 560 [209], Stern JA agreeing at 566 [239]).

934 Plaintiff's Primary Submissions, [83]-[84].

935 See paragraphs [47]-[48] above.

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purposeful application of force, and of the absence of legal justification, will not necessarily establish an intention to cause *injury* which is physiological or psychological in nature.

592 It is not, in any case, necessary to determine whether the reasoning in *Madden* applies to the batteries in this case, as the evidence establishes on the balance of probabilities that the police officers did in fact intend to cause injury to the plaintiff when they deployed OC foam. The evidence on which I have made that conclusion is the following.

593 The OC Manual sets out the effects of OC aerosols which are 'both physical and psychological' and 'rapid and debilitating'. It states that a consequence of this is that 'there is a requirement for the subject to be constantly reassured as to their wellbeing in order to avoid panic.'[936] The impact is clear. OC aerosols will cause debilitating physical and psychological reactions which affect a person's wellbeing in such a way that it may cause panic. A/Sergeant Bolzonello gave evidence that he was aware of the description of the effects of OC aerosols stated in the OC Manual,[937] and that he had been trained that OC is painful and causes irritation to the eyes, skin and mucous membranes.[938] Sergeant Guthrie gave evidence that she thought the OC Manual was superseded by other considerations in the context of the protest, evidence which I have found above does not reflect a proper understanding of the legal status of the directions contained in the OC Manual.[939] However, Sergeant Guthrie gave evidence that she expected that the effect of deploying OC foam would be to cause physical and psychological effects, including irritation to the eyes, a burning sensation to exposed skin and irritation of the mucous membranes of the upper respiratory tract, all of which are physiological responses.[940]

594 This awareness of the effects of OC aerosols described in the OC Manual, and knowledge that use of OC foam would inevitably have that consequence, is not

936 OC Manual (Exhibit P1) Part 3.1.
937 Transcript 26/02/25, T682.21-23; T683.31-T684.22; T683.31-T684.22 (Bolzonello XXN).
938 Transcript 26/02/25, T683.27-30 (Bolzonello XXN).
939 See [138] above.
940 Transcript 05/02/25, T1141.29-T1142.04 (Guthrie XXN).

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enough to prove an intention to injure. However, it is important background when considering the evidence of Sergeant Guthrie and A/Sergeant Bolzonello as to what their intentions were when deploying OC foam on the plaintiff.

595 Sergeant Guthrie gave evidence that in spraying the group of protesters of which the plaintiff was part, she intended to create the physical effect and physiological responses on them of irritation to the eyes and mucous membranes of the upper respiratory tract and a burning sensation to their exposed skin.[941] I find that given she sprayed directly at the level of the face of the plaintiff, she intended to cause that reaction to the exposed skin of his face, and intended to cause the reaction of irritation to his eyes. Her repeated evidence that she used the OC foam to achieve a 'change of shape, change of behaviour'[942] is at best a description of her ultimate purpose of getting the protesters to move out of the area.[943] However, I am satisfied that she intended to cause the injurious physical effects on the plaintiff and the protesters next to him by use of OC foam to achieve that purpose. I also observe that referring to deployment of OC foam as being to achieve a 'change of shape, change of behaviour'[944] is an unhelpful euphemism. It obscures the fact that deployment of OC foam is deployment of a weapon with injurious and potentially harmful and serious effects. If Sergeant Guthrie's evidence that she was utilising the OC foam 'as per my training to gain a change of shape, change of behaviour',[945] is correct, there is a material lack of clarity in the training which should be addressed.

596 For these reasons, I find that Sergeant Guthrie intended to injure the plaintiff, in the sense required by s 28LC(2)(a) of the *Wrongs Act*, when she deployed OC foam on the small group of protesters of which he was part.

597 A/Sergeant Bolzonello specifically accepted in his evidence that when OC foam contacts a person's skin, eyes, nose or mouth, it will cause a physiological reaction and cause pain, including burning and inflammation of the skin and irritation of the eyes,

941 Transcript 05/02/25, T1141.29-1142.07 (Guthrie XXN).
942 Transcript 05/02/25, T1141.02-10; T1142.08-15 (Guthrie XXN).
943 Transcript 05/03/25, T1142.30-T1143.03 (Guthrie XXN).
944 Transcript 05/03/25, T1142.08-11 (Guthrie XXN)
945 Transcript 05/03/25 T1142.13-15 (Guthrie XXN).

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skin and mucous membrane.[946] I find that when deploying OC foam at the plaintiff in the direction of the plaintiff's head, he intended to cause those reactions. As to A/Sergeant Bolzonello's evidence, relied on by the State in the context of his intentions, that he sprayed the OC foam to guard against a risk of the plaintiff drawing himself and other police officers into the crowd, I have not accepted that evidence.[947] I do accept his evidence that he used the OC foam to gain compliance with his directions to 'get back'. However, he knew that compliance would be achieved because he knew that the person affected by OC foam would be debilitated by the painful physiological effects of the foam. I find on this basis that A/Sergeant Bolzonello intended to injure the plaintiff when he deployed OC foam towards him.

Conclusion: the exception in s 28LC(2)(a) of the Wrongs Act applies to the deployment of OC foam in this proceeding

598 For the above reasons, the answer to Common Question 16 is 'yes', with respect to the tort of battery. Section 28LC(2)(a) of the *Wrongs Act* applies to the tort of battery as pleaded and as established in this proceeding.

Common Question 17: Does s 28C(2)(a) of the *Wrongs Act 1958* (Vic) apply to the torts of assault and battery as pleaded in this proceeding?

599 Part VB of the *Wrongs Act* applies to the award of personal injury damages, with the exception of an award of damages that is excluded by s 28C(2).[948] That Part contains certain limitations on the award of damages for personal injury and a Court cannot award damages to a claimant contrary to Part VB.[949]

600 Section 28C(2)(a) states:

> (2) The following awards of damages are excluded from the operation of this Part—
>
> (a) an award where the fault concerned in an intentional act that is done with intent to cause death or injury or that is sexual assault or other sexual misconduct; …

946 Transcript 26/02/25 T682.20-21 (Bolzonello XN).
947 See [352]-[353] above.
948 *Wrongs Act*, s 28C(1).
949 *Wrongs Act*, s 28D. No specific limitations in Part VB were, in any case, said by the State to apply to the plaintiff's claim. See Defendant's Primary Submissions, [82].

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601 The parties agreed that the section should be interpreted in the same way as s 28LC(2)(a), as involving a double intention of doing the act and causing the injury.[950] I have found above that these intentions have been established by the plaintiff. The answer to Common Question 17 is, therefore, 'yes'.

Relief sought by the plaintiff: Damages

602 Given the conclusion that Part VB and Part VBA of the *Wrongs Act* do not apply to the plaintiff's claims for damages, the claims fall to be determined pursuant to the common law.

603 The plaintiff claims a total of $236,000 in damages and is particularised as follows:

(a) $6,000 for future medical expenses;

(b) $150,000 for non-economic loss;

(c) $25,000 for aggravated damages; and

(d) $55,000 for exemplary damages.[951]

604 The State notes that the tort of battery is a trespass to the person and actionable *per se,* and submits that the Court should only award nominal damages if the Court concludes that one or both of the batteries are established.[952] The State did not identify any examples of Victorian authority in which batteries had been held to have occurred, but only nominal damages were awarded.[953]

General damages

605 General damages are compensatory in nature. The purpose of general damages is to cover losses, including pain and suffering, and loss of amenities and enjoyment of life.[954] I have accepted that the plaintiff suffered both physical and psychological

950 Defendant's Primary Submissions [82]; Plaintiff's Primary Submissions, [77] and [84]; Transcript 12/06/25, T202.15-27; T210.06-09 (Submissions).
951 Plaintiff's Primary Submissions, Summary of damages claimed.
952 Defendant's Primary Submissions, [95] referring to ***Carter v Walker*** (2010) 32 VR 1, 38 [215] (Buchanan, Ashley and Weinberg JJA).
953 Defendant's Primary Submissions, [96].
954 *CSR Ltd v Eddy* (2005) 226 CLR 1, 16 [29] (Gleeson CJ, Gummow and Heydon JJ); *Teubner v Humble* (1963) 108 CLR 491, 506 (Windeyer J).

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injury, by reason of the batteries. The State's own expert acknowledged that the plaintiff had an injury to which the IMARC events made a not insignificant causal contribution. It would not be appropriate to award nominal damages only.

606 In arriving at an appropriate amount of general damages, I take into account all of the evidence as to the nature of the plaintiff's physical and psychological injury. I take into account all of the evidence as to the impact of the two batteries on him, including the impact on his capacity to undertake volunteer work relating to protests and activism which was meaningful to him, but which he has avoided to some extent after the batteries. I find it is appropriate to award him $40,000 in damages.

Special damages

607 The plaintiff claims $6,000 for future treatment expenses, based on Dr Adlard's recommendations.[955] The State contended that it was inappropriate to award special damages because the plaintiff had never sought psychological treatment in the past.[956]

608 The plaintiff acknowledged in his evidence and submissions that he has not sought medical treatment in the past, however he said that he would consider seeking treatment from a psychologist if he could afford it.[957]

609 Dr Adlard gave the opinion that the plaintiff would benefit from seeing a psychologist 'to learn some specific skills to manage his anxiety and allow him to articulate and discuss his concerns particularly related to his anxious and depressed mood.' His opinion was that 12-15 sessions spread over a 12-18 month period at a cost of $3,500-$5,000 would be sufficient.[958] No other new treatment was recommended.[959] The plaintiff did not explain the reason for the difference in the cost range identified by Dr Adlard and the $6,000 sought for special damages.

610 I consider that although the plaintiff has not sought counselling in the past, he may,

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955 Plaintiff's Primary Submissions, [111].
956 Defendant's Primary Submissions, [100].
957 Transcript 18/02/25, T167.14-16 (Plaintiff XN); Plaintiff's Primary Submissions, [112].
958 Dr Adlard Report (Exhibit P57) 12.
959 Dr Adlard Report (Exhibit P57) 11. Other than use as required of the beta blocker Propranolol which the plaintiff had already used for several years for isolated anxiety.

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as he said in evidence, do so in the future. Although he has plainly been reticent to do so in the past, he may be more likely to do so after having given his evidence publicly and received judgment in this proceeding. Taking into account Dr Adlard's recommendation that treatment would be beneficial, and the cost range he identified, I will award $4,000 as special damages.

Aggravated damages and exemplary damages

611 Aggravated damages are compensatory damages awarded to compensate a plaintiff for harm done by a wrongful act, which was aggravated by the manner in which the act was done, such as with a 'contumelious disregard' of the plaintiff's rights, in an insulting or high handed way, or with malice.[960] It is necessary that the aggravating element increased the plaintiff's suffering.[961]

612 Exemplary damages are awarded to punish a defendant. Their purpose is to act as a deterrent, and to demonstrate the Court's disapprobation and denunciation of conduct which is committed in circumstances involving conscious and contumelious disregard of the plaintiff's rights, including through highhanded, insolent, vindictive or malicious behaviour.[962] In *Carter v Walker*, the Court of Appeal observed that it is open to award both aggravated and exemplary damages for the same tort, but warned against the risk of overcompensating:

> There is a risk in awarding both compensatory and punitive damages, arising out of exactly the same wrongdoing, that the plaintiff will receive an unwarranted windfall. That risk is accentuated by the recognition that, in reality, there can be a punitive element in aggravated damages.[963]

613 The plaintiff's claims for aggravated and exemplary damages in the Further Amended Statement of Claim were particularised on the same basis. It was pleaded as follows:

> **Particulars of aggravated and exemplary damages**
>
> The conduct of the PORT Tactical Commander and the Police Officers in responding to the protest was in contumelious disregard of the Plaintiff's and

960 *Carter v Walker*, 53, [283] (Buchanan, Ashley and Weinberg JJA).
961 *Carter v Walker,* 53, [283]; *McFadzean v Construction, Forestry, Mining and Energy Union* [2004] VSC 289, [105] (Ashley J).
962 ***Bishop*** *of the Roman Catholic Diocese* ***of Wagga Wagga*** *v TJ (a pseudonym)* (2024) 74 VR 612, 661 [237]-[238] (Beach, Orr JJA and J Forrest AJA); *Carter v Walker*, 53 [284] (Buchanan, Ashley and Weinberg JJA).
963 *Carter v Walker*, 53, [285].

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Group Members' rights and sufficiently egregious to warrant an award of aggravated and exemplary damages so as to:

1. mark the Court's disapprobation of the conduct of the Police Officers to protesters including the Plaintiff and Group Members, which caused unnecessary and unreasonable harm to the Plaintiff and Group Members posing no threat or danger;

2. act as a deterrent and spur to the Defendant to ensure that Police Officers are properly trained, including in the appropriate use of force, deploying OC foam, and the Human Rights of protesters including the Plaintiff and Group Members, and understand their heavy responsibilities;

3. recognise the unlawfulness of the conduct of the Police Officers.[964]

614 As the State observed, the particulars of the claim for aggravated and exemplary damages were vague, and addressed to the actions of police officers generally, and not the actions of Sergeant Guthrie and A/Sergeant Bolzonello in committing the tort of battery.[965] The particulars refer specifically to the Port Tactical Commander (A/Inspector Caldwell) but his actions were not the subject of the tort claim. The claim for aggravated and exemplary damages based on the conduct of other unspecified 'Police Officers in responding to the protest', is inappropriate given the limitations, arising from the pleadings and the pre-trial ruling, on making specific findings about the conduct of police officers and of protesters not before the Court.[966]

615 I also accept the State's submission that it would not be appropriate to award aggravated or exemplary damages to 'recognise the unlawfulness of the conduct of the Police Officers'. The unlawfulness of the deployment of OC foam by Sergeant Guthrie and A/Sergeant Bolzonello, which is the only conduct alleged and found to have been tortious, is a matter that has been taken into account in concluding that a battery was committed. It is reflected and compensated in the award of general damages.

616 Perhaps in recognition of these difficulties, the plaintiff approached the basis on which it was said that aggravated and exemplary damages should be awarded on a

964 Further Amended Statement of Claim, Prayer of Relief A.
965 Defendant's Primary Submissions, [104.1].
966 See [12]-[16] above.

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somewhat different basis in its closing submissions. It was submitted that aggravated damages were appropriate because of the context in which he was sprayed with OC foam, being his lawful attendance at a political protest, at which he was not charged with any offence. The plaintiff also relied on the confusing circumstances in which he was sprayed with OC foam, first when he was standing still and not moving towards any police officer, and secondly when he was trying to leave the area. The plaintiff also relied on the facts that:

(a) no aftercare was offered by police officers to the plaintiff; and

(b) despite the plaintiff making a formal written complaint to Victoria Police after the events, Victoria Police had not apologised nor acknowledged any wrongful conduct.[967]

617 With respect to exemplary damages, the plaintiff acknowledges that the award of such damages are rare, but are awarded in cases of abuse of government power and assault, including where police use excessive force and subject a person to greater indignity than is necessary and reasonable.[968] The plaintiff contends that an award of exemplary damages is appropriate on the basis, again, of the context of the plaintiff attending a political protest, and contextual matters including:

(a) 'the inadequate briefing and the decision of A/Inspector Caldwell to order the immediate arrest of the Climbers, in circumstances where this foreseeably, unnecessarily and unjustifiably led to escalation and serious physical confrontation between police and protesters'; and

(b) A/Sergeant Bolzonello's 'disgraceful comments made just minutes after the

967 Plaintiff's Primary Submissions, [114]-[117]. The letter of complaint was dated 25 November 2019 (Exhibit P20) and referred to the plaintiff 'standing stationary on the footpath near the Convention Centre, facing away from the police, when [he] was pushed by police and indiscriminately sprayed down the neck and back and on top of the head with OC foam at close range, only to be sprayed again moments later, directly in the eyes and face by police officers standing on the other side of [him]'. In the letter the plaintiff makes the complaint that the use of OC foam was not justified by s 462A of the *Crimes Act* and the VPMs. The plaintiff gave evidence that he was informed that the complaint was 'unsubstantiated'. Transcript 18/02/25, T157.17-25 (Plaintiff XN).

968 Plaintiff's Primary Submissions, [119], citing *Cruse* at [219]; *South Australia v Crossley* [2020] SASCFC 128, [85]; and two NSW District Court cases: *Randall v State of New South Wales* [2013] NSWDC 277, [90] and *Cuthbertson v New South Wales* [2017] NSWDC 367, [306], [313], [322].

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spray, implausibly referred to in evidence as a "hot debrief", gloating and joking about his actions…[which were] demonstrative of a cavalier and highhanded attitude to the use of force on protesters, as well as an utter lack of restraint or remorse, which is concerning, inappropriate and warranting the strongest condemnation of the Court'.[969]

618 I find that the sequence of the batteries to which the plaintiff was subjected are such that the individual acts were aggravated by the manner in which they unfolded, and involved a reprehensible disregard for the plaintiff's rights. The plaintiff was first sprayed with OC foam in circumstances which were unjustified and unlawful, where he was posing no physical risk to any person. He then sought to get away from the source of that deployment of OC foam. In doing so he was acting consistently with what Sergeant Guthrie's objective of getting him to leave the area. As he tried to move away, whilst seriously affected by the OC foam on his face and in his eyes, he was sprayed again, again without any justification and while he was particularly vulnerable. His evidence was that at the time of the second spray he felt 'very confused … in a heightened state of emergency, feeling very unsafe and yeah, just stumbling in that direction to get out of there'.[970] The circumstances of the second spray increased his overall suffering. I find that for the plaintiff to have been sprayed again while he was trying, in response to the first spray, to move away in the only direction that was feasible, adds a real element of aggravation to, in particular, the second battery. I consider it appropriate to award $10,000 in aggravated damages.

619 I have considered very closely whether it is appropriate to award exemplary damages. The conduct identified in the particulars to the Further Amended Statement of Claim in support of exemplary damages did not, for the most part, relate to the findings of battery by Sergeant Guthrie and A/Sergeant Bolzonello, but related to acts of A/Inspector Caldwell, as the PORT Tactical Commander, and other unidentified police. The plaintiff in closing submissions emphasises the conduct of A/Inspector

969 Plaintiff's Primary Submissions, [121]-[122]. See [379] above where A/Sergeant Bolzonello's comments are described in full.

970 Transcript 18/02/25, T150.11-23 (Plaintiff XN).

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Caldwell and A/Sergeant Bolzonello.

620 It is not, in my view, appropriate to base an award of exemplary damages on conduct of A/Inspector Caldwell in ordering the arrest. It was not a matter directly in issue in the plaintiff's claim, and there was no notice of an intention to rely on his orders for an arrest of the Climbers in the Further Amended Statement of Claim. It is the conduct of the defendant and the appropriateness of a deterrent or punitive effect in response to the defendant's conduct that is the primary focus of an award of exemplary damages.[971] Although it is the State which is the defendant in this proceeding, rather than the individual police officers, I consider that it in circumstances where it has not been necessary or appropriate to make definitive findings about the appropriateness of A/Inspector Caldwell's conduct, it is not appropriate to base an award of exemplary damages in part on his decision making.

621 I also do not consider that the conduct of Sergeant Guthrie and A/Sergeant Bolzonello is so egregious as to warrant an award of exemplary damages. Their conduct was unlawful. However, that is taken into account in the finding that there was no lawful justification for the conduct. The conduct was not such as to warrant the further punitive outcome of an award of exemplary damages. While I have concluded that both officers' conduct was unlawful, it also took place in the context of a fast moving and, at the relevant time, chaotic event. The chaotic nature of the circumstances did not arise for reasons for which the officers were individually responsible. The conduct does not in my view constitute the kind of outrageous conduct that warrants the award of exemplary damages.

622 I also do not accept that that Victoria Police's dismissive response to the plaintiff's formal complaint is the kind of outrageous conduct which warrants exemplary damages. It is unfortunate that the conduct the plaintiff complained of was not

971 *Bishop of Wagga Wagga*, 661 [265] (Beach, Orr JJA and J Forrest AJA). Note also the principle that in a case involving joint wrongdoers, the conduct of one defendant which would allow the award of exemplary damages will not justify an award of exemplary damages if the conduct of other defendants does not also merit punishment. See *Broome v Cassell & Co* [1972] AC 1027; *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448, and the discussion in James Edelman, *McGregor on Damages* (Sweet & Maxwell, 22nd ed, 2024) at [14-046] 480-481.

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examined more closely at the time (in that it may have prompted a recognition that, as admitted in this proceeding, he was in fact the subject of use of force by two police officers, and some investigation, given the availability of police evidence gathering footage and body worn camera footage, of whether that use of force was justified). However even if the response of the relevant police department was sufficiently related to the torts on the plaintiff, I do not accept that the nature of the response was so dismissive of the plaintiff's rights as to warrant the serious denunciation represented by an award of exemplary damages.

623 I also do not accept that the failure to offer aftercare to the plaintiff was outrageous conduct. Again, it was unfortunate given that the importance of the offer of aftercare is emphasised in both the OC Manual[972] and the *Operational safety equipment* VPM.[973] However, A/Sergeant Bolzonello was aware that aftercare was in fact being given by volunteers to protesters who were moving towards the grassy area.[974] Although the question of whether it will be possible to provide aftercare is a matter which should be taken into account in use of force, and an inability to do so would tend against its use, in circumstances where A/Sergeant Bolzonello was aware that aftercare was being made available by volunteers, it is apparent that he was aware that the plaintiff was not being left without some aftercare.

624 I have considered carefully whether A/Sergeant Bolzonello's comments after spraying the plaintiff warrant the punishment of an award of exemplary damages. His statements – 'It had to happen, we weren't getting anywhere, it had to happen' and 'Yeah, don't fuck with us any more' – were made in a context where I have found that, at least during his time approaching the West Pole, he had not been confronted by any behaviour of protesters warranting an opinion that they were behaving violently or in any other way appropriately described as 'fucking with' the police. The comments indicate that he may hold the view that the protesters were not entitled to be in the area and the police were entitled to clear them out including by use of OC foam.

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972 Exhibit P1, Part 7 (After-care).
973 Exhibit P3, Part 6 (After-care and medical attention).
974 Transcript 26/02/25, T662.29-T663.07 (Bolzonello XN).

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Plainly such a view has no legal foundation. However, it is possible that A/Sergeant Bolzonello's comments were referring to conduct of protesters that I did not view and with respect to which I have not made findings, and which may have warranted some police use of force. Further, the comments were made in a context intended to be private, as between A/Sergeant Bolzonello and colleagues and not to the plaintiff, protesters or other member of the public. In light of the potential ambiguity relating to A/Sergeant Bolzonello's comments, I consider it is not an appropriate basis on which to award exemplary damages.

625 No exemplary damages will be awarded.

Damages – conclusion

626 The plaintiff will be awarded $54,000 in damages, comprised of:

(a) $40,000 in general damages;

(b) $4,000 in special damages; and

(c) $10,000 in aggravated damages.

Relief sought by the plaintiff: Declarations

627 The Common Questions included several questions that touch on the availability of declarations. I have addressed above in the context of responding to Common Question 19 the issue of whether declaratory relief relating to *Charter* contraventions could be given against individual police officers, as raised by the plaintiff, and determined that it cannot.

Common Question 15: Can the Plaintiff seek a declaration against: (a) the Defendant; (b) Victoria Police; (c) the Police Officers?

628 Common Question 15 raises whether in this proceeding, the Plaintiff can seek a declaration against the State, Victoria Police, and individual police officers responsible for the tortious batteries. Common Question 27 is related in that it asks with respect to the plaintiff only whether if the Court finds that Police Officers used unlawful force against the plaintiff, declaratory relief should be given and against whom. Common Question 15(b) and (c) will also be answered 'no'.

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629 There is no legal restriction against the making of a declaration against the State with respect to the tortious and unlawful actions of police officers The State accepted that if the Court finds that the conduct of police officers constituted an unlawful battery, a declaration could be made to that effect, but that the declaration should not name the police officers.[975].

630 Common Question 15(a) will therefore be answered 'yes'. A declaration will be made to the effect that the plaintiff was the subject of a battery by two officers of Victoria Police on 30 October 2019.

631 I will hear the parties on the precise form of the declaration, and the other terms of final orders and costs before making the declaration and orders.

CERTIFICATE

I certify that this and the 223 preceding pages are a true copy of the reasons for judgment of the Honourable Justice Harris of the Supreme Court of Victoria delivered on the twelfth day of December 2025.

DATED this 12th day of December 2025.

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[975] Defendant's Primary Submissions, [59].

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ANNEXURE 1: COMMON QUESTIONS[976]

Common Question 1:
What were the relevant roles, powers, responsibilities, and statutory obligations of Police Officers in relation to their response to the protest to the International Mining and Resources Conference on 30 October 2019 (IMARC Protest)?
See [78]-[94].

Common Question 3:
What factually took place at the IMARC Protest? Including specifically:

(a) How many protestors were at the IMARC Protest between 12.23pm and 12.35pm on 30 October 2019 (**Relevant Time Period**)? *See [178].*

(b) At the time that the decision was made to arrest the pole climbers, how many protestors were:
   i. Around the east pole?
   ii. Around the west pole?
   See [225]-[227].

(c) How many Police Officers were at the IMARC Protest in the Relevant Time Period? *See [179].*

(e) Where were police officers stationed at the IMARC Protest? *See [180]-[183].*

(h) Were other Police Officers available on standby to attend the IMARC Protest if requested to do so? *See [183].*

(j) What weapons did Police Officers have available to them at the IMARC Protest? *See [184]-[186]*

(k) How many PORT Police Officers were carrying OC foam at the IMARC Protest? *See [186].*

(l) What size cannister(s) of OC foam were carried by PORT Police Officers at the IMARC Protest? *See [187].*

(m) Specifically regarding actions of Police Officers at the IMARC Protest in the Relevant Time Period (but without making findings as to the subjective intention of any police officer beyond the plaintiff's claim or the characterisation as a matter of law of the actions of any individual person beyond the Plaintiff): *See [188]-[272].*
   i. Did Police Officers deploy OC foam that came into contact with the Plaintiff?
   ii. If yes to any parts of question 3(m)(i):
      a. by which Police Officers was OC foam deployed;
      b. at what time was OC foam deployed; and
      c. where was OC foam deployed in relation to the location of the Plaintiff?
   iii. Did Police Officers Advance towards the Plaintiff and other protestors under the west pole including in a coordinated formation?
   iv. If yes to question 3(m)(iii):
      a. which police officers advanced towards the Plaintiff and other protestors;
      b. in what coordinated formation;
      c. at what time;
      d. where; and
      e. in what direction?
   v. Did Police Officers say "move", either by use of that specific word, or words to

[976] Italicised references are to paragraphs of the Judgment in which the questions are addressed.

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its effect under the west pole? *See [248].*

vi. Did Police Officers say words to the effect of "you are hindering police" under the west pole? *See [272].*

Common Question 4.
What was the source of power for the Police Officers carrying out the Advance and saying the words "move" in paragraph [3] above?
See [388]-[400].

Common Question 5.
What occurred during any debriefing by Police Officers about the events of the Relevant Time Period at the IMARC Protest?
See [376]-[386].

Common Question 6.
Regarding the IMARC Protest and prior to its commencement, what directions and/or orders and/or briefings were provided to PORT Police Officers, in respect of:
(a) the police response at the IMARC Protest?
(b) use of force against protestors at the IMARC Protest?
(c) use of OC foam specifically against protestors at the IMARC Protest?
(d) use of tactical options and measures to be used for crowd control of protestors at the IMARC Protest?
(e) alternatives to use of force against protestors at the IMARC Protest?
(f) any other matters relating to policing of the IMARC Protest?
See [192]-[272].

Common Question 7.
What directions and/or orders and/or instructions were given by Police Officers to other Police Officers in respect of the following acts, insofar as they occurred during the Relevant Time Period:
(a) the Advance?
(b) any use of force against protestors?
(c) use of OC foam against protestors?
(d) arrest of the climbers?
(e) formation of police officers at the IMARC Protest?
See [192]-[272].

Common Question 8.
What directions and/or orders and/or instructions were given by the PORT Tactical Commander or any of the commanding officers in respect of the following acts, insofar as they occurred during the Relevant Time Period:
(a) the Advance?
(b) any use of force against protestors?
(c) use of OC foam against protestors?
(d) arrest of the climbers?
(e) formation of police officers at the IMARC protest?
See [208]-[272].

Common Question 9.
What assessments did the PORT Tactical Commander or any of the commanding officers

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make about:

(a) the risk of harm or injury to any protestors in giving the directions and/or orders and/or instructions in the preceding paragraph?

(b) any infringement of any protestors' Charter rights in giving the directions and/or orders and/or instructions in the preceding paragraph?

(c) the nature of the offences that had been committed by the climbers?

See [401]-[410].

Common Question 10.

What range of alternatives to:

(a) use of OC foam;

(b) arresting the climbers when they descended the pole, were generally available to Police Officers at the IMARC Protest? (This question does not ask what specific alternatives were available at a particular time to any individual officer in the circumstances that they faced).

See [418]-[430].

Policies, procedures, standards of conduct and training

Common Question 11.

As at the IMARC Protest, what Victoria Police policies and procedures were operational and applicable to the use of force at the IMARC protest?

See [96]-[119].

Common Question 12.

What training and supervision was provided to Police Officers in respect of:

(a) the role of police at protests?

(b) policing tactics appropriate for use at protests?

(c) the use of OC foam at protests?

(d) any use of force at protests?

See [120]-[146].

Common Question 13.

What (if any) limitations or restrictions existed or standards of conduct applied to Police Officers using OC foam at a protest such as the IMARC Protest?

See [147]-[169].

Common Question 14.

What, in general, ought to be considered by a Police Officer before and when using OC foam at a protest such as the IMARC Protest?

See [170]-[175].

Relief

Common Question 15.

In this proceeding, can the Plaintiff seek a declaration against:

(a) the Defendant;

(b) Victoria Police;

(c) the Police Officers,

in respect of the tortious and unlawful actions of the Police Officers?

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See [461] – [486] and [627]-[630].

Common Question 16.
Does s 28LC(2)(a) of the *Wrongs Act 1958* (Vic) apply to the torts of assault and battery as pleaded in this proceeding?
See [562]-[598]

Common Question 17.
Does s 28C(2)(a) of the *Wrongs Act 1958* (Vic) apply to the torts of assault and battery as pleaded in this proceeding?
See [599]-[601].

Charter of Human Rights and Responsibilities

Common Question 18.
When planning for and attending the IMARC protest:
(a) were the Police Officers acting as public authorities within the meaning of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Charter)?
(b) were the Police Officers required to abide by s 38 of the Charter?
See [80]-[81].

Common Question 19.
Does the Plaintiff have a right to seek relief or remedy in this proceeding pursuant to s 39(1) of the Charter and if so, in relation to what 'acts' or 'decisions' (within the meaning of ss 38 and 39 of the Charter)?
See [442]-[486].

Common Question 20.
Did the police actions or decisions at the IMARC Protest in relation to the use of force against the Plaintiff in the Relevant Time Period limit any Charter rights of the Plaintiff?
See [493]-[523].

Common Question 21.
If the answer to the preceding paragraph is yes:
(a) what actions or decisions limited Charter rights?
(b) which rights were limited?
(c) could any such limitations be authorised by s 7(2) of the Charter?
See [493]-[523].

Common Question 22.
Did the decisions of the Police Officers:
(a) in planning the police response to the IMARC Protest;
(b) during the IMARC Protest in the Relevant Time Period in relation to the use of force against the Plaintiff to the extent that they are found to be 'decisions' within the meaning of ss 38 and 39 of the Charter;
fail to give proper consideration to the Charter Rights of the Plaintiff?
See [489].

Common Question 23.
Did the Police Officers act in a way:

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(a) in planning the police response to the IMARC Protest;
(b) during the IMARC Protest in the Relevant Time Period in relation to the use of force against the Plaintiff,

which was incompatible with the Charter Rights of the Plaintiff?
See [524]-[530].

The following questions will need to be asked and answered with respect to the Plaintiff only:

Question 24.
Were the Police Officers acting in concert and/or pursuant to direction of their superiors as part of a collective use of force in respect of use of force against the Plaintiff?
See [431]-[439].

Question 25A.
Did Police Officers use force against the Plaintiff as pleaded in the Amended Statement of Claim?
See [386].

Question 26.
Was any use of force by Police Officers on the Plaintiff lawfully justified? (In answering this question the Court can consider the conduct of the Plaintiff, and to the extent relevant, the conduct of other protestors and police officers in the vicinity of the Plaintiff, but should not characterise that conduct as a matter of law).
See [386],

Question 27.
If the Court finds that the Police Officers used unlawful force against the Plaintiff, should the Court order declaratory relief, and against whom?
See [627]-[630].

Question 28.
Should the Plaintiff be awarded damages and, if so, for what amount, and under what heads of damage?
See [*602]-[626]*

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ANNEXURE 2: ADMISSIBILITY OF EVIDENCE OF PROFESSOR MCCULLOCH

1 Professor Judith (Jude) McCulloch's evidence addressed three distinct areas of subject matter:

(a) the legal characterisation of conduct the subject of the proceeding, particularly by reference to the ***Charter*** *of Human Rights and Responsibilities Act 2006* (Vic), including whether it was lawful for protesters to attend, observe and protest at IMARC, and what police roles were in policing such protests;[977] and the source of police powers to use force at the IMARC Protest and limits on those powers;[978]

(b) policing tactics, including exercise of arrest powers,[979] and alternatives to use of OC foam and whether the use of OC foam against the plaintiff was appropriate or justified;[980] police procedures and policies operational at the time of the IMARC Protest, what a police officer should consider before using OC foam at a protest, and the appropriateness of directions, orders and briefing materials provided to police,[981] and

(c) the effects of OC foam on people on whom it is used.[982]

2 Professor McCulloch was also asked the question '[i]n your opinion, from a review of the footage, was the Plaintiff pushed, crushed and/or grabbed by police' and, if so, whether it was 'appropriate or justified'.[983] Professor McCulloch's response was that based on her review of the footage she could not see that the plaintiff was pushed, crushed and/or grabbed by the police, but she did make some further observations. Although no formal objection as to admissibility was made to these questions or the responses, it is unnecessary to consider this evidence in any detail and it is appropriate to deal with this aspect of her report at the outset as this evidence is inadmissible.

977 First McCulloch Report, Exhibit P21, Questions 2 and 3.
978 First McCulloch Report, Exhibit P21, Questions 5 and 7.
979 First McCulloch Report, Exhibit P21, Questions 12 and 13.
980 First McCulloch Report, Exhibit P21, Questions 11, 16 and 17.
981 First McCulloch Report, Exhibit P21, Questions 4, 6, 8, 9, 10, 14 and 15.
982 First McCulloch Report, Exhibit P21, Question 4; Second McCulloch Report, Exhibit P22, [25]-[39].
983 First McCulloch Report, Exhibit P21, Questions 18 and 19.

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Evidence as to what physically occurred based on Professor McCulloch's review of the footage is not relevant as it is a matter that the trial judge can assess from reviewing that footage.

Objections to the evidence of Professor McCulloch

3 The State originally objected to parts of Professor McCulloch's reports.[984] The parties subsequently agreed that the objection would not be pressed, and the evidence would be admitted subject to weight.[985] The objections made initially, and the submissions as to weight made subsequently, were broadly of three kinds.

(a) It was said that Professor McCulloch did not have relevant expertise to support the opinions expressed. It was submitted that she has no operational policing experience, nor any experience managing or briefing operational police in relation to operations to be conducted in the field, upon which she could express opinions as to tactical matters including alternatives available in policing a crowd.[986] It was also submitted that as she had no medical or psychological experience, qualifications or training, her evidence as to the medical effects of OC foam were inadmissible. [987]

(b) Certain opinions expressed by Professor McCulloch were said not to be supported by a clear path of reasoning, and it was not apparent how the opinion was based wholly or substantially on specialised knowledge.[988]

(c) Certain evidence based on references to a report of the Independent Broad-based Anti-corruption Commission was said not to be relevant to the issues in the proceeding.[989]

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984 **Defendant's List of Objections** to the Plaintiff's Evidence filed on 6 February 2025.

985 Defendant's List of Objections. This position was confirmed at trial before Professor McCulloch gave evidence: Transcript 19/02/25, T238.22-T239.06 (McCulloch XN). Senior counsel for the State did observe that 'in our view it was…right on the line about whether or not it was objectionable and therefore not admissible at all or if it was a weight issue' (T239.02-04).

986 First McCulloch Report, Exhibit P21, [45], [50], [106]-[148]; Second McCulloch Report, Exhibit P22, [7]-[10], [26]-[33], [45]-[55].

987 First McCulloch Report, Exhibit P21, [22]; Second McCulloch Report [38].

988 First McCulloch Report, Exhibit P21, [188]-[193], [200].

989 Second McCulloch Report, Exhibit P22, [15], [22]-[23].

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4 The plaintiff's reliance on the evidence of Professor McCulloch in closing submissions was relatively limited, but it was submitted that on various issues it should be taken into account or preferred to that of witnesses for the State. The parties submitted, as to the weight which could be afforded to Professor McCulloch's evidence:

(a) The State contended that Professor McCulloch's evidence as to the effects of OC foam was based on 'a sort of desktop review of some medical material', but she did not herself have any medical or health related qualifications, training or experience, so the evidence should be given *no* weight.[990] The plaintiff submitted that as the State did not put up an alternative expert and Professor McCulloch was not cross-examined on her evidence as to the effects of OC aerosols, it should be accepted. It was said that even though she was not a medical professional, she had gathered articles and material on the issue and presented it to the Court, which could be independently considered.[991]

(b) The State submitted that Professor McCulloch's evidence on the *Charter* was more in the nature of submissions and was not useful for the Court as evidence.[992]

(c) The State submitted that Professor McCulloch's evidence on police tactics, training and alternative policing tactics, including alternatives to capsicum spray, were more in the nature of submissions. The State contended that she has no relevant expertise in police tactics and the evidence of police witnesses on police tactics and training should be preferred.[993] The plaintiff submitted that Professor McCulloch was an experienced and credentialled criminologist 'in the area of use of force' by police and had the relevant specialised knowledge, and was independent, so that her evidence as to the reasonable alternatives to use of force and reasonableness and proportionality were

990 Transcript 11/06/25, T5.03-14 (Submissions).
991 Transcript 11/06/25, T133.05-T135.01 (Submissions).
992 Transcript 11/06/25, T22.12-20 (Submissions).
993 Transcript 11/06/25, T22.03-30 (Submissions).

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admissible.[994]

Conclusions on admissibility and weight of Professor McCulloch's evidence

5 Although the parties agreed that the evidence should be admitted subject to weight, it would have been more appropriate for me to rule on these admissibility questions during the proceeding.[995] I have concluded (for reasons to which I will come) that some of the evidence of Professor McCulloch on which the plaintiff seeks to rely is not admissible having regard to the requirements of the ***Evidence Act*** *2008* (Vic), such that the question of weight does not arise.[996]

6 I considered whether it is necessary to raise the question of the inadmissibility of aspects of Professor McCulloch's evidence with the parties after their closing submissions. I have concluded that, given the defendant's position that the relevant evidence should be afforded *no* weight for reasons which ultimately go to admissibility rather than weight,[997] the plaintiff has been on notice of and responded to the relevant arguments against admissibility,[998] and will not be prejudiced by this issue being determined without further submissions.

7 Most, but not all, of Professor McCulloch's evidence is expressed as an opinion.[999] The starting point for the assessment of the admissibility of the opinion evidence is

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994 Transcript 17/02/25, T85.21-T86.13.

995 ***Dasreef*** *Pty Limited v Hawchar* (2011) 243 CLR 588, 599 [19]-[20] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

996 *Dasreef*, 599 [19]-[20].

997 That is, to questions of whether the opinions were based on specialised knowledge based on training, study or experience, which is a matter going to admissibility rather than weight: *Dasreef*, 604-605 [42]. The State had objected that Professor McCulloch was not qualified to give opinions as to the effect of OC foam and questions of police tactics.

998 The issue of the admissibility of Professor McCulloch's evidence on the interpretation and application of the *Charter* was specifically raised with counsel in the course of opening submissions (Transcript 17/02/25, T78.07-16) and senior counsel for the State submitted that 'it was…right on the line about whether or not it was… not admissible at all or if it was a weight issue' (Transcript 19/02/25, T238.25-T239.06 (McCulloch XN)). The potential significance of accepting objections as to Professor McCulloch's lack of expertise was again the subject of discussion in closing submissions: Transcript 11/06/25, T133.16-T134.13 (Submissions). The parties elected to continue on the basis that the evidence should be admitted, subject to its weight.

999 Some of Professor McCulloch's evidence was to identify policies and procedures applicable to Victoria Police officers, which were tendered in evidence (First McCulloch Report, Exhibit P21, [29] - list of Victoria Police policies and procedures) and in that sense did not, in my view, have any material element of opinion, as opposed to an observation based on the documents and drawing on her body of specialist knowledge, arising from her study, of police regulation (on this distinction see *Matthews v SPI Electricity Pty Ltd (Ruling No 9)* [2012] VSC 340, [40]-[41] (J Forrest J)).

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whether it is relevant, as required by s 56(2) of the *Evidence Act*. If relevant, the opinion rule in s 76 of the *Evidence Act* will apply:

> **76 The opinion rule**
>
> Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

8 There are several exceptions to the opinion rule in s 76. One is the exception relating to expert opinion in s 79(1) of the *Evidence Act*:

> **79 Exception – opinions based on specialised knowledge**
>
> (1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

9 In applying these provisions it is necessary first to ascertain the purpose for which the tendering party seeks to rely on the evidence.[1000] In this case, the plaintiff in closing submissions relied on various parts of Professor McCulloch's evidence for three broad purposes: (i) to support submissions relating to the legal characterisation of conduct of both protesters and police; (ii) to show the effects of OC aerosols which should be known to police using it; and (iii) to support the conclusion that various police tactics were not appropriate or justified.

Opinions which involve interpretation and application of the law

10 The first category of opinion evidence as to the law and application of it to police and protester conduct is the most straightforward to address. It is inadmissible, for the following reasons.

11 Evidence is not admissible to prove the content of Australian law or how it applies to facts. This principle and the rationale for it was described by Justice Lindgren in ***Allstate*** *Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 6)*:[1001]

> It is fundamental that the ascertainment of the law relevant to a matter before a court and its proper application to the facts of the particular case are of the essence of the judicial function and duty. Although those processes are properly the subject of submission, *evidence* of opinion, whether as to the

1000 *Dasreef*, 603 [20] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

1001 (1996) 64 FCR 79, 83 (emphasis in original).

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> identification of the relevant law or as to its proper application, is not admissible. The rationale underlying this fundamental principle may be expressed in various closely related ways: to admit such evidence would be to permit abdication of the judicial duty and usurpation of the judicial function; such evidence cannot be allowed to be probative or to rise higher than a submission; such evidence is necessarily irrelevant.

12 Justice Lindgren's observations in *Allstate* have been referred to with approval on numerous occasions, including in this Court by Justice Keogh in *Davis v Comensoli (No 1)*[1002] and by the New South Wales Court of Appeal in *Faucett v St George Bank Ltd.*[1003]

13 Professor McCulloch's opinions on the law and its application were relied on by the plaintiff in the following specific ways:

(a) that although the protesters' conduct at the IMARC Protest may have been unlawful, this does not render a protest unlawful,[1004] relying on Professor's McCulloch's observations as to the interpretation of the *Charter* right to peaceful assembly and freedom of association and its application to the PORT Tactical Plan;[1005]

(b) how the *Charter* applies to police decision making,[1006] which was the subject of Professor McCulloch's evidence as to what police should consider before using OC foam having regard to *Charter* considerations of proportionality and reasonableness;[1007] and

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1002 (2024) 76 VR 556, 559-560 [16].

1003 [2003] NSWCA 43, [48] (Sheller JA, Mason P and Meagher JA agreeing). See also the observations of Callinan J in *Naxakis v Western General Hospital* (1999) 197 CLR 269, 306 [110].

1004 Plaintiff's Response to Defendant's Answers to Common Questions and Plaintiff's Answers to Common Questions, [3].

1005 First McCulloch Report, Exhibit P21, response to Question 2: 'Was it lawful for protestors to attend, observe and protest at the International Mining and Resources Conference on 30 October 2019 (IMARC Protest)?', [5]-[8]; response to Question 3: 'What is the role of police in policing protests such [as] at the IMARC Protest?', [9]-[15]. These were opinions based on Professor McCulloch's interpretation of the *Charter* and ss 8 and 9 of the *Victoria Police Act* at [51]-[57] and her observations about the scope of police 'move on' powers in the *Summary Offences Act*, [58]– [69].

1006 Transcript 17/02/25, T77.14-T78.16.

1007 First McCulloch Report, Exhibit P21, response to Question 8 'What, in general, ought to be considered by a police officer before and when using OC foam at a protest such as the IMARC Protest?', [45]: Professor McCulloch describes her opinion as to what questions police should ask before using OC foam at a protest such as the IMARC Protest to 'align with and reflect the obligation by police to use only minimum force and to limit restrictions on Charter rights to the least restrictive option'.

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(c) the legal source of power to use force and OC foam, and the characterisation of OC foam as not appropriate or justified, by reference to the *Charter* and the *Crimes Act*;[1008] relying on Professor McCulloch's opinion as to the 'laws and police standards of conduct that restrict or limit the use of OC at protests such as the IMARC protest'.[1009]

14 The above evidence is opinion evidence as to the relevant Victorian law, its effect and application to the conduct of the protesters and the police. It is, therefore, inadmissible. Opinions of this kind can be put by way of submission and I infer that they did inform the plaintiff's submissions, but they are not admitted as evidence.

15 To the extent that some of the opinions involved identification of relevant Victoria Police Manuals and policies and how they applied,[1010] they may not be rendered inadmissible by the principle discussed above. They are operational policies rather than the law and, as discussed below, Professor McCulloch does have specialised knowledge in regulation of policing.[1011] However, Professor McCulloch's opinions on those policies are expressed in combination with her inadmissible opinions as to the application of the law. As the relevant manuals are in evidence, and are able to be construed on their face, I do not think it appropriate to afford Professor McCulloch's opinion evidence on the effect of the manuals any significant weight.

1008 Transcript 17/02/25, T60.28-T61.06.

1009 First McCulloch Report, Exhibit P21, response to Question 5: 'What was the source of power for police officers to use force (including OC foam) at the IMARC Protest?', [26]-[28].
Response to Question 7: 'What (if any) limitations or restrictions existed or standards of conduct applied to police officers using OC foam at a protest such as the IMARC Protest?', [30]-[43]: Professor McCulloch refers to the application of the *Crimes Act*, the *Charter* and the *Summary Offences Act.*
See also, in response to Question 10, which asked Professor McCulloch to review the IMARC debriefing materials and comment on 'the response of Victoria Police to the conduct of its officers at the IMARC Protest', Professor McCulloch expresses opinions as to effect of the *Crimes Act* at [96] and [112]-[113].
Response to Question 16: 'In your opinion, from a review of the footage, was the use of OC foam against the Plaintiff appropriate or justified?' at [149]-[158], Professor McCulloch expresses the opinion at [154] that 'the use of OC against the Plaintiff was in breach of the lawful limits on police use of force and not the least restrictive option in terms of limiting the Plaintiff's right to engage in peaceful protest'; [159]-[160] based on application of the *Charter*, and [165]-[169] on the application of the limits on police 'move on' powers in the *Summary Offences Act.*

1010 Such as references to the relevant content of the Victoria Police Manuals generally at [41] and the *Operational safety equipment* VPM at [44].

1011 See, on the distinction between opinions expressed as to whether use of force was justified in law, or complied with police internal requirements, *R v Rolfe (No 4)* [2021] NTSC 58, [21]-[22] (Mildren AJ).

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Opinion as to the effects of OC foam

16 Professor McCulloch's evidence is relied on by the plaintiff to establish the effects of OC foam,[1012] and to dispute the State's submission that OC foam is a more appropriate tactical tool than other uses of force.[1013]

17 The evidence of Professor McCulloch which is relied on includes the following passage of the first Report:

> The below summary of the immediate effects of OC are quoted from my article published in the Journal of Law and Medicine in 2000. The summary is drawn from a range of academic literature on the effects of OC referenced in the article.
>
> > When capsicum spray is inhaled, inflammation of the respiratory tract occurs and breathing is restricted. It also causes swelling and closing of the eyelids leading to temporary blindness, an extreme burning sensation and/or blistering on the skin, and upper body spasms which force a person to bend forward. Exposure is likely to lead to an increase in heart rate and an increase in blood pressure. The pain associated with being sprayed is generally intense.[1014]

18 The article referred to was Professor McCulloch's article published in the Journal of Law and Medicine in 2000, titled '*Capsicum Spray: Safe Alternative or Dangerous Chemical Weapon?*'.[1015] The plaintiff urged in submissions that at least the opinions in the article should be admitted.[1016]

19 The plaintiff also tendered Professor McCulloch's second Report, which was based on a literature review on policing and OC aerosol which drew from Professor McCulloch's 2000 Article, as well as later articles and studies from several sources between 2017 and 2024.[1017] The articles and studies were tendered.[1018]

1012 Plaintiff's Primary Submissions, [11]-[13]. Transcript 11/06/25, T132.30-T137.08 (Submissions).
1013 Plaintiff's Response to Defendant's Answers to Common Questions and Plaintiff's Answers to Common Questions, [99].
1014 First McCulloch Report, Exhibit P21, [22].
1015 Jude McCulloch, 'Capsicum Spray: Safe Alternative or Dangerous Chemical Weapon?' (2000) 7(3) *Journal of Law and Medicine* 311, 313 (Exhibit P40) (**Professor McCulloch's 2000 Article**).
1016 Transcript 11/06/25, T135.09-T136.04 (Submissions).
1017 Second McCulloch Report, Exhibit P22, [26]-[33]; [35]-[36].
1018 Rohini J Haar, Vincent Iacopino, Nikhil Ranadive, Sheri D. Weister and Madhavi Dandu, 'Health impacts of chemical irritants used for crowd control: a systematic review of the injuries and deaths caused by tear gas and pepper spray' (2017) 17(1) *BMC Public Health* 1 (Exhibit P41); Sadik Toprak, John

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20 The first question is whether the evidence is relevant for the purpose for which the plaintiff seeks to use it. The second question is whether Professor McCulloch's opinion is based on specialised knowledge within the meaning of s 79 of the *Evidence Act*.

21 The plaintiff's submissions as to the effects of OC foam emphasise that police should understand 'these physical and psychological effects' and the harm that can be caused by its use.[1019] It is also submitted that the physical injuries suffered by the plaintiff are consistent with the effects described by Professor McCulloch in her reports.[1020]

22 I have reservations about the extent to which the opinions, based on studies as to the effects of OC aerosols as used in a wide range of circumstances that[1021] were not always made apparent in the journal articles and studies relied on[1022] are evidence which is probative of what police should understand as being the potential effects of use in a policing setting. There is evidence of significantly higher probative value for that purpose, being the description of the effect of OC aerosols in the OC Manual,[1023] with which police officers are required to be familiar,[1024] and which is referred to below.

23 I accept that Professor McCulloch could acquire specialised knowledge relating to aspects of usage of OC aerosols by police, from review of literature and studies in that field with her extensive qualifications as a criminologist, which could be described as

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Hart, Peter Clevestig, Gökhan Ersoy and Burak Gümüş, 'Mid to Longer-term Harmful Effects of Riot Control Agents' (2020) 4(3) *Medical Journal of Western Black Sea* 107 (Exhibit P42); Jamie Smith, 'What is pepper spray, and is it dangerous?' *Medical News* Today (Web Page, 24 April 2023) <https://www.medicalnewstoday.com/articles/238262> (Exhibit P43); Independent Broad-based Anti-Corruption Commission, 'IBAC thematic review summary: Investigations into the use of OC spray by Victoria Police' (April 2024) (Exhibit P44); Kevin Petersen, Christopher S. Koper, Bruce G. Taylor, Weiwei Liu and Jackie Sheridan-Johnson, 'Less-Lethal Weapons and Civilian Injury in Police Use of Force Encounters: A Multi-agency Analysis' (2024) 102(2) *J Urban Health* 389 (Exhibit P45).

1019 Plaintiff's Primary Submissions, [13].

1020 Plaintiff's Primary Submissions, [81].

1021 Professor McCulloch noted that '[c]apsicum, in the form of acylated vanillylamide, was used as a harassing agent in World War I… [c]apsicum spray was first manufactured and used in Canada where it was used as a grizzly bear repellent. The United States Postal service then imported it for posties to use against attacking dogs' and then explained the use of capsicum by law enforcement agencies, in a range of delivery mechanisms: Professor McCulloch's 2000 Article, 313 (Exhibit P40).

1022 See, for example, the reports referred to in Professor McCulloch's 2000 Article at 314-317.

1023 OC Manual, Exhibit P1, Parts 3.1 and 7.

1024 See [159]-[165] above.

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knowledge based on 'study' within the meaning of s 79(1) of the *Evidence Act*.[1025] However, authority suggests that opinions based only on a literature review in a discipline other than the expert's own area of specialised knowledge may not be properly understood as based on study.[1026] In this case, the question is whether reviewing and summarising the effect of literature on the physiological and psychological effects of capsicum spray, by an expert whose qualifications are in law and criminology with a focus on policing constitutes providing an opinion based on an area of specialised knowledge. It is a difficult question as to whether the specific opinions expressed by Professor McCulloch are opinions *based on* her specialised knowledge, as required by s 79(1), or are more appropriately characterised as statements or descriptions of other people's opinions expressed in the articles and studies identified in the literature review. Given that the authors of the reports were unavailable for cross-examination this is not simply a technical objection.

24 Ultimately, I do not think it necessary to resolve the question of the admissibility of this aspect of Professor McCulloch's opinion evidence, given my view as to its limited relevance. Even if the evidence of Professor McCulloch on the effects of OC aerosol is admissible, I would give it low weight. I give it some weight as evidence which supports the accuracy of the description of the effects of OC aerosols in the OC Manual. Insofar as Professor McCulloch's observations go further (for example in referring to or adopting opinions as to potential long term effects or fatal consequences in some circumstances)[1027] I do not consider that there is adequate factual basis

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1025 See, in this respect, ***BQ*** *v The King* (2024) 279 CLR 124 (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ), in which the Court considered the evidence of an Associate Professor in the School of Law at the University of Sydney, with qualifications in both law and psychology, whose knowledge in the relevant area was acquired from reviewing psychological and other research: 131, [12]. The Court unanimously concluded that her evidence 'concerned the development and behaviour of victims of child sexual assault and was 'wholly or substantially base'" on her specialised knowledge on that topic based upon (at least) her 'study': 138-139, [35].

1026 See, for example, *BQ* at 135, [27] and 140, [40]; See also *AJ v The Queen* (2022) 110 NSWLR 339, 356-357, [72]-[73] (Beech-Jones CJ at CL, Harrison J agreeing).

1027 See, for example, the references in Professor McCulloch's 2000 Article at 314-315 to several studies, one of which refers to the risk of long term effects such as carcinogenic effects and cardiovascular and pulmonary toxicity, and others which note risks to pregnant women and people with asthma (but also noting that the effect of the literature was that there was insufficient research to determine whether there were such effects). The article at 316-317also refers to studies considering whether OC spray or foam was implicated in fatalities, couched in terms which did not permit a conclusive finding on whether OC aerosols had a causative role.

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identified in the evidence to support those opinions.

Opinions as to police tactics and alternatives to use of OC foam

25 The final area of the evidence of Professor McCulloch relied on by the plaintiff related to police conduct and tactics, including whether particular tactical responses were appropriate or justified and or there were alternatives to those tactics.[1028]

26 Professor McCulloch gave evidence that she had expertise in reviewing and understanding commonly used police tactics and alternatives[1029] based on her specialised knowledge in this area, which was described in her evidence as being based on her study, her work with Flemington / Kensington Community Legal Centre on police shootings and in the context of coronial inquests, and her work with Victoria Police in research partnerships on counter-terrorism policing, hate crime and evaluations of body worn camera footage.[1030] She said that she had specific experience in police briefing and debriefing documents and policies, including for policing of protest events through her work on coronial inquests and her research for Victoria Police.[1031]

27 I accept that Professor McCulloch has specialised knowledge of police tactics, and regulation of tactical options and use of force by police, based on her extensive study, experience of review of police conduct in inquests, and experience of working with Victoria Police on research relating to use of force. She has the specialised knowledge to qualify her to give expert opinions in that field. Her individual conclusions and opinions relied on by the plaintiff must then be considered as to relevance and whether they are based on that specialised knowledge.

28 It was submitted in general terms for the plaintiff in opening that he would rely on Professor McCulloch's assessment of the reasonableness and proportionality of the use of force by police at the IMARC Protests.[1032] Ultimately, the ways in which the

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1028 Plaintiff's Primary Submissions, [3], [40]; Plaintiff's Response to Defendant's Answers to Common Questions and Plaintiff's Answers to Common Questions, [89.2]; [99].
1029 First McCulloch Report, [1].
1030 First McCulloch Report, [2]-[4].
1031 First McCulloch Report, [46]; [72]
1032 Transcript 17/02/25, T60.28-T61.06; T85.21-T86.13.

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plaintiff relied on Professor McCulloch's opinions on police use of force in closing submissions was relatively confined. It was relied on in four ways.

29 First it was relied on to support a submission that the police conduct in attempt to arrest the Climbers 'escalat[ed] tension, risk and hostilities and increase[ed] the sense of chaos'.[1033] This was based on Professor McCulloch's opinions of her observations of the video footage of the IMARC Protest.[1034] These opinions were to the effect of the police use of OC foam in the context of arresting the Climbers having intensified physical proximity and have escalated risk rather than created safe spaces.[1035] I accept that these opinions are informed by Professor McCulloch's specialised knowledge of policing and tactical options, and can be characterised as being based on that knowledge. However I give the opinions limited weight given that I am able to make my own observation of the footage of the behaviour of both the protesters and police and form my own assessments.[1036]

30 Professor McCulloch's evidence was then relied on by the plaintiff to support the submission that there are levels of tactical response, with 'hands on' policing tactics involving a lower level use of force, which should have been preferred to use of OC foam.[1037] Professor McCulloch's opinion in this respect was said to be based in part on the terms of the Victoria Police operational safety briefing for IMARC, which stated that 'if protesters passively resist arrest and need to be removed, consider "Manual Handling" techniques'.[1038] This opinion is based on Professor McCulloch's specialised knowledge and facts that she has identified and is admissible.

31 It was also submitted that police should have exercised discretion not to intervene in the minor offending of the Climbers in trespassing, and that tactical engagement was

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1033 Plaintiff's Response to Defendant's Answers to Common Questions and Plaintiff's Answers to Common Questions, [3].

1034 First McCulloch Report, [149]-[158].

1035 Transcript 19/02/25, T247.20-T248.02 (McCulloch XN).

1036 *R v Rolfe (No 4)* [2021] NTSC 58.

1037 Plaintiff's Response to Defendant's Answers to Common Questions and Plaintiff's Answers to Common Questions, [89.2], referring to Second McCulloch Report, Exhibit P22, [10] (see also First McCulloch Report at [113], [147] and Professor McCulloch's evidence to similar effect at Transcript 19/02/25, T259.23-29 (McCulloch XXN))

1038 IMARC Operational Safety Briefing (Exhibit P26).

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an alternative.[1039] This relied on Professor McCulloch's evidence that tactical disengagement, involving police discretion not to intervene in minor offending to facilitate peaceful protest and avoid any escalation of conflict, was an option for the police instead of use of OC foam. This opinion was described as being based in part on Professor McCulloch's review of the relevant provisions of the Victoria Police Manuals and the PORT Tactical Plan, as well as her observations about the importance of police communication and negotiation with protesters.[1040] The foundation and reasoning for the opinion is clearly explained. It is admissible.

32 Finally and most specifically, it was submitted that the spraying of the plaintiff with OC foam by Sergeant Guthrie and A/Sergeant Bolzonello was not proportionate,[1041] relying on the evidence of Professor McCulloch that the plaintiff was 'doing nothing else in my opinion, but being passively resistant'.[1042]

33 The proportionality of a use of force, as an element of the consideration of whether a use of force is reasonably necessary, is directly relevant to the defence of self-defence[1043] and is an element of the defence under s 462A of the *Crimes Act*. Proportionality is also a factor in determinations as to whether *Charter* rights have been breached. The proportionality of the use of OC foam against the plaintiff is therefore one of the ultimate issues I must determine. Although opinions are not inadmissible only by reason only that they are about an ultimate issue,[1044] questions of relevance and admissibility remain. In this case, the opinion that the use of OC foam was not proportionate is a mixed question of fact (arising from Professor McCulloch's review of the video footage) and law.[1045] It may, to the extent that it involves legal assessments, be based on Professor McCulloch's specialised knowledge as a professor

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1039 Plaintiff's Response to Defendant's Answers to Common Questions and Plaintiff's Answers to Common Questions, [99].

1040 First McCulloch Report, Exhibit P21, [106]-[111]; [114]-[115]. See also Transcript 19/02/25, T267.24 (McCulloch XXN).

1041 Plaintiff's Primary Submissions, [40]; [67]-[68].

1042 Transcript 19/02/25, T292.28-T293.12 (McCulloch XXN); First McCulloch Report, Exhibit P21, [184]. Professor McCulloch also expressed other opinions at [194]-[196] about proportionality that were not specifically relied on by the plaintiff.

1043 *R v Portelli* [28]; *Watkins*, [73-74]; *Underhill v Sherwell* [1997] NSWCA 325 (Beazley JA, Meagher JA and Sheller JA agreeing).

1044 *Evidence Act*, s 80(a).

1045 ***Harding v Sutton*** *(No 2)* [2021] VSC 789, [56]-[60] (Richards J).

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of law and criminology. However that serves to demonstrate that this aspect of the opinion as to proportionality falls within the scope of the legal questions that are properly for the Court to determine for itself. Insofar as the opinion involves factual conclusions from observation of the footage, such as whether the plaintiff was simply 'passively resisting', this is a matter on which I am as well placed as Professor McCulloch to determine.

34 I have considered the authority of *R v Rolfe (No 4)*, in which Mildren AJ considered whether the opinions of a senior police officer about certain uses of force, in that case the defendant's use of a shotgun, were admissible. In that case, his Honour observed that the officer:

> … expressed no opinion on whether or not the second and third shots were justified in law. His opinion on that subject matter is limited to whether or not those shots complied with Police General Orders and the Accused's training as a Constable in the Northern Territory Police Force. In that respect, his opinion does not go to the ultimate issue which the jury will have to consider….[1046]

35 His Honour concluded that because the evidence did not go to the ultimate issue but to compliance with the relevant police standard in the General Orders (orders made by the Northern Territory Commissioner of Police pursuant to s 14A of the *Police Administration Act 1978* (NT), it was admissible.[1047]

36 In this case, the opinions expressed by Professor McCulloch about the proportionality of the use of force were not, for the most part, expressed by reference to the VPMs or training material, but by reference to legal considerations or her factual observations from the videos and her interpretation of the behaviour of the plaintiff and relevant police officers.[1048] However, she did refer in the context of one of her conclusions to the content of the *Operational safety equipment* VPM,[1049] which states that:

- OC aerosols should only be used where there are reasonable grounds to believe the use is necessary and proportionate in situations:
  - of violence or serious physical confrontation

1046 *R v Rolfe (No 4)* [2021] NTSC 58, [21].
1047 *R v Rolfe (No 4)* [2021] NTSC 58, [26].
1048 See, for example, First McCulloch Report, [179]-[196]
1049 First McCulloch Report, [44].

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- where violent or serious physical confrontation is imminent
- where a person is involved in violent or other physical conduct and likely to seriously injure themselves or result in suicide

- Members and PCOs:
  - should not use OC aerosols when a person is only passively resisting e.g. simply hanging limp or refusing to comply with instructions only
  - may use OC aerosols to deter attacking animals.

37 Professor McCulloch's opinion as to the use of OC foam against the plaintiff was not specifically expressed by reference to the application of this standard. I accept that, taking her evidence as a whole, this aspect of the *Operational safety equipment* VPM is one of the bases of her conclusion that use of OC foam against the plaintiff was not proportionate because he was, in her view, passively resisting. The evidence may, for that reason, be admissible but it will carry limited weight, as it is ultimately a matter that is more in the nature of a legal submission. The Court is in a position to have regard to that part of the Manual (which is in evidence) and take it into account in assessing both the police conduct and the plaintiff's conduct as shown on the footage.

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ANNEXURE 3: SUBMISSIONS ON COMMON QUESTION 14 (CONSIDERATIONS WHEN USING OC FOAM AT A PROTEST)

PARTIES' SUBMISSIONS

1 The Defendant submitted that 'before and when using OC foam, a police member should ordinarily (and subject to the amount of time available) give consideration to' the following matters:[1050]

70.1. the objective the police member seeks to achieve;[1051]

70.2. their assessment of the risks and safety considerations arising in the specific circumstance confronting them (referred to by police as their risk assessment);[1052]

70.3. the existence of a lawful basis to use force and the specific criteria applicable to that lawful basis, whether ss 462A and 322K of the Crimes Act or the common law (namely, proportionality, reasonableness and necessity);[1053]

70.4. human rights considerations;[1054]

70.5. the possible alternatives to the use of OC foam in the particular circumstances, which in a given case may extend to consideration of:

(a) the size of subjects/police;

(b) any special fighting skills a subject may possess;

(c) the ages and gender of the police and subject (as an indicator to physical and physiological ability and differences);

(d) the degree of motivation and mental states of those present, proximity of weapons/firearms (including police operational safety equipment);

(e) special knowledge about the situation/offender;

(f) any injury/fatigue of the members;

(g) the members' ground position;

(h) whether there is any imminent danger;

(i) the number of subjects and whether police are outnumbered or whether there are multiple police so lesser control techniques

1050 Defendant's Answers to Common Questions, [70].
1051 T616.28-29 and T618.23-27 (Bolzonello XN).
1052 Exhibit P2 (CB1102-4); T616.29-30 (Bolzonello XN), T1248.13-31 (Galliott XN).
1053 Exhibit P2 (CB1102-3).
1054 Exhibit P10 (CB819-827) and Exhibit P33 CB1010-1013).

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might be able to be used);[1055] and

70.6. the circumstances and location of a proposed deployment (consideration if the deployment is indoors or outdoors and if there are bystanders).[1056]

2 The Plaintiff submitted that in addition to the above matters, a police officer 'should consider the following matters':[1057]

129.1 The effects of OC aerosols are serious and debilitating with physical and psychological effects.[1058]

129.2 As a less than lethal weapon it should be treated as potentially lethal and not definitely non-lethal.[1059]

129.3 OC foam should not be used as a form of crowd control or crowd dispersal.[1060]

129.4 OC foam should not be used to simply move people, to clean up an area or create space – there must be a lawful justification.[1061]

129.5 OC foam cannot be used simply because protestors are pushing back on a police line or considered to be hindering police – there must be a lawful justification.[1062]

129.6 Use of OC foam can only be lawfully used if justified under s 462A and 322K of the *Crimes Act 1958* or the common law.

129.7 When considering use of OC foam against any protestor, the consideration must be given to justification for the use as against the individual and not a group.[1063]

129.8 Police should consider the ability of police to offer after care to the recipient when weighing up considerations of necessity and proportionality in using OC foam. If the recipient will be forced to run away when sprayed and will not be monitored by police, that is a factor that weighs against use of OC foam.[1064]

129.9 If using OC foam pursuant to s 462A of the Crimes Act 1958 and effecting an arrest, police should consider, as part of the proportionality assessment, the seriousness of the offence for which the arrest is being

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1055 Exhibit P1 (CB1071-1072).
1056 Exhibit P1 (CB1071).
1057 Plaintiff's Responses to Defendant's Answers to Common Questions and Plaintiff's Answers to Common Questions, [129].
1058 Exhibit P1 (CB 1058).
1059 Exhibit P10 (CB 820).
1060 T860.15 (Trimble XXN).
1061 T1262.28 (Galliott XXN).
1062 T1362.8 (Lahman XXN).
1063 T1005.10 (Caldwell XXN).
1064 T485.11 - 17 (Tully XXN).

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effected.[1065]

129.10 In protest situations, discretion should be exercised toward lower level offending, focussing on arrest for offences involving violence or damage to property.[1066]

129.11 Police should consider the matters identified in the HRIA.[1067]

129.12 Police are legally obligated to consider protestors' protected human rights in all operational decision making and to act compatibly with those rights.[1068]

129.13 Members should only use OC aerosols where they believe on reasonable grounds it is necessary and proportionate in situations:[1069]

(a) of violence or serious physical confrontation;

(b) where violent or serious physical confrontation is imminent;

(c) where a person is involved in violent or other physical conduct likely to seriously injure themselves or result in suicide.

129.14 Members should not use OC aerosols when a person is only passively resisting e.g. simply hanging limp or refusing to comply with instructions only

129.15 Members may use OC aerosols to deter attacking animals.[1070]

1065 T914.8 (Barras XXN); T917.14 (Barras XXN).
1066 T1024.13-21 (Caldwell XXN).
1067 Exhibit P10 (CB 819).
1068 Charter section 38(1). See also the Plaintiff's written submissions at paragraphs [125]-[126].
1069 Exhibit P3 (CB 1093); Exhibit P1 (CB 1062).
1070 Exhibit P3 (CB 1093); Exhibit P1 (CB 1062).

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