



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

No. S ECI 2022 03440
Case: S ECI 2022 03440
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BETWEEN

JORDAN BROWN

Plaintiff

- and -

STATE OF VICTORIA

Defendant

DEFENCE

Date of document: 12 May 2023

Code: 7977

Filed on behalf of the Defendant

Tel: 03 8684 0444

Prepared by:

Fax: 03 8684 0449

Victorian Government Solicitor's Office
Level 25, 121 Exhibition Street Melbourne
VIC 3000

Ref: 2205050

Attn: Sally Robertson

Email:

sally.robertson@vgso.vic.gov.au

The Defendant, by way of defence to the Plaintiff's Statement of Claim dated 1 September 2022 says as follows:

A. THE PLAINTIFF AND GROUP MEMBERS

A.1 Group members

1. In response to the allegations in paragraph 1, it:

- (a) admits that the 6th Annual International Mining and Resources Conference was held between 28 and 31 October 2019 (the **IMARC Conference**) at the Melbourne Convention and Exhibition Centre (the **Convention Centre**) in Southbank, Melbourne;
- (b) admits there were protests held in response to the IMARC Conference between 28 and 31 October 2019 (the **IMARC Protests**), including on 30 October 2019 (the **30 October Protest**);
- (c) admits that Oleoresin Capsicum foam (**OC foam**) was deployed by some Victoria Police members between approximately 12:24pm and 12:35pm in circumstances set out more fully in the balance of this Defence;

- (d) admits that the Plaintiff was present at the 30 October Protest and was sprayed with OC foam in circumstances set out more fully in the balance of this Defence;
- (e) says that the use of OC foam was lawful for reasons set out more fully in the balance of this Defence;
- (f) denies that the battery claims made by the Plaintiff and the Group Members are capable of being made or resolved by way of a representative proceeding and reserves its right to bring an application for declassification of the proceeding at an appropriate time; and
- (g) otherwise, does not admit the allegations in paragraph 1.

2. In response to the allegations in paragraph 2, it:

- (a) refers to and repeats the matters set out in paragraph 1 above;
- (b) says that the elements of the tort of battery, and the elements of the defence of lawful and not disproportionate force, require the Court to determine the precise circumstances in which the alleged battery occurred, including the conduct of the alleged victim immediately before and during the alleged battery;
- (c) says that for this reason the determination of any claim made in battery will require the Court to receive evidence of the identity and conduct of each person making such a claim; and
- (d) otherwise does not admit the allegations in paragraph 2.

A.2 The Plaintiff

3. In response to the allegations in paragraph 3, it:

- (a) admits that the Plaintiff was present at the 30 October Protest;
- (b) says that the Plaintiff was part of a group of protesters who hindered police in the execution of their lawful duties by attempting to prevent police carrying out the lawful arrest of the Climbers;
- (c) admits that the Plaintiff was sprayed with OC foam in the circumstances set out more fully in the balance of this Defence; and
- (d) otherwise does not admit the allegations in paragraph 3.

B. THE DEFENDANT

4. In response to the allegations in paragraph 4, it:
 - (a) says that the police force of Victoria (**Victoria Police**) is constituted under Part 2, Division 1 of the *Victoria Police Act 2013* (Vic) (the **Victoria Police Act**);
 - (b) says that Victoria Police is a special body under s 6(1)(k) of the *Public Administration Act 2004* (Vic); and
 - (c) otherwise does not admit the allegations in paragraph 4.

5. In response to the allegations in paragraph 5, it:
 - (a) admits that it may be sued pursuant to Part 4, Division 4 of the Victoria Police Act;
 - (b) admits that it may be liable for a 'police tort' as defined in section 72(1) save where section 74(2) of the Victoria Police Act applies; and
 - (c) otherwise, does not admit the allegations in paragraph 5.

C. ROLES, POWERS AND REPONSIBILITIES OF VICTORIA POLICE

6. In response to the allegations in paragraph 6, it:
 - (a) says that Victoria Police consists of the persons listed in s 7 of the Victoria Police Act, including but not limited to, the Chief Commissioner, Deputy Commissioners, Assistant Commissioners and other police officers;
 - (b) says that as at 30 June 2019 Victoria Police was organised into five portfolios overseen by the Chief Commissioner and Deputy Commissioners;
 - (c) says that the Regional Operations portfolio of Victoria Police relevantly included:
 - (i) a North West Metro Region portfolio overseen by an Assistant Commissioner; and
 - (ii) a Transit and Public Safety portfolio overseen by an Assistant Commissioner;
 - (d) says that the North West Metro Region portfolio relevantly included general duty police members from the North West Metro region of Melbourne, Victoria;

- (e) says that the Transit and Public and Public Safety portfolio relevantly included:
 - (i) the Operations Response Unit (the **ORU**);
 - (ii) the Search and Rescue Squad; and
 - (iii) the Mounted Branch;
- (f) says that the ORU:
 - (i) was not formally titled the Public Order Response Team (**PORT**) until on or about 1 March 2020;
 - (ii) was a specialist support team for planned operations such as protests, demonstrations, sporting events and other gatherings, where there was a high potential for violent or a specific need for crowd management or public order capabilities;
 - (iii) had a specialist public order capability beyond that of local resources;
 - (iv) comprised police members who were specifically trained in crowd management and dispersal techniques, public order tactics and the use of protective equipment;
 - (v) deployed police members by way of teams called Public Order Response Teams (**PORTs**); and
 - (vi) included an Evidence Gathering Team;
- (g) says that the Legal Services Department of Victoria Police included the Legal Prosecutions Specialist Branch which oversaw the Prosecutions Frontline Support Unit (the **PFSU**);
- (h) says the PFSU was a support resource to police members and provides frontline support, including at public order events and protests, to respond to and answer legal questions in respect of criminal offences; and
- (i) otherwise, does not admit the allegations in paragraph 6.

7. In response to the allegations in paragraph 7, it says that:

- (a) at the 30 October protest the Victoria Police Command relevantly consisted of:
 - (i) Acting Commander Tim Tully of the North West Metro Division of Victoria Police, who was the Police Commander with overall oversight

of the police response to the IMARC Conference, including protests (the **Police Commander**);

- (ii) Superintendent Dan Trimble who was the Police Forward Commander and was present at the Conference Centre as the officer in charge with overall decision making responsibility for the police members deployed to the IMARC protest (the **Police Forward Commander**);
 - (iii) Acting Inspector Graham Caldwell who was the Tactical Commander of the ORU for the morning shift until at or about 12:30pm with responsibility for the ORU and for the giving of tactical advice to the Police Forward Commander (the **PORT Tactical Commander**);
 - (iv) Inspector Gregory Barras who was the Deputy Tactical Commander for the ORU for the morning shift until at or about 12:30pm and in charge of a protestor extraction team (the **PORT Deputy Tactical Commander**);
 - (v) Michael Pierlot who was the Tactical Advisor of the ORU for the morning shift until at or about 12:30pm providing support and advice to the PORT Tactical Commander (the **PORT Tactical Advisor**);
- (b) the police members who were present at the 30 October protest, including those members whose conduct is relevant to the allegations in the Statement of Claim, included:
- (i) general duties/uniform in the North West Metro Region of Victoria Police who were deployed to create and hold a police line in front of the front steps outside the Convention Centre nearest to Clarendon Street (the **Police Line**);

Particulars

The roster for general duties members rostered to attend the 30 October protest have been discovered as documents 178 (SOV.0010.0003.0001) and 179 (SOV.0010.0003.0009) in the Defendant's Affidavit of Documents dated 17 April 2023.

- (ii) teams of PORT members from the ORU comprising 301 Blue, White, Red, and Green and 401 Blue, White Red and Green;

Particulars

The ORU rosters for the 30 October protest have been discovered as documents 172 (SOV.0010.0002.0003) and 173 (SOV.0010.0002.0004) in the Defendant's Affidavit of Documents dated 17 April 2023.

- (iii) Members from the Search and Rescue Squad;
- (iv) two Police members from the PFSU;

Particulars

Acting Senior Sergeant Luke Devlin and Sergeant Lisa Barnes were present as at 12:00pm at the 30 October protest.

- (c) the ORU and the PFSU were specialist resources available to the Police Forward Commander if required;
 - (d) all police members present at the 30 October protest:
 - (i) constituted Victoria Police pursuant to s 7(d) of the Victoria Police Act;
 - (ii) were appointed police officers pursuant to s 27(1) of the Victoria Police Act and/or the *Police Regulation Act 1958* (Vic) (now amended);
 - (iii) were acting in the performance of their duties as police officers at the 30 October Protest pursuant to s 72(1) of the Victoria Police Act; and
 - (e) it otherwise does not admit the allegations in paragraph 7.
8. In response to the allegations in paragraph 8, it:
- (a) refers to and repeats paragraph 7(d) above; and
 - (b) otherwise does not admit the allegations in paragraph 8.
9. In response to the allegations in paragraph 9, it:
- (a) admits that the effect of section 32 of the *Charter of Human Rights and Responsibilities Act 2006* (**the Charter**) is that all statutory provisions must be interpreted in a way that is compatible with human rights, so far as is possible having regard to the provision's purpose; and
 - (b) otherwise denies the allegations in paragraph 9.
10. In response to the allegations in paragraph 10, it:

- (a) says that police officers' powers to arrest an offender for a Victorian offence without a warrant are relevantly contained in:
 - (i) sections 457-458 and 463A of the *Crimes Act 1958* (Vic) (the **Crimes Act**);
 - (ii) section 15 of the *Summary Offences Act 1966* (Vic) (the **Summary Offences Act**); and
 - (b) otherwise does not admit the allegations in paragraph 10.
11. In response to the allegations in paragraph 11, it:
- (a) says that the lawful use of force by police officers is relevantly governed by:
 - (i) sections 462A and 322K of the *Crimes Act*; and
 - (ii) the common law when preventing or reasonably apprehending a breach of the peace; and
 - (b) otherwise does not admit the allegations in paragraph 11.
12. In response to the allegations in paragraph 12, it:
- (a) admits that the Chief Commissioner of Police may issue, amend and revoke instructions for the general administration of Victoria Police and for the effective and efficient conduct for its operations pursuant to s 60(1) of the *Victoria Police Act*;
 - (b) says that such instructions under s 60(1) of the *Victoria Police Act* include the issuing of the *Victoria Police Manuals* (the **VPMs**) which are divided into Policy Rules (mandatory requirements) and Procedures and Guidelines (best practice requirements);
 - (c) says that a VPM does not have the force of statute or common law;
 - (d) says that a breach of a VPM:
 - (i) may make a police member subject to managerial or disciplinary action;
 - (ii) does not invalidate any action take by a police member;
 - (iii) does not create a cause of action in law;
 - (e) admits that as at 30 October 2019:

- (i) the VPM titled 'Operational safety and the use of force' contained sections on Victoria Police's 'Operational response principles' in Chapter 4 and the 'Tactical Options Model' in Chapter 6;
- (ii) the VPM titled 'Operational safety and equipment' contained a section in Chapter 3.2 on the 'use of OC aerosols';
- (iii) the VPM titled 'Public Order' stated that one of the '*key roles of police is to maintain public order and protect the public*';
- (iv) the VPM titled 'Crowd control' applied to situations including demonstrations, protests, picket lines and industrial disputes;
- (v) the VPM titled 'Breach of the peace' applied and contained relevant definitions and guidance on police powers when responding to disturbances of the public order:

Particulars

The VPMs referred to in paragraphs 12(b)(i)-(v) have been discovered as documents 36 (SOV.0002.0001.0039), 34 (SOV.0002.0001.0001), 39 (SOV.0002.0001.0066), 37 (SOV.0002.0001.0048) and 169 (SOV.0009.0001.0006) in the Defendant's Affidavit of Documents dated 17 April 2023.

- (f) refers to the full contents of the VPMs for their meaning and effect; and
- (g) otherwise does not admit the allegations in paragraph 12.

D. ALLEGED ASSAULT AND BATTERY

D.1 The IMARC Conference

13. It does not plead to paragraph 13 as it contains no allegations against it.

14. In response to the allegations in paragraph 14, it:

- (a) refers to and repeats paragraph 1 above; and
- (b) otherwise does not plead to paragraph 14 as it contains no allegations against it.

15. In response to the allegations in paragraph 15, it:
- (a) admits that prior to the IMARC Conference, Victoria Police anticipated protest activity at the IMARC Conference;
 - (b) says that the Northwest Metro Division of Victoria Police was responsible for the delivery of the police response to the anticipated protest activity;
 - (c) says that the police response was planned by the State Event Planning Unit of Victoria Police (**SEPU**) and relevantly included the involvement of general duties and specialist police members;
 - (d) says that the North West Metro Regional Police Operations Centre (**RPOC**) was activated and manned to assist in the overall monitoring and coordination of the police response in recognition of the size and potential significance of anticipated protestor activity;
 - (e) says that as part of the overall response to the anticipated protests, a request was made and approved for the attendance of teams of PORT members under the command of ORU supervisors;
 - (f) says that prior to the IMARC Conference, a PORT Tactical Plan for the event was prepared and approved by the PORT Tactical Commander (the **PORT Tactical Plan**);
 - (g) says that the PORT Tactical Plan relevantly included an analysis of contingencies and tactical options which could be utilised by PORT members in the event of protesters engaging in unlawful activity and so as to facilitate safe and orderly demonstration activity;
 - (h) says that the PORT Tactical Plan also contained a human rights impact assessment;
 - (i) refers to the full content of the PORT Tactical Plan; and

Particulars

The PORT Tactical Plan is in the possession of the Defendant's solicitors and can be inspected upon request.

- (j) otherwise does not admit the allegations in paragraph 15.

16. In response to the allegations in paragraph 16, it:

- (a) admits that at the commencement of their shifts the ORU members rostered onto the 30 October protest received:
- (i) an ORU tactical briefing for Wednesday 30th October (the **PORT Tactical Briefing**); and
 - (ii) a safety briefing (the **PORT Safety Briefing**);

Particulars

The PORT Tactical Briefing and the PORT Safety Briefing have been discovered as documents 8 (SOV.0001.0001.0015) and 9 (SOV.0001.0001.0040) in the Defendant's Affidavit of Documents dated 17 April 2023.

These briefings were held in the ORU at the Victoria Police Centre and were provided by the ORU Tactical Commanders rostered on for the morning and afternoon shifts.

- (b) says that an operational safety briefing was given to general duty members ahead of their shift at the 30 October protest which was identical to the PORT Safety Briefing;

Particulars

The IMARC 2019 Operational Safety Briefing has been discovered as document 156 (SOV.0007.0001.0001) in the Defendant's Affidavit of Documents dated 17 April 2023.

- (c) says that PORT members received additional safety briefings at or about 6:00am, 8:00am and 8:38am during in the morning shift of the 30 October protest by the PORT Tactical Commander when on site at the Convention Centre;

Particulars

These briefings are referred to in the Public Order Log for the morning shift at the 30 October protest compiled by First Constable Mathew Samata recording the activity and decision making by the PORT Tactical Commander (the **Public Order Log Book**). This document has been discovered as document

SOV.0023.0001.0001 in the Defendant's Affidavit of Documents
dated 17 April 2023.

- (d) says that the PORT Tactical Briefing relevantly included the following information to the effect that:
 - (i) safety was the first priority;
 - (ii) disruptive action was likely during the IMARC conference;
 - (iii) violence was possible but not expected;
 - (iv) the mission for the ORU was to “provide a PORT response in the event that the protestors engage in unlawful activity and specialist support to [N]orth [W]est [M]etro Region’s mission and strategic intent”;
 - (v) that ‘move on powers’ under section 6 of the Summary Offences Act could not be exercised in a demonstration, protest or picket event;
 - (vi) that police recognise the Charter and the specific rights of protestors under sections 12 and 14-16 of the Charter;
 - (vii) that police had a common law power with a broad discretion with respect to breach of the peace but that this was not a power to arrest or an offence but a power to detain, remove persons/property and to do what is reasonable, including using force, until peace is restored;
 - (e) says that the ORU safety briefing and the general police safety briefing included references to safety, the Victoria Police Response Principles and the Operational Safety Tool amongst other operational matters such as equipment and techniques; and
 - (f) otherwise does not admit the allegations in paragraph 16.
17. In response to the allegations in paragraph 17, it:
- (a) refers to and repeats paragraph 1 above; and
 - (b) otherwise does not admit the allegations in paragraph 17.
18. In respect to the allegations in paragraph 18, it:
- (a) admits that there is no legislative impediment on the right to lawfully protest in Victoria;

- (b) says that those attending, observing and protesting at protests in Victoria must uphold the law and abide by it, including by not committing any criminal offences;
- (c) says that at multiple points in time during the IMARC Protests, including prior to 11:30am on 30 October protest, various protestors:
 - (i) were not protesting peacefully and/or lawfully;
 - (ii) were committing criminal offences; and/or
 - (iii) were causing breaches of the peace which affected IMARC Conference attendees and/or members of the public;
- (d) says that the behaviour of protestors included assaulting, intimidating, harassing, and/or spitting on police members and members of the public, including delegates attending the IMARC Conference;
- (e) says that at least three police members were injured during the IMARC Conference, including one member who suffered a hairline fracture in his right leg after falling to the ground and being jumped on by a protestor while effecting the arrest of the west pole climber;
- (f) says that at the relevant time at the 30 October protest, protestors including the Plaintiff:
 - (i) were resisting and hindering police in the execution of their duties; and/or
 - (ii) were committing criminal offences; and/or
 - (iii) were not protesting peacefully or lawfully; and
- (g) otherwise does not admit the allegations in paragraph 18.

19. In response to the allegations in paragraph 19, it:

- (a) admits that at or about 11:45am at the 30 October protest, approximately 100 protestors were present at the front of the Convention Centre;
- (b) says that at or about 12:20-12:29pm at the 30 October protest:
 - (i) additional protestors came to the front of the Convention Centre;
 - (ii) approximately 150-200 protestors were present at the front of the Convention Centre;

- (iii) at or about 12:29pm, protestors commenced linking arms creating a 'human chain' around the base of the two poles which were being climbed by the climbers; and
- (c) otherwise does not admit the allegations in paragraph 19.

20. In response to the allegations in paragraph 20, it:

- (a) admits that at or about 11:45am on 30 October 2019, two protestors climbed and/or scaled two large poles outside the Convention Centre (the **poles**) at the 30 October Protest (together, the **Climbers**);

Particulars

The Climbers were Darcy Vermont who climbed and/or scaled the east pole outside the Convention Centre (respectively, the **east pole** and the **east pole climber**) and Eva Davis Jones who climbed the west pole outside the Convention Centre (respectively, the **west pole** and the **west pole climber**).

- (b) says that upon reaching the top of the poles, at or about 12:13pm, the Climbers commenced unfurling a banner which they attached to the Convention Centre; and
- (c) otherwise does not admit the allegations in paragraph 20.

21. In response to the allegations to paragraph 21, it

- (a) refers to and repeats paragraph 19 above;
- (b) says that at or about 12:29pm, the protestors commenced linking arms creating a 'human chain' at the base of each of the east and the west poles in an attempt to hinder police attempts to reach the Climbers and/or any police response to the Climbers;
- (c) says that the Plaintiff was one of the protestors directly below the west pole and had both arms linked with other protestors, hindering and/or preventing police efforts to reach and arrest the west pole climber; and

Particulars

The Plaintiff had his arms linked with a male protestor in a white t-shirt with blue shorts and shoulder length blonde hair and a

male protestor with a tie-dye t-shirt with khaki pants and long dark hair in a ponytail.

(d) otherwise does not admit the allegations in paragraph 21.

22. In response to the allegations in paragraph 22, it:

(a) admits that at or about 12:24pm, the Climbers started to descend the poles;
and

(b) otherwise does not admit the allegations in paragraph 22.

D.2 The Advance

23. In response to the allegations in paragraph 23, it says that:

(a) the Climbers did not have authority from those operating the Convention Centre to climb and/or scale the poles and were trespassing;

(b) the Climbers were endangering themselves, and the public below them, by putting them at risk of serious injury, given the Climbers had the potential to fall or to drop items from a height;

(c) at the relevant time, the Climbers were suspected of committing various criminal offences including:

(i) the indictable offence recklessly engaging in conduct endangering persons without lawful excuse contrary to section 23 of the Crimes Act;

(ii) trespass contrary to section 9 of the Summary Offences Act,

(d) at or about 12:06pm, the PORT Tactical Commander gave instructions to the Green and White PORT 301 teams to move near the northeast side of the Convention Centre near Clarendon Street in an attempt to stop the Climbers from raising a banner if it was raised from the ground after the Climbers were up the poles;

(e) at or about 12:08pm, the PORT Tactical Commander gave a direction to the Green and White PORT 301 teams to return behind the Police Line as the Climbers had the banner with them so that it would not be possible for police to prevent it being raised from the ground;

(f) in response to the direction, the Green and White PORT 301 teams retreated to behind the Police Line;

- (g) at or about 12:19pm, there was a discussion between the Police Forward Commander, the PORT Tactical Commander and the PFSU members present about the Climbers being arrested when they climbed down the poles for the criminal offences they were reasonably suspected of committing as pleaded in paragraph 23(c) above;
- (h) following the discussion as pleaded at paragraph 23(g) above, at or about 12:22pm, the Police Forward Commander:
 - (i) made a decision that the Climbers should be arrested for the criminal offences pleaded in paragraph 23(c) above, when they descended from the poles; and
 - (ii) directed the PORT Tactical Commander to have the PORT teams effect the arrests safely;
- (i) the PORT Tactical Commander, in conjunction with the PORT Deputy Tactical Commander and the PORT Tactical Advisor, made a tactical plan about how the arrest of the Climber were to be effected which relevantly included:
 - (i) the arresting PORT teams for the east police climber would be the PORT Green and Blue 401 teams;
 - (ii) the arresting PORT teams for the west police climber would be the PORT Green and Blue 301 teams;
 - (iii) the designated PORT teams would move to the bottom of the poles to effect the arrests by moving through the crowd of protestors utilising a PORT tactic known as a 'wedge';

Particulars

A 'wedge' is an internationally recognised public order tactic to move through a crowd of people. The formation requires a PORT team to be shaped like an inverted 'V'.

This tactical shape allows police members to move through a crowd of persons effectively and to move persons out of the way. When a wedge is utilised the PORT members repeat the direction of 'move'.

As part of the wedge formation, the PORT team leader (generally a Sergeant) stands in the middle of the inverted 'V' shape. This provides distance for the PORT

team leader to assess a situation, provide directions (including as to the use force, if necessary) to members in the wedge formation.

Training is provided on the formation and use of a wedge as part of specialised PORT training.

- (iv) the Green and Blue 401 PORT teams would first enter the crowd of protestors from the direction of Clarendon Street, near the east pole as there were fewer protestors present under the east pole;
- (v) the Green 301 and 401 PORT Teams would form a cordon at the base of each pole to create a safe working area under the poles to:
 - (A) enable the safe arrest of the Climbers to be arrested once they had descended from the poles; and
 - (B) ensure from a safety perspective that no protestors or police members would be injured at the bottom of the poles if the Climbers fell and/or dropped any item;
- (j) the PORT Tactical Commander gave the directions above to the PORT teams via a combination of the PORT radio channel and direct conversations with PORT supervisors; and
- (k) otherwise does not admit the allegations in paragraph 23.

24. In response to the allegations in paragraph 24, it:

- (a) refers to and repeats the matters in paragraphs 19 and 21 above;
- (b) otherwise does not admit the allegations in paragraph 24.

25. In response to the allegations in paragraph 25, it:

- (a) denies that at or about 12:23pm, any police officer advanced on any protestor, including the Plaintiff, in a coordinated formation yelling 'move';
- (b) admits that in response to the directions of the PORT Tactical Commander as pleaded in paragraph 23(i) above, PORT members took action as set out in paragraphs 25A to 25GG below;
- (c) refers to the chronology of events pleaded at paragraphs 25A to 25GG below; and

- (d) otherwise denies the allegations in paragraph 25.

CHRONOLOGY OF EVENTS PRIOR TO USE OF OC FOAM

At the east pole

- 25A. At or about 12:24pm, the Green and Blue 401 PORT teams walked towards the east of the Convention Centre near Clarendon Street from behind the Police Line.
- 25B. At or about 12:26pm, the Green and Blue 401 PORT teams walked into the crowd of protestors from the Clarendon Street towards the east pole. They were not in any tactical formation.
- 25C. The Green and Blue 401 PORT teams stood in a circle around the base of the east pole in order to attempt to create a cordon under it.
- 25D. Upon observing the Green and Blue 401 PORT teams both the east and the west Climbers stopped their descent and did not continue to descend from the poles.
- 25E. The Green and Blue 401 PORT teams gave directions to various protestors to create space under the east pole.

Particulars

The Green and Blue 401 PORT teams using words such as “clear out guys”, “out of the way guys”, “clear out”, “give us some space guys”, “push it out one step”, “get out of the police line mate” and “get back”.

- 25F. The directions given by the police members in the Green and Blue 401 PORT teams were authorised by sections 458 and 459 of the Crimes Act and/or the common law to effect an arrest or prevent a breach of the peace.
- 25G. Some of the protestors near the Green and Blue 401 PORT teams at the east pole:
- (a) did not abide by police directions to move back or create space;
 - (b) surged towards the police who were standing in the circle under the east pole;
 - (c) resisted police;
 - (d) pushed police members, including pushing on the police line;
 - (e) verbally abused police members, including swearing at them;

- (f) behaved aggressively towards police members; and
- (g) committed possible offences under section 31(1)(b) of the Crimes Act and/or section 51 of the Summary Offences Act.

25H. In response to the behaviour of protestors as set out in paragraph 25G above, some of the Green and Blue 401 PORT team members moved away and/or pushed protestors using their arms.

25I. The use of force by each of those PORT team members was for the purpose of:

- (a) effecting the arrest of the east pole climber; and/or
- (b) creating a safe cordon under the east pole; and/or
- (c) self defence or defence of other police members; and/or
- (d) to prevent a breach or anticipated breach of the peace; and/or
- (e) to prevent further resisting or hindering of police by protestors;

and was not disproportionate to those objectives so that it was justified by section 462A of the Crimes Act and/or section 322K of the Crimes Act and/or under the common law.

25J. The Plaintiff was not under or near the east pole at or about 12:26pm when the events under the east pole were taking place as set out in paragraphs 25A to 25I above and was not subject to any use of force or police direction by any member of the Green and Blue 401 PORT teams.

Tactical withdrawal from the east pole

25K. At or about 12:28pm, after the crowd of protestors under the east pole increased in number and surged towards the Green and Blue 401 PORT teams as set out in paragraph 25G above, and following a discussion between the PORT Tactical Commander and the PORT Deputy Tactical Commander, the PORT Tactical Commander authorised the Green and Blue 401 PORT teams to tactically withdraw from the bottom of the east pole due to safety concerns for Green and Blue 401 PORT team members.

25L. At or about 12:29pm, the PORT Tactical Commander directed the Green and Blue 401 PORT teams to withdraw from the bottom of the east pole after forming the view

that it was unsafe for the Green and Blue 401 Port Teams to remain there because of the aggressive behaviour of protestors.

- 25M. At or about 12:29pm, as set out in paragraphs 19 and 21 above, the protestors began to link arms creating a human chain around the east pole in an attempt to hinder police movement and protect the east pole climber from arrest.
- 25N. For the purposes of withdrawing from the protestors safely, the Green and Blue 401 teams formed into two wedge formations and exited to the Clarendon Street side of the Convention Centre.
- 25O. As they withdrew, the Green and Blue 401 teams gave protestors directions to move away in order for them to withdraw via the wedge formations.

Particulars

The Green and Blue 401 PORT teams using phrases such as “move” and “get out of the way”.

- 25P. As the Green and Blue 401 teams withdrew from the east pole out towards Claredon Street:
- (a) some protestors did not follow police direction and did not let the Green and Blue 401 PORT teams exit the crowd of protestors; and
 - (b) some protestors cheered, clapped and shouted “pigs out”.
- 25Q. The Plaintiff was not at or under the east pole when the Green and Blue 401 PORT teams withdrew from the east pole of protestors as set out in paragraphs 25K to 25P above and was not subject to any use of force or police direction by any member of the Green and Blue 401 PORT teams.

Re-entry towards the east pole

- 25R. At or about 12:30pm, upon the withdrawal of the Green and Blue 401 Blue 401 PORT teams, the Climbers recommenced descending the poles towards the ground.

- 25S. In response, the Green and Blue 401 PORT teams were directed by the PORT Tactical Commander to re-enter the crowd of protestors to arrest the Climbers once they had descended to the ground.
- 25T. In accordance with the direction, the Green and Blue 401 PORT teams formed two further wedge formations and entered the crowd of protestors from the Clarendon Street side of the Convention Centre directing the crowd to 'move' as per PORT training in order to effect the arrest of the Climbers.
- 25U. The word 'move' was a lawful police direction for the protestors to move away from the Green and Blue 401 PORT teams so as to give them sufficient space to effect the safe and lawful arrest of the Climbers pursuant to s 458 of the Crimes Act.
- 25V. Protestors near the Green and Blue 401 PORT teams:
- (a) surged towards the Green and Blue 401 PORT teams;
 - (b) did not abide by police directions to 'move'; and/or
 - (c) continued to stand under the bottom of the poles with arms interlaced to assist the Climbers in evading lawful arrest; and/or
 - (d) vigorously resisted and/or hindered police in effecting a lawful arrest by not moving from or making space underneath the poles; and/or
 - (e) pushed police members, including pushing on the police line; and/or
 - (f) verbally abused members, including swearing at members; and/or
 - (g) behaved aggressively towards police members; and/or
 - (h) committed possible offences under section 31(1)(b) of the Crimes Act and/or section 51 of the Summary Offences Act; and/or
 - (i) caused police members to have reasonable fears and concerns for their own safety and the safety of their police member colleagues, including because of the risk posed by protestors potentially accessing the members' operational safety equipment.
- 25W. In response to the behaviour of the protestors, some of the Green and Blue 401 PORT team members moved away and/or pushed protestors using their arms.
- 25X. The use of force by each of those PORT team members was for the purpose of:

- (a) effecting the arrest of the east pole climber; and/or
- (b) creating a safe cordon under the east pole; and/or
- (c) self defence or defence of other police members; and/or
- (d) to prevent a breach or anticipated breach of the peace; and/or
- (e) to prevent further resisting or hindering of police by protestors –

and was not disproportionate to those objectives so that it was justified by section 462A of the Crimes Act and/or section 322K of the Crimes Act and/or under the common law.

25Y. The Plaintiff was not at or under the east pole when the Green and Blue 401 PORT teams re-entered the group of protestors at or about 12:30pm as set out in paragraphs 25R to 25X above and was not subject to any use of force force by members of the Blue and Green 401 PORT teams when they re-entered the group of protestors.

The east pole climber evades arrest

25Z. At or about 12:31pm, the east pole climber:

- (a) descended the east pole and masked himself in the crowd of protestors gathered below the east pole;
- (b) successfully evaded police arrest and ran west from the Convention Centre along the bank of the Yarra River; and
- (c) was later lawfully arrested by members of Victoria Police pursuant to section 458(1)(a) of the Crimes Act and charged with offences which later resolved at Court by way of diversion.

At the west pole

25AA. At or about 12:31pm, the White, Green and Blue 301 PORT teams entered the crowd of protestors from the front steps of the Convention Centre in front of the Police Line and moved in the direction of the west pole so as to effect the arrest of the west pole climber.

25BB. As they moved towards the west pole, the PORT teams gave the protestors multiple lawful police directions to move away from the west pole area using the word “move”.

- 25CC. The protestors near the White, Green and Blue 301 PORT teams:
- (a) surged towards the White, Green and Blue 301 PORT teams;
 - (b) did not comply with police directions to 'move'; and/or
 - (c) continued to stand under the bottom of the poles with arms interlaced to assist the Climbers in evading lawful arrest; and/or
 - (d) vigorously resisted and/or hindered police in effecting a lawful arrest by not moving or making space from underneath the west pole; and/or
 - (e) pushed police members, including pushing on the police line; and/or
 - (f) verbally abused members, including swearing at members; and/or
 - (g) behaved aggressively towards police members; and/or
 - (h) committed possible offences under section 31(1)(b) of the Crimes Act and/or section 51 of the Summary Offences Act; and/or
 - (i) caused police members to have fears and concerns for their own safety and the safety of their police member colleagues, including protestors accessing the member's operational safety equipment.
- 25DD. Following the east pole climber evading arrest, the Blue and Green 401 PORT teams moved towards the west pole and joined the Blue, Green and White PORT 301 teams in attempting to establish a police cordon around the poles in order to assist in the safe arrest of the west pole climber and to preserve police member safety.
- 25EE. The protestors near the Green and Blue 401 teams and the White, Green and Blue 301 PORT teams:
- (a) surged towards the Green and Blue 401 teams and White, Green and Blue 301 PORT teams; and/or
 - (b) did not abide by police directions to 'move'; and/or
 - (c) continued to stand under the bottom of the west pole with arms interlaced to assist the west pole climbers to evade lawful arrest; and/or
 - (d) resisted and/or hindered police in effecting a lawful arrest by not moving or making space from underneath the west pole; and/or
 - (e) pushed police members, including pushing on the police line; and/or

- (f) verbally abused members, including swearing at members; and/or
- (g) behaved aggressively towards police members; and/or
- (h) committed possible offences under section 31(1)(b) of the Crimes Act and/or section 51 of the Summary Offences Act; and/or
- (i) caused police members to have reasonable fears and concerns for their own safety and the safety of their police member colleagues, including protestors accessing the members operational safety equipment.

25FF. In response to the actions of protestors as set out in paragraph 25EE above, some of the Green and Blue 301 and 401 PORT teams and the White 301 PORT team members moved away and/or pushed protestors using their arms.

25GG. The use of force by each of those PORT team members was for the purpose of:

- (a) effecting the arrest of the west pole climber; and/or
- (b) creating a safe cordon under the west pole; and/or
- (c) self defence or defence of other police members; and/or
- (d) to prevent a breach or anticipated breach of the peace; and/or
- (e) to prevent further resisting or hindering of police by protestors –

and was not disproportionate to those objectives so that it was justified by section 462A of the Crimes Act and/or section 322K of the Crimes Act and/or under the common law.

26. In response to the allegations in paragraph 26, it:

- (a) admits that section 6(1) of the Summary Offences Act does not apply to a person, whether in the company of other persons or not, who is 'demonstrating or protesting a particular issue' as defined by section 6(5)(b) of the Summary Offences Act;
- (b) denies that any police member present at the 30 October protest, including any PORT member when in a wedge formation using the phrase 'move', was exercising any power/s or issuing any direction under section 6 of the Summary Offences Act for protestors to 'move on';

Particulars

The PORT Tactical Briefing specifically stated that the 'move on' powers under section 6 of the Summary Offences Act "cannot be exercised in a demonstration, protest or picket event".

- (c) under cover of this denial, says that any member present at the 30 October protest, including any PORT member when in a wedge formation using the phrase 'move', was:
 - (i) exercising the power to arrest one or more of the Climbers pursuant to sections 458 and 459 of the Crimes Act;
 - (ii) giving protestors verbal directions to move in order for police to:
 - (A) effect the arrest of the Climbers as part of, and/or ancillary to, their powers of arrest pursuant to section 458 of the Crimes Act; and
 - (B) further and or alternatively, prevent the continuing breach of the peace under common law; and
 - (d) says further that:
 - (i) the activities of the Climbers endangered themselves, other members of the public (including other protestors) and members of Victoria Police; and
 - (ii) the general functions of Victoria Police pursuant to section 9(1) of the Victoria Police Act include to:
 - (A) preserve the peace;
 - (B) protect life and property;
 - (C) prevent the commission of offences; and
 - (D) detect and apprehend offenders; and
 - (e) otherwise denies the allegations in paragraph 26.
27. In response to the allegations in paragraph 27 it:
- (a) refers to and repeats the chronology set out in paragraphs 25A to 25GG above; and
 - (b) otherwise, does not admit the allegations in paragraph 27.

28. In response to the allegations in paragraph 28 it:
- (a) refers to and repeats the chronology of events set out in paragraphs 25A to 25GG above;
 - (b) says that the Plaintiff:
 - (i) was not under the east pole and was not subject to any use of force or police direction by any member of the Green and Blue 401 PORT teams;
 - (ii) was not subject to any use of force by any member of the Green and Blue 401 PORT teams when they entered the protester crowd at or about 12:26pm and re-entered at or about 12:30pm; and
 - (c) otherwise denies the allegations in paragraph 28.

D.3 Discharge of OC Foam

29. In response to the allegations in paragraph 29, it:
- (a) refers to and repeats the matters in paragraph 19, 21 and 25A to 25GG above;
 - (b) denies that the Plaintiff was in the vicinity of the east pole;
 - (c) denies that any police member deployed OC spray or foam prior to the escape of the east pole climber;
 - (d) admits that at or about 12:31pm to 12:33pm, in response to the hindering and/or criminal behaviour of protestors, and in a continuance of the events set in paragraphs 25A to 25GG above, members of the Blue and Green 401 PORT teams and the White, Blue and Green 301 PORT teams:
 - (i) continued to issue verbal directions to protestors to move back and create space;
 - (ii) continued to use their arms to move away and/or push protestors using their arms;
 - (iii) in the case of some members, displayed OC foam canisters as a warning to protestors about imminent use of OC foam in an attempt to gain compliance from the crowd and the cessation of criminal activity on the part of protestors;

- (e) refers to the further chronology of events in paragraph 30 below; and
- (f) otherwise does not admit the allegations in paragraph 29.

30. In response to the allegations in paragraph 30, it:

- (a) refers to and repeats the matters set out in paragraphs 25Z to 25GG and 29 above;
- (b) says that at or about 12:32pm as the west pole climber was descending the west pole;
 - (i) general duty members and the PORT Deputy Tactical Commander reached the west pole climber from the left side of the west pole after pushing and moving protestors from underneath the west pole;
 - (ii) the PORT Deputy Tactical Commander and general duty members took hold of the west pole climber and cut her safety sling;
 - (iii) the west pole climber was placed on the ground and lawfully arrested by members of Victoria Police pursuant to section 458 of the Crimes Act and later charged with criminal offences which resolved at court by way of diversion;
- (c) admits that the Plaintiff was sprayed with OC foam by Sergeant Paul Saunders and by Sergeant Lauren Guthrie (nee Smith) of the ORU;
- (d) says that Sergeant Paul Saunders's decision to use OC foam was a response to the Plaintiff -
 - (i) hindering him and other police in the execution of his duties;
 - (ii) preventing the safe arrest of the west pole climber; and
 - (iii) resisting police efforts to clear the area.
- (e) says that Sergeant Lauren Guthrie's decision to use OC foam was a response to the Plaintiff -
 - (i) hindering her and other police in the execution of her duties;
 - (ii) attempting to prevent the safe arrest of the west pole climber;
 - (iii) hindering and resisting police in the safe arrest of the west pole climber and was also informed by the need to restore the peace and to create space under the west pole for the safety of police;

- (f) says that the use of OC spray or foam on the Plaintiff by Sergeant Saunders and Sergeant Guthrie was authorised by sections 322K and/or 462A of the Crimes Act and/or the common law;
- (g) admits that a number of members of Victoria Police deployed OC spray and/or foam in response to the actions of other protestors;
- (h) says that the deployment of OC spray and foam occurred in the period between 12:31pm and 12:33pm following the escape of the east pole climber and during the continued attempt to arrest the west pole climber;
- (i) says that Victoria Police is engaged in the ongoing task of identifying and conferring with each member who deployed OC spray and/or foam towards other protestors during that 2 minute period;
- (j) says that each police member who has been thus far been identified as having deployed OC spray or foam towards the protestors other than the Plaintiff:
 - (i) made an individual assessment as to whether use of the OC spray or foam was an appropriate tactical option in the circumstances with which he or she was confronted;
 - (ii) formed a subjective belief that the use of OC spray or foam was a not disproportionate means by which to achieve his or her objective;
 - (iii) made that assessment and formed their belief having regard to their particular circumstances, which relevantly included -
 - (A) their allocated role in their PORT team;
 - (B) their individual skills and capacities;
 - (C) the behaviour of the particular protestor or protestors with whom they were interacting; and
 - (D) the environment in which they were having that interaction;
- (k) says that whether each of those police members and the other members who are yet to be identified -
 - (i) used force against a Group Member; and
 - (ii) had a reasonable basis for his or her belief that the use of OC spray or foam was an appropriate and not disproportionate tactical option pursuant to s 462A of the Crimes Act; and/or

(iii) was additionally authorised to use force pursuant to section 322K of the Crimes Act and/or the common law.

must be determined by reference to the individual circumstances of each member which are not fully known to the Defendant at the time of finalising this Defence;

(l) says that without details of the identity and actions of each Group Member, it is not able to plead a fuller defence to the allegation of battery against those Group Members as it cannot identify the police member or members (if any) who deployed OC spray or foam towards those Group Members;

(m) says that at or about 12:33pm:

(i) the protesters retreated and moved back from the poles; and

(ii) the retreat of the protestors enabled the Green, Blue and White 301 PORT Teams and the Green and Blue 401 PORT Teams, together with the assistance of general duty members and the PORT extraction team to create a new police line in front of the poles; and

(n) otherwise, does not admit the allegations in paragraph 30.

31. In response to the allegations in paragraph 31, it:

(a) refers to and repeats paragraphs 25A to 25GG and 29 to 30 above; and

(b) otherwise denies the allegations in paragraph 31.

32. In response to the allegations in paragraph 32, it:

(a) refers to and repeats paragraph 30 above; and

(b) otherwise denies the allegations in paragraph 32.

33. In response to the allegations in paragraph 33, it:

(a) refers to and repeats paragraph 30 above; and

(b) otherwise does not admit the allegations in paragraph 33.

34. In response to the allegations in paragraph 34, it:

(a) refers to and repeats the matters in paragraph 30 above;

- (b) says that after the west pole climber was removed from the pole she was taken to the ground to be placed under arrest;
- (c) says that the use of OC spray and OC foam after the west pole climber was removed from the pole occurred during the arrest of the west pole climber;
- (d) says that protestors continued to link themselves to the west pole and to each other close to where the arrest was taking place;
- (e) says that the continued presence of protestors in the close vicinity of the arrest posed a danger to police members affecting the arrest of the west pole climber;
- (f) says that protestors continued to cluster together near the west pole in defiance of repeated police directions that they move away;
- (g) admits that, as set out in paragraph 30 above, the Plaintiff was sprayed with OC foam as he continued to hold on to the west pole and to resist police directions to move away from the west pole area;
- (h) says that the use of OC foam on the Plaintiff was authorised by sections 322K and/or 462A of the Crimes Act and/or the common law;
- (i) says that without details of the identity and actions of each Group Member it is not able to plead a full defence to the allegation of battery against those Group Members or identify the police members if any who used OC foam on those Group Members; and
- (j) otherwise does not admit the allegations in paragraph 34.

35. In response to the allegations in paragraph 35, it:

- (a) refers to and repeats the matters in paragraph 29 and 34 above; and
- (b) otherwise denies the allegations in paragraph 35.

36. In response to the allegations in paragraph 36, it:

- (a) refers to and repeats the matters in paragraph 30 above;
- (b) says that some protestors continued to advance on police or attempt to return to their former positions at the base of the pole in defiance of police instructions;

- (c) says that in response police members from Green, Blue and White 301 PORT Teams and the Green and Blue 401 PORT Teams moved away and/or pushed protestors using their arms;
- (d) says that the use of force by each of those PORT team members was for the purpose of:
 - (i) creating a safe cordon under the poles; and/or
 - (ii) self defence or defence of other police members; and/or
 - (iii) to prevent a breach or anticipated breach of the peace; and/or
 - (iv) to prevent further resisting or hindering of police by protestors;and was not disproportionate to those objectives so that it was justified by section 462A of the Crimes Act and/or section 322K of the Crimes Act and/or under the common law; and
- (e) otherwise, does not admit the allegations in paragraph 36.

37. In response to the allegations in paragraph 37, it:

- (a) refers to and repeats the matters in paragraphs 29 to 36 above; and
- (b) otherwise denies the allegations in paragraph 37.

38. In response to the allegations in paragraph 38, it:

- (a) admits that if any battery alleged by the Plaintiff or a Group Member were established on the evidence (which is specifically denied) it would be a police tort for the purposes of the Victoria Police Act;
- (b) says that, to the extent it has been able to identify and confer with the police members who used force, the use of force by those police members was lawful and authorised under section 462A of the Crimes Act and/or section 322K of the Crimes Act and/or at common law;
- (c) refers to and repeats the matters in paragraph 48 below; and
- (d) otherwise denies the allegations in paragraph 38.

39. In response to the allegations in paragraph 39, it:

- (a) refers to and repeats the matters set out in paragraphs 1 to 38 above; and
- (b) otherwise does not admit the allegations in paragraph 39.

E. CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES

40. It admits the allegations in paragraph 40.
41. In response to the allegations in paragraph 41:
- (a) it admits that, subject to section 38, section 38(1) of the Charter renders it unlawful for members of Victoria Police to act in a way that is incompatible with a human right, or in making a decision, to fail to give proper consideration to a relevant human right;
 - (b) refers to paragraphs 42 to 46 below; and
 - (c) otherwise denies the allegations in paragraph 41.
42. In response to the allegations in paragraph 42, it:
- (a) admits that, to the extent that the PORT Tactical Plan and PORT Tactical Briefing contained decisions about the way that Victoria Police would respond at the 30 October Protest, the decision-makers were required to give proper consideration to any relevant human rights of the Plaintiff and Group Members in accordance with section 38(1) of the Charter;
 - (b) denies that the obligation to give proper consideration to human rights under s 38(1) of the Charter otherwise applies to the conduct of members of Victoria Police in responding to the events at the 30 October Protest; and
 - (c) otherwise denies the allegations in paragraph 42.
43. In response to the allegations in paragraph 43, it:
- (a) refers to and repeats the matters in paragraphs 9, 40 , 41 and 42 above;
 - (b) refers to and repeats the chronology of events set out in paragraphs 23 to 25, 25A to 25GG and 26 to 30 above;
 - (c) admits that, to the extent that the PORT Tactical Plan and PORT Tactical Briefing contained decisions about the way that Victoria Police would respond at the 30 October Protest, the decision-makers were required to give proper consideration to the Plaintiff and Group Members' rights contained in sections 10, 12, 15, 16(1) and 21(1) of the Charter; and
 - (d) otherwise denies the allegations in paragraph 43.

44. In response to the allegations in paragraph 44, it:
- (a) refers to and repeats paragraph 43 above;
 - (b) says that proper consideration of relevant human rights does not require a decision-maker to demonstrate any form of authorisation by section 7 of the Charter; and
 - (c) otherwise denies the allegations in paragraph 44.
45. In response to the allegations in paragraph 45, it:
- (a) refers to and repeats the matters in paragraphs 43 and 44 above; and
 - (b) otherwise denies the allegations in paragraph 45.
46. In response to the allegations in paragraph 46, it:
- (a) says that section 39(1) of the Charter, when read with sections 72 to 81 of the Victoria Police Act, does not permit the Plaintiff and Group Members to seek, nor the Court to make, any declaration of unlawfulness in respect of the conduct of individual police officers; and
 - (b) otherwise denies the allegations in paragraph 46.
47. It denies that the Plaintiff and Group Members are entitled to the relief claimed as alleged or at all and says further that the Plaintiff and Group Members are not entitled to recover damages for non-economic loss because:
- (a) the Plaintiff and Group Members have not been subject to an intentional act or acts that have been done with intent to cause injury;
 - (b) the Plaintiff and Group Members have not suffered a significant injury within the meaning of, and for the purposes of, Part VBA of the Wrongs Act; and
 - (c) their degree of impairment, if any, has not been assessed pursuant to Division 3 of Part VBA of the *Wrongs Act 1958* (Vic) (the **Wrongs Act**).
48. Further, the Defendant says that -
- (a) the use of force by a police member involves the exercise of an individual discretion, informed by relevant legislation and police training, in response to the particular circumstances confronting that police member;

- (b) whether or not any specific use of force by any police member was lawful will require the Court to consider -
 - (i) each police member's subjective purpose or object in using force;
 - (ii) each police member's subjective assessment that the force chosen was not disproportionate to the purpose or objective;
 - (iii) the objective reasonableness of each police member's subjective assessment; and
 - (iv) the context in which the force was used, including the behaviour of the person or persons to whom the force was directed;
- (c) the resolution of the Plaintiff's claim will require the Court to consider the specific circumstances of the force used on the Plaintiff, including the Plaintiff's location and conduct and the subjective intention of the police members who used force on the Plaintiff;
- (d) in those circumstances, the resolution of the Plaintiff's claim will not be capable of resolving the question of whether the use of force by different police members towards other protestors was lawful;
- (e) accordingly, insofar as the Common Questions relate to the circumstances of force being used and whether that force was lawful, and carried out within, or in excess of, applicable police powers, those questions are not capable of a common answer but rather will require separate consideration in respect of each alleged battery directed to each Group Member; and
- (f) the defendant accordingly reserves its right to make application, at the appropriate time, for an order under section 33N of the *Supreme Court Act 1986* (Vic) that the Plaintiff's claim no longer continue as a representative proceeding.

Dated: 12 May 2023

SD HAY

RACHEL ELLYARD

MONIKA PEKEVSKA

Counsel for the Defendant



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For Matthew Hocking
Victorian Government Solicitor
Solicitor for the Defendant