IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
GENERAL LIST

Revised
Not Restricted
Suitable for Publication

Case No. CI-21-01328

MONICA SMIT — Plaintiff

v

STATE OF VICTORIA — Defendant

JUDGE:	HER HONOUR JUDGE TRAN
WHERE HELD:	Melbourne
DATE OF HEARING:	23, 24, 25, 26 and 29 July and 1, 5, 6, 7, 13, 13, 16 and 19 August 2024
DATE OF JUDGMENT:	12 September 2024
CASE MAY BE CITED AS:	Smit v State of Victoria
MEDIUM NEUTRAL CITATION:	[2024] VCC 1411

REASONS FOR JUDGMENT

Subject:	TORT
Catchwords:	False imprisonment – application of s458 of *Crimes Act* 1958 – whether belief on reasonable grounds – whether necessary – whether continuing
Legislation Cited:	*Crimes Act* 1958, s458; *Evidence Act* 2008, s38;
Cases Cited:	*Coco v R* [1994] HCA 15; *Christie v Leachinsky* [1947] A.C. 573; *Trobridge v Hardy* (1955) 94 CLR 147; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569; *Donaldson v Broomby* (1982) 40 ALR 525; *De Moor v Davies* [1999] VSC 416; *George v Rockett* (1990) 170 CLR 104; *Ruddock v Taylor* (2005) 222 CLR 612; *Hyder v Commonwealth* (2012) 217 A Crim R 571; *DPP v Farmer* [2010] VSC 343; *Loughnan v Magistrates' Court of Victoria Sitting at Melbourne & Anor* [1993] 1 VR 685 at 692; *O'Hara v Chief Constable of Royal Ulster Constabulary* [1997] AC 286; *Carrie Peters* (*a Pseudonym) v State of Victoria* [2023] VCC 1791*; State of New South Wales v Smith* (2017) 95 NSWLR 662; *Slaveski v State of Victoria* [2010] VSC 441; *Hogan v Australian Crime Commission* (2010) 240 CLR 651; *Australian Competition and Consumer Commission v BlueScope Steel Limited* [2019] FCA 1532; *DPP v Carr* [2002] NSWSC 194; *R v Officer A (No 2)* [[2022] NSWSC 1381; *Plenty v Dillon* (1991) 171 CLR 635
Judgment:	Damages awarded.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	The plaintiff appeared in person	
For the Defendant	Ms R Ellyard with Mr D McCredden	Hall & Wilcox

TABLE OF CONTENTS

HER HONOUR:

Background

1 On 16 March 2020, a state of emergency was declared in Melbourne. The COVID-19 virus, which was first identified in late 2019, had spread rapidly around the world. As an island nation, Australia had a capacity to physically isolate itself from the world. This held out the tantalising hope that the impact of the virus could be kept within manageable limits, and the most vulnerable members of our society protected, if only outbreaks could be constrained by lockdowns, mask mandates and other restrictions on movement, outings and gatherings. Over the following months, Melbourne, uniquely in Australia, suffered several significant outbreaks of community transmission, which, in turn, led to strict and lengthy lockdowns and other restrictions. These lockdowns and restrictions were given legal effect through directions from the Chief Health Officer ("CHO directions"), authorised under s190 and s200 of the *Public Health and Wellbeing Act* 2008 ("PHW Act"). Melbourne was to become known as the most locked-down city in the world.

2 As may be expected in a diverse society, not everyone agreed with the nature and extent of these lockdowns and restrictions. One of the people who disagreed was Monica Smit ("Smit"), the plaintiff in this proceeding. In mid-2020, Smit founded an organisation called Reignite Democracy Australia ("RDA"), a lobby group that opposed the policies of the then premier of Victoria, Dan Andrews and the lockdowns and other restrictions imposed by the CHO directions.[1]

3 An anti-Dan Andrews "Stop the Sale of Victoria" protest was organised[2] for the Treasury Gardens on 31 October 2020. Smit attended that protest, ostensibly in the capacity of an independent journalist working for RDA. Within the space of less than three hours, Smit was arrested and released three times by Victoria

---

1 Transcript ("T") 174, Lines ("L") 31 – T175, L3; T180, L18-22; T184, L6-9

2 The protest was ostensibly organised by Smit's partner, Morgan Jonas ("Jonas"). The defendant contended, and Smit denied, that Smit was also an organiser of the protest. This issue is addressed further under the heading "Was the first arrest lawful"

Police in, or near, the Treasury Gardens. She has sued the defendant for the tort of false imprisonment for each of these three arrests.

4 There is no dispute that each arrest occurred. Accordingly, unless the defendant can prove that there was a lawful justification for each arrest, Smit will succeed in her claim for the tort of false imprisonment. The defendant relies on s458 of the *Crimes Act* 1958, which permits the arrest of a person found committing an offence, if necessary for one of four permitted purposes. The defendant alleges that, prior to each arrest, Smit was found committing, or continuing to commit, the offence of refusing, or failing to comply with, the CHO directions, in contravention of s203 of the PHW Act.

5 In her opening submissions, Smit explained:

> "… no-one walking past me on that day in my floor-length skirt and long flowing blonde hair – no offence, but people do judge a book by its cover - no-one would have thought that I was a criminal, I can tell you that much.
>
> ... no-one walking past from the public with a reasonable mindset would have wished that someone like me would have been restrained and imprisoned … ."[3]

6 For the reasons which follow, I have found that Smit was falsely imprisoned on two of the three occasions that she was arrested. However, it is no part of the Court's reasoning that, because of her blonde hair and long skirt, Smit did not look like a criminal. A reasonable police officer would not judge a person based on their hair colour, or clothing, nor, indeed, their skin colour, number of tattoos, socioeconomic background or any other manner of superficially-observable factors. There is, and should be, no special protection – or attention – given to someone based solely on their physical appearance.

7 There is, however, special and enduring protection afforded by the common law to the human right to liberty.[4] By definition, human rights are available to every member of our society, including people whose views may be seen as

---

3 T21; see *Coco v R* [1994] HCA 15 at paragraph [8]

4 *Christie v Leachinsky* [1947] AC 573 ("*Christie*"); *Trobridge v Hardy* (1955) 94 CLR 147 at 152 ("*Trobridge*")

unreasonable by the majority of community members. Indeed, the protection of minorities from the tyranny of the majority is one of the tenets of human rights law.

8 The right to liberty can be abrogated. However, the principle of legality provides that it may only be eroded by express, unmistakeable and unambiguous language. Where more than one interpretation of a statutory provision is available, the Court will ordinarily prefer the interpretation which avoids or minimises encroachment on the right to liberty.[5]

9 Powers of arrest, which by definition curtail the right to liberty, are therefore strictly construed. As said by Deane J (with whom Kelly J agreed) in *Donaldson v Broomby*:

> "Arrest is the deprivation of freedom. The ultimate instrument of arrest is force. The customary companions of arrest are ignominy and fear. A police power of arbitrary arrest is a negation of any true right to personal liberty. A police practice of arbitrary arrest is a hallmark of tyranny. It is plainly of critical importance to the existence and protection of personal liberty under the law that the circumstances in which a police officer may, without judicial warrant, arrest or detain an individual should be strictly confined, plainly stated and readily ascertainable."[6]

10 The right to liberty is curtailed by s458 of the *Crimes Act*. It was also curtailed by the CHO directions in force on 31 October 2020. However, those provisions have limits. This case turns on whether the defendant has satisfied the Court that it came within those limits in relation to each of the three arrests.

Structure of reasons

11 In these reasons, I will first address the following matters, which have relevance to each arrest:

(a) the evidence led at trial, including some general comments on reliability;

(b) the factual context to the arrests;

---

5 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, paragraph [11] at 581

6 (1982) 40 ALR 525 at 526

(c) the requirements for lawful arrest under s458 of the Crimes Act;

(d) the relevant CHO directions applicable on 31 October 2020; and

(e) what I have described as "red herrings" ─ some matters which occupied time at trial that I do not consider relevant to my ultimate decision.

12 In relation to each of the three arrests, I will then consider whether the defendant has discharged the burden of proving that the required elements of s458 of the *Crimes Act* were satisfied.

13 Finally, I will assess the damages to be awarded to Smit.

The evidence

14 The evidence at trial consisted of:

(a) the oral testimony of witnesses called by Smit and the defendant;

(b) police bodycam footage from 31 October 2020;

(c) videos recorded on 31 October 2020 by Smit and others present;

(d) other publicly-available videos;

(e) other documents tendered in evidence, including police intelligence and tactical planning documents and "Wayback machine"[7] extracts from Smit's website.

15 There was extensive video footage tendered of 31 October 2020. All bodycam footage was stamped in the top right corner with the (approximate) time in Greenwich mean time. In these reasons, this has been converted to Melbourne time.[8] Other videos tendered in evidence were not time stamped, but an

[7] The "Wayback machine" is an internet archive which permits a website to be viewed as it was on a particular date.

[8] By the addition of eleven hours, allowing for daylight savings time.

approximate time can be ascertained by comparing events in these videos with events in the bodycam footage.

16 Smit gave evidence and was cross-examined. She also called James Wong, who she had hired to work as her videographer on 31 October 2020. Smit also called Superintendent Jamie Templeton ("Templeton"), who was the police forward commander at Treasury Gardens on the day, to give evidence. Partway through her examination-in-chief of Templeton, Smit was given leave to cross-examine him under s38 of the *Evidence Act* 2008.

17 The defendant called the following witnesses:

(a) Detective Senior Seargeant Jason Dolman ("Dolman"), who the defendant contended had formed the relevant beliefs under s458 for the purposes of the first and second arrests;

(b) Acting Superintendent Troy Papworth ("Papworth"), who the defendant contended had formed the relevant beliefs under s458 of the *Crimes Act* for the purposes of the third arrest;

(c) Senior Constable Dani Lee ("Lee"), the arresting officer for the first and second arrests;

(d) Senior Constable Carmel Elliott ("Elliott"), who had bodycam footage relevant to the first and second arrests; and was the arresting officer for the third arrest;

(e) Inspector Donna Watson ("Watson"), who had some discussions with Dolman and others between the first and second arrests, and who spoke to Smit around the time that she was released from the second arrest;

(f) Leading Senior Constable Jack Radovanovic ("Radovanovic"), who had bodycam footage relevant to the first and second arrests; and

(g) Former Sergeant Melissa Wilson ("Wilson"), who had bodycam footage relevant to the first and second arrests.

18 Dolman and Papworth were the police officers who formed the beliefs relied on by the defendant to justify the arrests under s438. Their state of mind was a fact in issue in the proceeding. That state of mind could not be directly proven or disproven by the tendered video footage. Their evidence of this state of mind and the reliability of it, is therefore of some importance. I will consider this issue further, where relevant, in relation to each arrest.

19 The observations by other witnesses of the events of that day may have had relevance to the "reasonable grounds" for Dolman and Papworth's beliefs. However, as is probably inevitable where witnesses are asked to recall events of nearly four years ago in relation to which there is extensive video footage, none of the witnesses' recollections proved to be particularly reliable when compared to that footage. The tendered video footage was the most reliable evidence as to the events of the day. This was followed by the contemporaneous documents, such as briefing documents, tactical plans and field notes. Witness recollections were the least reliable form of evidence. I have therefore examined carefully any claim by a witness that something was said or done which could not be observed in the video footage.

20 With two exceptions, it was not necessary to go to the oral evidence to establish the relevant events of the day. The first exception was the number of people who had gathered for a common purpose (or, rather, the number of people who Papworth believed on reasonable grounds had gathered for a common purpose) at the time Papworth gave the direction which led to the third arrest. There was no tendered video footage of this moment in time, with the only footage tendered showing events before or after the cordon had begun to be formed. On this issue, I have found the evidence of Templeton to be of particular importance,

corroborated by documentary evidence and video footage. I will address this issue further under the heading "Was the third arrest lawful".

21 The second exception relates to Smit's evidence. The reliability of Smit's evidence was of only minimal relevance to liability. The question of whether Smit had actually breached the CHO directions was not a fact in issue. Rather, the fact in issue was whether Dolman and Papworth believed, on reasonable grounds, that she had. Smit's actual knowledge and beliefs before, during and after the protest were not known to Dolman and Papworth and could not have formed part of the reasonable grounds for their beliefs. Her actions and public statements could form part of the reasonable grounds for their beliefs, but only insofar as they were aware of them, or ought to have been.

22 However, Smit's evidence was not confined to issues relevant to liability. It extended to the emotional distress and suffering she experienced as a result of the arrests. Smit did not call any other witnesses to support her testimony on this issue. The reliability of her evidence was therefore important to the assessment of damages.

23 The defendant submitted that Smit was an unimpressive and unreliable witness and that I should not accept her evidence of the events of the day, nor of the impact of these events upon her. Smit accepted there were inaccuracies in her evidence, but submitted she had given evidence honestly and to the best of her recollection, and made frank admissions whenever required.

24 Several matters suggested that Smit's evidence lacked reliability. First, Smit's recollection of the events of the day was demonstrably flawed. For example, she denied she had intended to make a speech herself on 31 October 2020.[9] This was contradicted by footage of her on the day, taken after the third arrest, in which she says "I haven't said my speech yet".[10] After being shown this footage, she

9 T278, L5-6
10 Elliott bodycam footage at 12.26pm

ultimately admitted that she had intended to make a speech, although she was initially reluctant to do so, stating only "I'm agreeing with you that clearly that's what I've said which insinuates that I was going to make a speech, but I didn't".[11] She also gave evidence that Jonas was taken "to the ground" when arrested[12] – this was shown not to be the case in the bodycam footage.

25 Second, Smit demonstrated a readiness to prepare and rely upon inaccurate documents. For example, a permit was tendered in evidence, dated 20 October 2020, which included an incorrect residential address in Tynong, although she did not live there at the time.[13] Her explanation for doing so was that she feared being targeted by the police. This made little sense given, first, it was relatively early days in her history as an activist and, second, the police could have easily ascertained where she lived. In any event, this explanation did not negate the inference that she was prepared to rely upon an inaccurate document when it suited her interests.

26 Finally, Smit's plain (and to a large extent proudly admitted) *modus operandi* was to:

(a) strain the boundaries of the literal truth in search of what she described as a "loophole";[14] and

(b) say things which literally were within the CHO directions, but in a tongue-in-cheek or ribbing tone, which made it clear she was speaking sarcastically.[15]

27 Thus, for example:

(a) she persistently claimed (both on 31 October 2020 and in evidence) to have a letter from her doctor confirming she had an exemption from wearing a

---

11 T297, L11-13
12 T118, L7-10
13 T193, L6-8
14 JCB 1106; T299, L2 – T301, L18; Exhibit D14 – The James Delingpole Channel YouTube episode titled "I was a political prisoner – Monica Smit"
15 T300, L 29-T301, L7

mask. However, the letter itself only confirmed that Smit had stated that she suffered from asthma, experienced difficulty in breathing while wearing face-mask and got anxiety while wearing a mask.[16] It provided no medical opinion in support of this statement or in support of Smit's claim to be entitled to a medical exemption. Smit admitted, in cross-examination, that she knew the doctor who wrote the letter believed her condition was not severe enough to justify an exemption;[17]

(b) she relied upon work permits issued by RDA, not only to herself, but also to her mother and father, but was not able to provide any convincing detail of the manner in which they were both "working" for RDA on that day (particularly in relation to her mother),[18] and did not retain their permits;

(c) she maintained she had no control over others present that day (aside from her immediate circle)[19] and no knowledge of what they were there for. Given her involvement in the movement, and encouragement of others to attend the protest, this was disingenuous;

(d) she was recorded in video footage saying things in a clearly tongue-in-cheek tone. For example, in footage of the "Freedom Day" rally on 23 October 2024, she says "oh I will just be the journalist of course" and refers to "group exercise".[20] In a livestream on the way to the Treasury Gardens, she says:

> "Good morning everyone! It is a lovely day to go to the park, especially Treasury Gardens Park or Fitzroy Gardens Park, um, yes, there might be a special bus there, there might be some megaphones. I don't know, I am just going to report on the situation, so ah, I guess we will see what happens. But if you live within 25kms of that particular park I think it is a great idea if, you know, you go for some exercise down there."[21]

---

16 JCB 175
17 T147, L14-16
18 See, for example, T202, L10-23; T238, L28-30
19 See, for example, T240, L27-29; T241, L18-21; T282, L20 – T283, L12; T291, L26 – T291, L11
20 Exhibit P19
21 Exhibit D6

In a livestream at the Treasury Gardens, she comments "lovely day for a walk" as she walks past police officers;[22] and

(e) where questions did not fit with her desired narrative, she evaded answering them.[23]

28 Smit did at times make frank admissions, however overall her evidence demonstrated a propensity to strain the boundaries of the truth in order to further her cause and a difficulty in accepting anything that did not accord with her world view. This undermined the reliability of her evidence in this proceeding.

Factual context

Before the protest

29 Smit founded the RDA in mid-2020, only a few months after a state of emergency had been declared in Melbourne. On 7 August 2020, Smit organised her first protest through the RDA. It was an online livestream protest,[24] which included speeches by a number of anti-lockdown activists. She considered this protest a success and so went on to organise two further online livestream protests on 14 August 2020 and 21 August 2020. At some point, a supporter provided her with the use of a bus, which had a graphic on its side depicting then Premier Dan Andrews and the words "LET US OUT #sackdanandrews". She then produced and published a number of videos of herself interviewing people at or near the bus.[25]

30 On 22 October 2020, Assistant Commissioner Luke Cornelius gave a press conference in which he said:

> Protesting is not unlawful. It's a human right. We are now operating in a context where the CHO directions do allow people to leave home for recreation and for socialising. And people can choose if they want to, while they are doing that, to also voice protest or give effect to protest. But whether you are protesting at home, whether you are protesting down at

22 Exhibit D7
23 See, for example, T234, L2 – 26; T236, L3-16
24 T60, L1-19; JCB 295
25 See, for example, Exhibit P44

> the local park, whether you are protesting at the Shrine, you must comply with the CHO directions about public gatherings and the public gathering rules are very clear in Melbourne Metro including the Shrine, and that is: groups of no more than 10, comprised of no more than two households, socially distanced one and a half metres within the group, wearing a mask if you are not eating or drinking or you have a medical exemption for not having a mask and no further than 25kms from your home. Now, anyone who turns up to the Shrine, or indeed any other location, can expect to find police asking them who are you, where are you from, where do you live, so that we can test the 25k rule. Then we are going to say: how many households have we got here? And if there's more than two, you're in breach. If you're more than 25ks, you're in breach. If your numbers exceed ten, you are in breach. If you are not maintaining social distance, you are in breach. And if you are in breach, you can expect to be fined. You can expect to be the subject of enforcement. So, in terms of coming out and socialising and engaging in catch-ups with friends, for whatever reason, in whatever context, whether you are protesting or whether you're just going for a jog or you're having a picnic, make sure you comply with the CHO directions. Because if you don't and we observe you in breach, we will hold you to account…."[26]

31 On 23 October 2020, Smit attended a physical protest held at the Shrine of Remembrance in Melbourne. She said, in her evidence-in-chief, that this was the first physical protest she had attended.[27] Smit livestreamed and posted videos of herself at this protest. At one point, the video showed her standing outside a police cordon of protestors, wearing a "Let Victoria Work" cap and holding a microphone. She states: "Protesting is legal. Cornelius said that himself". Ultimately, her partner, Jonas, and her father, John Smit ("John Smit"), were both arrested at this protest.

32 On 26 October 2020, a Victoria Police Public Order Response Team ("PORT") intelligence briefing[28] noted that a "Stop the Sale of Victoria" rally was scheduled for 31 October 2020 at 11.00am at Treasury Place. The report noted that the host of the event was Jonas, a "right leaning nationalist who has organised similar events in the past". The report also noted that:[29]

> "JONAS was a prominent figure at the Anti-Lockdown rally on 23-Oct-20 at the Shrine, livestreaming and being interviewed by several individuals. As a result, Anti-Lockdown personalities such as Monica SMIT (Reignite Democracy) have begun to promote the 'Stop the Sale' event. Protest organiser 'Guardian Angel Melbourne' has indicated that they are in

26 Exhibit D1
27 T64, L31 – T64, L14
28 JCB 628
29 JCB 629

meetings with Reignite Democracy about a protest on the 31-Oct highly likely to be 'Stop the Sale'. This is probable (sic) to increase attendance. (O:S)

As of 25-Oct-20, there are 1.4k people registered as 'going' on Facebook and 7.3k people registered as 'interested'. This event is likely to significantly impact TPSC resources. (0:S)"[30]

33 On 28 October 2020, Jonas posted the following text on his Facebook page:

"STOP THE SALE OF VICTORIA

11AM SAT 31/10
TREASURY GARDENS

PROTEST IS A HUMAN RIGHT"[31]

34 Smit then shared this post on the RDA Facebook page, together with a picture of the bus and the words:

Myself and the bus will be at this event next:

Click here to see more info;

Stop the sale of Victoria

I will be attending as a reporter.

The bus is back on the road!!!"[32]

35 The "Daily Event Scanning" police intelligence report for 28 October 2020[33] noted, under the heading "Key Finding(s)", that Jonas had confirmed the "Stop the Sale of Victoria" event was going ahead and that the RDA had announced the bus was back and would be at the protest planned for 31 October 2020. The report stated "Monica SMIT … stated that she will be attending the event as a reporter".[34] Later in the report, under the heading "Facebook", an image of Smit's post on the RDA Facebook page was included, with the words:[35]

"**Reignite Democracy Australia (RDA):**
RDA announced that the #SACKANDREWS bus is back and will be at the protest 'Stop the Sale of Victoria' planned for Saturday 31-Oct-2020 … at 1100hrs. Monica SMIT stated that she will be attending the event as a

30 JCB 628
31 JCB 639
32 JCB 640
33 JCB 351
34 *Ibid*
35 JCB 353

reporter. This post attracted 295 comments and 204 shares. The comments are largely supportive of the protest and extremely anti-Andrews. … ."[36]

36 Finally, under the heading "Upcoming Events", the following text appeared:

> **Stop the sale of Victoria**
>
> **Where: Treasury Place**
> **When: Saturday 31-Oct-2020 at 1100hrs**
>
> …
>
> **As of 29-Oct-2020 there were 1.6k going and 7.7k interested**."[37]

37 At some point between 18 October 2020 and 30 October 2020,[38] Smit added the following words to the RDA website:

> "RDA has evolved quickly into becoming a lobby group that acts on behalf of its 25,000 members. We are also journalist (sic). How can we act on behalf of the people if we can't hear them? This is why we have ventured into journalism and media."[39]

38 Operation Prevail was the ongoing police response to breaches of the CHO directions in the North-Western Metropolitan regions and the Southern Metropolitan regions.[40] A police intelligence summary report, dated 29 October 2020, was prepared for Operation Prevail.[41] That report recorded:

> "**Key Considerations:**
>
> - It is almost certain that both the 'Stop the Sale' and 'Freedom Day' protest will be held on their respective dates as they are heavily advertising the dates and locations across social media;
> - It is highly likely that on Saturday 31-Oct-2020 that protestors will bring footballs or other sporting equipment to 'play' with after the protest is complete as JONAS intends to 'test out' a football after he finishes his speeches;
> - It is highly likely that on Tuesday 03-Nov-2020 that participants will display similar behaviour to Friday 23-Oct-2020 where flares were lit and violence directed towards police as the event is organised by the same group and shared to social media groups with similar anti-lockdown ideologies;

36 *Ibid*
37 JCB 355
38 T180, L16-22, compare JCB 857 with JCB 867
39 JCB 867
40 JCB 591
41 JCB 359

…

- It is likely that the number of attendees for both events will be similar to Friday 23-Oct-2020 where approximately 350 to 400 people gathered outside the Shrine of Remembrance as the organisers indicate the easing of restrictions is 'too little too late' and vow to continue protesting and the event will 'NEVER be cancelled'."[42]

39 Under the heading "Events" it was recorded that:

"**Stop the Sale of Victoria Protest, Saturday 31-Oct-2020 at 1100hrs**

Intelligence holdings suggest:

- That the location has moved slightly from **Treasury Place** to **Treasury Gardens;**
- As at 29-Oct-2020, there are approximately '**1500 going**' and '**7700 interested**";
- it is likely that protestors will gather in the gardens and then may rally closer to the Treasury Place building as numbers increase;
- Organiser Morgan C JONAS refuses to engage with police to discuss the event and as of 28-Oct-2020 has been promoting his event on his Facebook … ;"[43]

(Footnote omitted.)

40 Under the heading "POIs" it was recorded:

"Intelligence holdings suggest:

- That RDA reporter Monica SMIT plans to continue attending protests in the capacity of a journalist and it is highly likely she will be present with the #SACK ANDREWS bus at both events; …"[44]

(Footnote omitted.)

41 The report also included images of both Jonas' and Smit's Facebook posts in relation to the protest.

42 As part of the Victoria Police's Operation Prevail planning for 31 October 2020, six "zones" were created. For each zone, a structure of commanders and allocated officers was established.[45] The first five zones were physical areas. Of these, the

---

42 JCB 359
43 JCB 360
44 JCB 361
45 JCB 550

key zone was Zone 1, the Parliament/Treasury area. This zone included Treasury Gardens, which was anticipated to be the site of the protest. In addition, there were zones for the Shrine, CBD North, CBD South and CBD West. The remaining zones were teams with particular specialisations or responsibilities, rather than physical locations. Zone 6 was called "Response". This comprised of response teams, each headed by a deputy commander, which could assist in one of the five physical zones. Zone 7 was traffic. Zone 8 was PORT. Zone 9 was transit. Zone 10 was support (which included officers allocated to process people once in custody).

43 Dolman was a Senior Sergeant in charge of the Zone 6c response team, which formed part of Zone 6.[46] Papworth was a Zone Commander for Zone 1 (Parliament/Treasury). Templeton was the Police Forward Commander[47] for the entire Operation Prevail on the day.

44 An Operation Prevail tactical plan for 31 October 2020 was prepared. This was provided to Zone Commanders and the Police Forward Commander, but may not have been provided to other officers.[48] The first line of the plan read:

> "*Enforcing 'Blatant, Obvious & Deliberate' breaches of the Chief Health Officer's Directions*".[49]

45 The tactical plan continued:

> "**Noting it is not unlawful to leave home to protest, the intent is to prevent the spread of the COVID-19 virus by:**
>
> - **deterring people from leaving their homes to breach CHO Directions;**
> - **preventing public gatherings which breach CHO Directions; and**

46 JCB 550 and 552

47 That is, the Police Commander who went "Forward" into the field, as opposed to the Police Commander who supervised remotely.

48 T519, L31 – T520, L13

49 JCB 591

- **intervening early with appropriate enforcement options, including arrest where required, in order to ensure compliance with CHO Directions.**"[50]

46 The Tactical Plan attached a "Trigger Points Ready Reckoner" document.[51] The first page of the "Trigger Points Ready Reckoner" is extracted as Figure 1, below.

47 Figure 1 illustrates the four contemplated tiers of response:

(a) Tier 1, a group of five to six – "Consider engaging";

(b) Tier 2, a group of seven to nine – "Engage where practical";

(c) Tier 3, a group of more than ten – "**Breach of CHO's directions complete**. Must engage and enforce";

(d) Tier 4, a "Large group / mass gathering" – "Consider tactical response. On-air notification to Police Forward Commander".

48 An issue in this proceeding was whether the contemplated trigger point for a Tier-4 response had been reached prior to the third arrest.[52]

50 *Ibid*
51 JCB 588, noted as an attachment to the Tactical Plan at JCB 592
52 See below under heading "Was the third arrest lawful?"

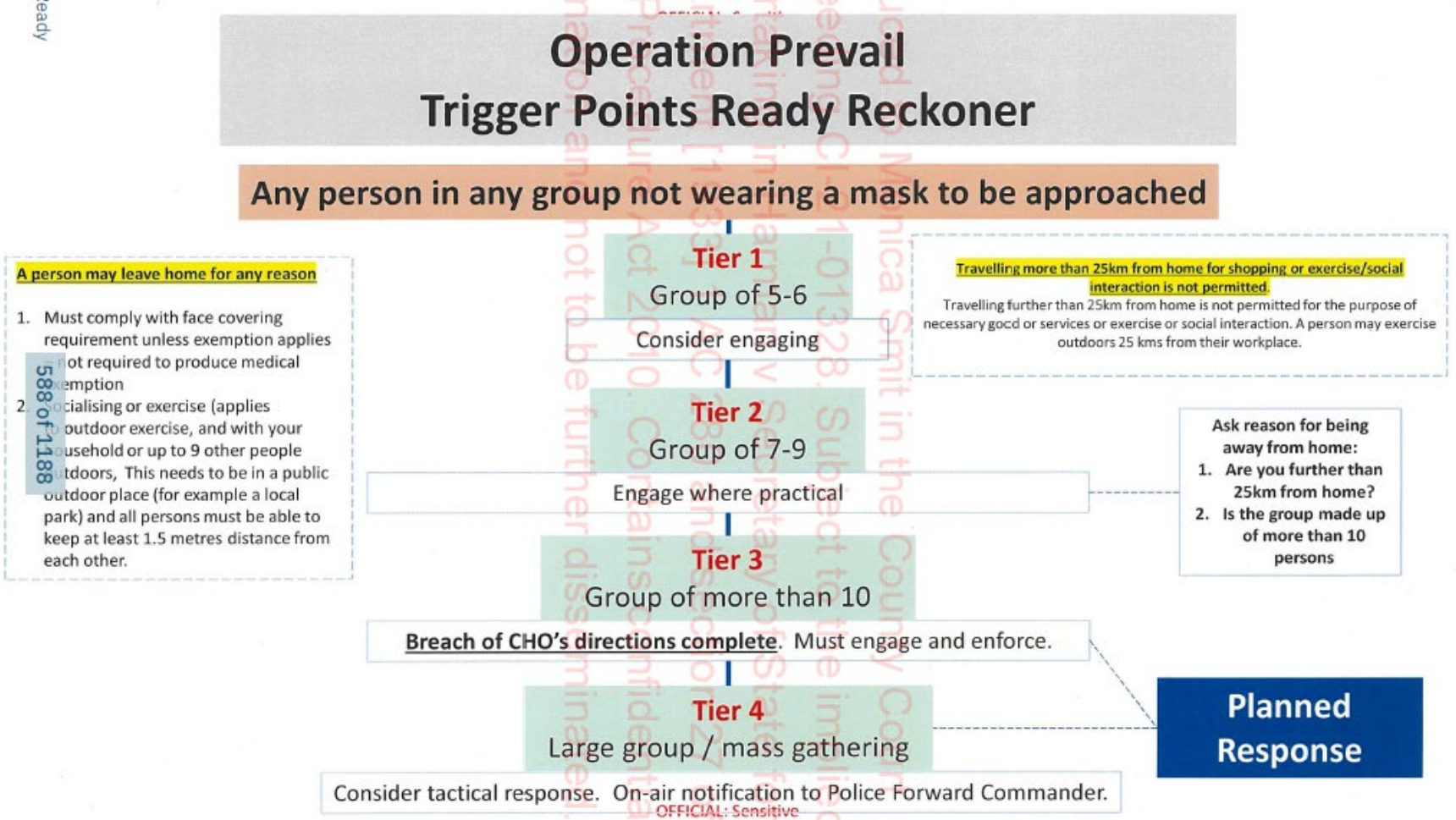

Figure 1: Operation Prevail, Trigger Points Ready Reckoner

49 The second page of the "Trigger Points Ready Reckoner" described four phases:

(a) Phase 1 – identification of offence: three breaches of the CHO directions are identified:

(i) being more than 25 kilometres from premises;

(ii) a gathering of more than ten persons for a common purpose, or two or more groups of ten meeting for a common purpose; and

(iii) failing to comply with the face-covering requirements;

(b) Phase 2 – early engagement: a script is provided for explaining the CHO directions and requesting compliance;

(c) Phase 3 – warning/breach of CHO directions/fail to comply: three options are provided:

(i) if no offence detected, or compliance, consider no action or warning;

(ii) if offence complete, obtain details and issue infringement notices;

(iii) if continuation of offence or failure to comply, inform the person that they will be arrested unless offending ceases and provide a reasonable time to comply with the direction, then set up for arrest.[53]

50 Under the heading "Arrest of Offenders", it is noted that "Arrests should occur in the following circumstances … Continuation of the offence".[54] Under the heading "Processing of Offender", it is noted that "PIN[55] issued for breach of CHO –

53 JCB 727
54 *Ibid*
55 An infringement notice

Request to move on if offender returns after issue of PIN consider arrest re continuation of offence".[56]

On the day of the "Stop the Sale of Victoria" protest

The police are briefed

51 An in-person police briefing was held early on the morning of 31 October 2020. At the briefing, Templeton delivered a PowerPoint presentation to the officers to be deployed as part of Operation Prevail that day.[57] Among other things, the PowerPoint slides stated:

(a) that:

> "Treasury Place has been nominated by POI's as the primary target location. Previous involvements with these agitators has been hostile and confrontational. They are to be arrested and issued with PINs for blatant breaches of CHO Directions.
>
> *Protesting is not unlawful but gathering in large numbers against the CHO directions is*"[58]

(b) and:

> "The intent is to prevent the spread of the COVID-19 virus by:
>
> - Preventing public gatherings which breach CHO Directions, and
> - Intervening early with appropriate enforcement options, including arrest where required, in order to ensure compliance with the CHO Directions." [59]

(c) and:

> "GENERAL DUTIES RESPONSE
>
> The Protestor group are to be contained at the Primary Protest location by –
>
> Large scale strong police cordon from East, South and West comprising POM GDs and PORT. Shoulder to shoulder no gaps. No person breaching the CHO will be allowed to leave without authorization from the police forward commander

56 *Ibid*
57 T810, L21-27
58 JCB 600
59 JCB 603

> Upon containment POM and GD's fix cordon with PORT and Mounted Branch strategically positioned
>
> PORT arrest crews move in and hand over to GD or Processing team
>
> Offenders will be taken to brawler vans for processing"[60]

(d) and:

> "GENERAL POLICE INSTRUCTIONS MANAGING THE MEDIA
>
> …
>
> Provide clear instructions to anybody purporting to be from media (mainstream and self appointed)"[61]

Smit livestreams on the way to the protest

52 Sometime prior to 10.30am that morning, Smit, Jonas, John Smit (Smit's father) and Lise Smit (Smit's mother) travelled to the Treasury Gardens by car. Smit posted a livestreamed video from her car on RDA's Facebook page. In the video she says:

> "…there might be a special bus there, there might be some megaphones, I don't know, I'm just going to report on the situation, so I guess we will see what happens. But if you live within 25 km of that particular park, I think it's a great idea if you go for some exercise down there"[62]

Smit's first interaction with police

53 On arrival, Smit, Jonas, John Smit and Lise Smit walked together through the Treasury Gardens. In a livestream posted by Smit, Jonas is seen carrying a megaphone and a Southern-Cross flag. Lise Smit then takes the flag. Smit provides commentary, saying, among other things:

> "So we are in Fitzroy Gardens, isn't it beautiful here ... Who else have we got here? We have many members of Victoria Police. Commissioner said protest is a human right and people can leave home to protest ... How do you feel? I never invited the …. It is a free country, they are allowed to attend, maybe they are coming to protest with you ... Not holding my breath. We are walking around with a megaphone so we are pretty much a target. And we have an Australian flag which is pretty much against the law."[63]

---

60 JCB 612
61 JCB 614
62 Exhibit D6
63 Exhibit D7

54 They see members of the police ahead, near Lansdowne Street. At about 10.34am,[64] Dolman directs them to stop and says that the police are there enforcing CHO directions. There then occurs what has been described as the "first interaction" in the Amended Statement of Claim.

55 At the time, there are five people present in addition to police officers: Smit, Jonas, John Smit, Lise Smit and one other man, "Justin". The group are asked by police to provide their identification ("ID") details. Everyone in the group say that they have a medical exemption from wearing a face-mask. Each of the five people in the group are wearing identical badges saying "EXEMPT".

56 Throughout the interaction, Smit does a lot of the talking, on her own behalf, and on behalf of Jonas, Lise Smit and John Smit. She reminds her mother that she has a permit and does not have to provide her phone number. She asks her mother to provide her ID details, as she is on camera. She explains (in relation to their "EXEMPT" badges) that, "[w]e actually got these from Bunnings. They work in Bunnings… We don't wear masks, we have got an exemption".[65] She engages in a discussion with Dolman about whether a letter of exemption is required. She is told that it is fine not to have a letter from her doctor saying she does not have a mask, but the police would still issue an infringement notice and she could produce the letter later on in court.

57 Justin produces a medical exemption letter on his phone. Nobody else does (although they are not specifically asked to). Two officers go to look for face-masks, but they are not ultimately provided to the group.

58 After address details are confirmed and Dolman confirms that everyone is claiming to have a medical exemption, the group are told that infringement notices will be

64 Taken from the bodycam footage of Wilson, Radovanovic and Senior Constable Cecilia Nguyen, which commences at this time.

65 Bodycam footage of Nguyen at 10.38am

issued in the mail to everyone except Justin. Smit confirms that they are free to go and the group walks away from the police officers.

59 After the group walks off, one of the officers is heard to say on Radovanovic's bodycam footage that they "all have a work permit to be part of this protest". Dolman responds "oh they got a work permit!".[66]

The first arrest

60 Smit was arrested for the first time at about 10.46am on 31 October 2020, near a tree in Treasury Gardens. At the time, she was holding a mobile phone on a selfie stick, with a clip-on microphone attached to the phone. She was facing towards Jonas and her father, John Smit, who were holding a large banner which read "Stop the Sale of Victoria". Her mother, Lise Smit, was standing behind this banner, holding a Southern-Cross flag. Standing at various distances around this small group were over twenty police officers.

61 At 10.45 am, Dolman approaches the small group. He says ,"I have just been told that you have basically produced a permit". He said that the permit "does not comply" and he was going to give them a direction to move on. Smit replies "I am actually media" and then proceeds to talk at some length about the Australian Constitution. Dolman says "Are you prepared to leave the area". Smit replies "No". Dolman says, "Can I get someone to arrest this lady". Smit protests that she has a permit. Lee, with the assistance of other officers, steps forward and arrests Smit. As Lee is walking Smit away, Dolman says "she needs to be put in handcuffs". Handcuffs are then placed upon Smit and she is walked towards Lansdowne Street, still protesting that she has a work permit and is a journalist.

62 At 10.53am, Watson is heard to explain to Dolman that there is a plan to cordon the protestors in Treasury Gardens and arrest them.[67]

---

66 Nguyen, Radovanovic and Jordan Rodrigues bodycam footage at 10.41am

67 Wilson bodycam footage at 10.53am

63 At 10.54am a police officer is heard to explain to a member of the press that Smit had been arrested for not wearing a mask and continuing and not moving on. Smit interrupts and says "you can't move us on."[68]

64 There is then a period of approximately fifteen to twenty minutes where Smit is held under arrest by the side of Lansdowne Street. Throughout, it is fair to say she is argumentative and assertive in proclaiming her right to be there. She attempts to have her father livestream using her phone and, when this is unsuccessful, has her phone provided to someone else who is able to operate it. She speaks to her phone camera, she speaks to supporters and press gathered. She maintains to police she has a right to be there because she is working.

65 While this is going on, the police are endeavouring to formally identify her on their system. Initially, Dolman is told by another officer that both Jonas and Smit are within their 25-kilometre zone because they are partners and Jonas lives in Hampton. He responds, "no mask, penalty notice, no mask, penalty notice, direction to move on. If they fail to comply with direction to move on, they will be arrested."[69] A police officer has some difficulty pulling up Smit's details on his iPad. He asks Smit for ID. She says she has ID on her phone. At about 11.01am, she is uncuffed so that she can obtain it. There is no footage of Smit being told she is free to go, but at 11.04am she is heard to say "I am not under arrest anymore"[70] and at 11.07am, a police officer is heard to comment that "she is actually right to leave now if she wants … I got a feeling she is going to end up being locked up".[71]

The second arrest

66 At 11.08am, there is bodycam footage of a discussion between police officers while writing out the tickets. Dolman is heard to say that Smit is outside her 25-

---

68 Elliot bodycam footage at 10.55am
69 Lee bodycam footage at 10.52am
70 Lee bodycam footage at 11.04am
71 Elliott bodycam footage at 11.07am

kilometre zone and when she is given the ticket she needs to move on, otherwise she will be arrested.[72]

67 Dolman then has a conversation with Smit. He tells her that they are preparing the infringement notices and then she is going to be told she has to leave the area. She replies "under what reasons". He says, "otherwise you are continuing committing the offence". She asks what offence. He replies, "out of required distance from home and fail to wear mask". Smit says that she has a work permit and a letter from her doctor. Dolman says "but you can't produce it". He says that she is now required to leave the area. She maintains (loudly) that she is not leaving.

68 At 11.10am, Dolman says "someone arrest this lady please". Lee then places Smit under arrest again and handcuffs her.

69 At 11.11am, Smit asks why she is being arrested. Dolman says for failure to wear a mask and being outside her 25-kilometre zone. Another female officer is heard to say "we've given you a direction to move on Ma'am". Dolman repeats that she has been given a direction to move on and that she was "continuing under 458", and says that "we asked you to leave. This is not a circus, you are not wearing a mask".[73]

70 Meanwhile, Jonas is being told he has been given a direction to move on for breach of the peace and that if he fails to move on, he will be arrested for breach of the peace.[74]

71 At around 11.13am, Smit's bag is searched and Dolman is informed that there is no permit in there. Someone says over the radio that Smit has been given a direction to leave, has refused to leave, and that she just needs to move on. Smit

---

72 Lee and Elliott bodycam footage at 11.08am
73 Eliott bodycam footage at 11.11am
74 Wilson bodycam footage 11.11 am

is then told that she will be taken to the police station and given bail under a direction not to attend the protest. She continues to maintain she is a journalist.

72 Lee completes an arrest form with the assistance of a member of the processing team. Lee writes on the form that the arrest is for breach of the 25-kilometre zone and failure to wear a mask.

73 At around 11.17am, Smit is placed in a brawler van, wearing handcuffs. The door is closed.

74 There is then a conversation between Dolman and Lee.[75] Dolman appears to be confirming with Lee what to write in her report of the arrest. He says:

> "Along the lines of observed didn't have a mask… spoke to…They told us they had a ticket to be in the area for …reasons… the work permit yep…. We were told by the other senior sergeant that there was not a valid reason for being in the area so we detained them for continuing the offence. Brought them back, give them a ticket and told them to move on, so gave them a second opportunity, we didn't need to give them that, she has then refused and then we have had to arrest her … so effectively continuation under s458, allows us to arrest her, take her back, give her bail conditions …"

The third arrest

75 As events transpired, Smit was not transported anywhere after the second arrest. Watson explained, in her oral evidence, that this was because a decision was made that it was not appropriate to take an unmasked protestor for processing indoors at a police station due to the risk of COVID transmission[76].

76 Smit sat in the van for around thirty minutes. At one point, an officer opened the van door, changed her handcuffs and then relocked her in the van. Then, Watson and Aitken came and had a conversation with Smit. According to Watson's notes, this was at about 11.40am.[77] According to Aitken's notes this was at about 11.55am.[78] During the course of the conversation, it was strongly recommended

---

75 Lee bodycam footage at 11.18am
76 T973, L10-18
77 SCB 4-5
78 JCB 377

to Smit that she leave the area. She was told that, if she joined a gathering of more than ten in breach of the CHO directions, she would be arrested. Shortly after this, Smit was released.

77 Smit then spoke to the press and recorded a livestream video. She is then seen walking with several others towards Treasury Gardens.[79]

78 At some point in time,[80] Papworth decided there was a gathering of more than ten people for a common purpose in Treasury Gardens and determined that it was appropriate to implement the pre-organised[81] "tactical plan" of cordoning and arresting those present. He sought, and was provided, approval from Templeton to implement this plan.[82]

79 In accordance with this tactical plan, a large number of police officers surrounded the group of people that Papworth had identified and slowly moved inwards, cordoning those present. While this was happening, a processing team set up tables to process those arrested; and the PORT team gathered to effect arrests. Once everything was in place, those within the cordon were instructed by Papworth, via megaphone, that they should place their hands on their heads and come to the edge of the circle to be arrested. Those who did so were arrested by general duties' police officers and taken to be processed at the processing tables. Those who did not do so were initially arrested by members of the PORT Team.

80 Jonas and Smit were both inside the cordon.

81 Shortly before Papworth made his announcement over the megaphone that those within the cordon should place their hands on their head, Jonas had commenced giving a speech. Smit stood a short distance away from him, recording the speech using her phone on a selfie stick and an external microphone. When Papworth

---

79 In footage taken by "Rukshan" – Exhibit P51

80 I will address the precise timing of this decision in the section on the third arrest.

81 See Tier 4 in the *Trigger Points Ready Reckoner*, JCB 725; and *General Duties Response*, JCB 612; T463, L4-9

82 T462, L1-15

made his announcement, Jonas suggested that they should leave. Smit insisted they had a right to be there and should stay.

82 Jonas stayed, as suggested by Smit. Ultimately, he was arrested by PORT officers. As he was led away, he was handcuffed. He could be heard crying out that he was being hurt and accusing the PORT officers of being rough. In the background, another protestor can be seen being taken to the ground by several PORT officers.

83 Finally, only Smit remained, encircled by dozens of police officers. She was asked again to place her hands on her head. She refused and maintained that she was a journalist. For a moment, it appeared as though she might also be arrested by PORT officers. However, Elliott stepped up to Smit and said "you are under arrest" and took her by the arm. Elliott walked Smit quietly out of the cordon to the processing tables without handcuffing her.

The requirements for lawful arrest under s458 of the *Crimes Act*

84 Section 458 of the Crimes Act is headed:

> "**Person found committing offences may be arrested without warrant by any person**"

85 This heading conveniently highlights three features of the arrest power under s458:

(a) it empowers *any person* to make an arrest – the power is not limited to a person with the duties, responsibilities and training of a police officer or protective services officer;

(b) an arrest may be made for *any offence* – including summary offences, offences punishable only by fine, common law offences and statutory offences. A failure to comply with delegated legislation such as regulations does not fall within the definition of offence in s458 unless expressly provided by an Act of Parliament.[83] There is no other limitation of the range of offences

83 Section 458(2) of the *Crimes Act*

which may be relied upon to justify an arrest under s458. Necessarily, very minor offences fall within its scope;

(c) it empowers *immediate arrest* without the necessity to obtain a warrant.

86 The complete text of s458 provides:

> "(1) Any person, whether a police officer or not, may at any time without warrant apprehend and take before a bail justice or the Magistrates' Court to be dealt with according to law or deliver to a police officer to be so taken, any person—
>
> (a) he finds committing any offence (whether an indictable offence or an offence punishable on summary conviction) where he believes on reasonable grounds that the apprehension of the person is necessary for any one or more of the following reasons, namely—
>
> (i) to ensure the attendance of the offender before a court of competent jurisdiction;
>
> (ii) to preserve public order;
>
> (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;
>
> (b) when instructed so to do by any police officer having power under this Act to apprehend that person; or
>
> (c) he believes on reasonable grounds is escaping from legal custody or aiding or abetting another person to escape from legal custody or avoiding apprehension by some person having authority to apprehend that person in the circumstances of the case.
>
> (2) For the purposes of paragraph (a) in subsection (1) ***offence*** means offence at common law or a contravention of or failure to comply with a provision of an Act of Parliament and unless otherwise by Act of Parliament expressly provided does not include a contravention of or failure to comply with a rule regulation by-law or other law made under an Act of Parliament.
>
> (3) A person who has been apprehended without warrant pursuant to the provisions of paragraph (a) in subsection (1) in respect of any offence punishable on summary conviction (not being an indictable offence that may be heard and determined summarily) and taken into custody shall be held in the custody of the person apprehending him only so long as any reason referred to in the said paragraph for his apprehension continues and where, before that person is charged with an offence, it appears to the person arresting that person that the reason no longer continues the person arresting

that other person shall, without any further or other authority than this subsection, release that person from custody without bail or cause him to be so released and whether or not a summons has been issued against him or a notice to appear has been served on him with respect to the offence alleged.

(4) In subsection (3), *notice to appear* has the same meaning as in the Criminal Procedure Act 2009."

87 Through this text, Parliament has limited the potentially broad circumstances in which the power of arrest may arise in three ways. First, a person is only empowered to arrest a person that they "find[s]…committing an offence". The term "finds committing" is further defined in s462,[84] which provides:

"**Definition of *finds committing***

In this Act the expression ***finds committing*** and any derivative thereof 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."

88 There is both a subjective component (the person finding believes) and an objective component (on reasonable grounds) to the words "finds committing" as defined in s462. The requirements of a belief on reasonable grounds are addressed further below.

89 Parliament has chosen to use the present tense in the words "finds committing" and the words used in the extended definition in s462 ("doing any act … so behaving or conducting himself … in such circumstances"). This suggests that the power under s458 is designed to address a current situation in which the offender "is found" offending and an immediate response is required, rather than a less urgent scenario, such as at the conclusion of a remotely-conducted investigation into past offending. This may be contrasted with s459, the arrest power available where a police officer or protective services officer believes, on reasonable grounds, that a person "has committed" (in the past tense) an indictable offence.

---

84 Technically s462 may be viewed as extending the scope of the words "finds committing" rather than exhaustively defining those words. However, it is not necessary to consider whether the words "finds committing" includes circumstances which do not fall within the scope of the definition provided in s462, as the defendant relied solely on the definition of "finds committing" in s462.

Having said that, the extended definition of "finds committing" in s462 is not limited to the case where a person is found "red-handed" in the actual process of committing the offence.[85]

90 Second, finding a person committing an offence is not sufficient, in and of itself, to empower arrest. A person is only empowered to arrest if they believe, on reasonable grounds, that it is "necessary" for one or more of:

(a) ensuring the attendance of the offender before a court of competent jurisdiction;

(b) preserving public order;

(c) preventing the continuation or repetition of the offence or the commission of a further offence; or

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

91 Again, this criteria has a subjective component ("believe") and an objective component ("on reasonable grounds"), which will be addressed further below.

92 Thirdly, s458(3) elucidates the temporal limits of the arrest power. A person may be detained in custody only so long as the reason or reasons for which arrest was necessary continues. If the reason ceases to continue, the arrested person must be released, even if they have not yet been charged.

Belief on reasonable grounds

93 A belief on reasonable grounds is required by both the first criteria in s458 ("finds committing") and the second criteria ("necessary" for one of four purposes). For a belief to be held on reasonable grounds there must be:

(a) an actual belief;

85 *De Moor v Davies* [1999] VSC 416

(b) based on grounds that are reasonable.

94 A belief may be contrasted with a mere suspicion.[86] A belief requires an actual state of persuasion based on material sufficient to induce the state of belief – a belief cannot be formed on the mere "bald assertion" of another.[87] However, a belief need not be based on material which would be admissible in evidence. A "belief" for the purposes of s458 is different to a judicial finding, whether that be made on the balance of probabilities, beyond reasonable doubt or reasonable satisfaction.[88] It may be based on information provided by others, so long as it is reasonable to rely on that information, given the whole of the surrounding circumstances.[89] It may also be based on an inference which was reasonable to draw in all the circumstances.[90] It is not necessary for a belief to be held that all other reasonable possibilities are rejected.[91]

95 The grounds which the relevant person relied on to form that belief must also be (objectively) reasonable. The Court must assess the actual grounds relied upon by the person to form their belief for reasonableness.[92] However, in assessing whether those grounds were reasonable, regard may be had to other matters which the person ought to have known in the circumstances.[93]

96 The Court must be careful not to assess reasonableness with the benefit of hindsight, or on the basis of after-acquired knowledge.[94] A decision may, in all the

---

86 *George v Rockett* (1990) 170 CLR 104 at 116 ("*George*"); see also *Ruddock v Taylor* (2005) 222 CLR 612 at 633-637 ("*Ruddock*") where McHugh J provides a useful review of authorities.

87 *Hyder v Commonwealth* (2012) 217 A Crim R 571 at paragraph [15] ("*Hyder*")

88 *DPP v Farmer* [2010] VSC 343 ("*Farmer*"), see also *George at 116; Loughnan v Magistrates' Court of Victoria Sitting at Melbourne & Anor* [1993] 1 VR 685 at 692 ("*Loughnan*")

89 *O'Hara v Chief Constable of Royal Ulster Constabulary* [1997] AC 286 ("*O'Hara*")

90 *Hyder* at [15(8)]

91 *Farmer* at [paragraph [32]

92 *Carrie Peters* (*a Pseudonym) v State of Victoria* [2023] VCC 1791 at paragraph [74] ("*Carrie Peters*"); *O'Hara* at 291-293 and 298

93 *Ruddock*, paragraph [40] at 626; *State of New South Wales v Smith* (2017) 95 NSWLR 662, paragraph [134] at 696

94 *Loughnan* at 696; *Hyder* at 43; *Slaveski v State of Victoria* [2010] VSC 441 at paragraph [130] ("*Slaveski*")

circumstances, be made on reasonable grounds even if based on a mistake, including a mistake of law, rather than of fact.[95]

97 Context is relevant in assessing the reasonableness of the grounds relied upon.[96] In the present case, what is reasonable needs to be assessed in the context of time. Victoria was – literally – in a state of emergency. The police officers present were working in a context of frequently changing CHO directions; uncertainty as to the dangers – to themselves and their family members – of exposure to COVID-19; and potential for significant harm to the public if the COVID-19 virus spread.

98 On the other hand, as police officers, they were expected to be trained to deal with stressful and rapidly-changing situations, and to respond appropriately and with an understanding of the law. Regard must also given to the sheer number of police present on the day, given far fewer people attended the protest than were actually expected to attend. Victoria may have been in a state of emergency, but the same phrase cannot be used to described the events that occurred on 31 October 2020.

Necessary for permitted purpose

99 For a lawful arrest under s458, the relevant person must believe, on reasonable grounds, that arrest is "*necessary*" for one or more of the four permitted purposes in that section.

100 "Necessary" has been described by the High Court as a "strong" word. It imports something more than merely "convenient, reasonable or sensible".[97] However, it is a word which is capable of a number of meanings. As said by O'Bryan J in *Australian Competition and Consumer Commission v BlueScope Steel Limite*d[98] "it…has shades of meaning which reflect the context in which it is used".

101 The defendant submitted that "necessary", in the context of s458, should be interpreted to mean no more than what was factually required to achieve the stated

95 *Ruddock* at paragraphs [41]-[46] and [229] at 626-7 and 675
96 *Carrie Peters* at paragraph [68], (citing *Hyder* at [15(8)] per McColl JA)
97 *Hogan v Australian Crime Commission* (2010) 240 CLR 651 ("*Hogan*")
98 [2019] FCA 1532 at paragraph [32] ("*BlueScope*")

purpose. It submitted that no element of reasonableness or proportionality fed into the question of what was "necessary". Smit, on the other hand, submitted that it could not be "necessary" to arrest a person for a relatively-minor offence, such as failure to wear a face-mask; or in circumstances where arrest was not contemplated in the police tactical planning documents.

102 In interpreting the word "necessary", I bear in mind the principle of legality. Where two interpretations of a statutory provision are reasonably available, ordinarily the least restrictive on the right to liberty should be preferred. Section 458 must also be determined in its statutory context. It empowers any person – whether a police officer or not – to effect an arrest, and for a very broad range of offences, many of which carry no term of imprisonment as punishment. The requirement that the power to arrest be only used where it is "necessary" for one or more of the permitted purposes, is the mechanism by which the Parliament limits what would otherwise be an extraordinarily-broad arrest power. In that respect, s458 can be contrasted with s459, which has no such purposive limitation, but is restricted to arrest by a police officer or protective services officer, and in relation to an indictable offence.

103 To take an example of the potential breadth of the power to arrest under s458, it is an offence under s4(d)(i) of the *Summary Offences Act* 1966 to fly a kite or play a game to the annoyance of any person. Under the defendant's proposed interpretation, s458 would permit *any person* who believes, on reasonable grounds, that a person is flying a kite or playing a game to the annoyance of another person to perform a citizen's arrest, if this is factually required to stop the continuance of the offence. The principle of legality tends against an interpretation which gives rise to such a broad power of arrest in any person, no matter how minor the offence. Although said in a different statutory context, the words of Smart AJ in the NSW Supreme Court decision of *DPP v Carr*[99] are apt:

99 [2002] NSWSC 194 at paragraph [35]

> "… it is inappropriate for powers of arrest to be used for minor offences where the defendant's name and address are known, there is no risk of him departing and there is no reason to believe that a summons will not be effective. Arrest is an additional punishment involving deprivation of freedom and frequently ignominy and fear. The consequences of the employment of the power of arrest unnecessarily and inappropriately and instead of issuing a summons are often anger on the part of the person arrested and an escalation of the situation leading to the person resisting arrest and assaulting the police. … ."

104 The word "necessary" must also be interpreted, having regard to all of the four possible permitted purposes. It may make literal sense to interpret "necessary" as requiring no more than what was factually required to prevent the continuation of an offence. Whether an offence is, or is not, being committed may be viewed as a matter of fact, with no value judgement required. However, the word "necessary" is also applied to purposes such as preserving public order and safety or welfare of members of the public, or of the offender. It is difficult to see how a conclusion could sensibly be drawn on whether an arrest was necessary to preserve public order or for the safety or welfare of members of the public without an assessment of the extent of the likely impact on public order or safety, or the likelihood that this impact would occur. This would entail a value judgement in which the proportionality of arrest is weighed up against the nature of the likely impact to public order or safety, and the likelihood such an impact would occur.

105 The meaning of the word "necessary" has been extensively considered in relation to applications to make a suppression order on the grounds that it is necessary to prevent prejudice to the administration of justice. The courts have consistently held that determining whether a matter is "necessary" requires an assessment of the likelihood and severity of any detriment to the administration of justice. It is not sufficient that there be any detriment, no matter how minor. These assessments are performed at the threshold stage of determining whether the power to suppress exists, rather than in relation to the question of whether, as a matter of discretion, that power should be exercised.[100]

---

100 See, for example, *Hogan* and *BlueScope*

106 Further, in *R v Officer A (No 2)*,[101] Beech-Jones CJ considered regulation 303 of the *Crimes (Administration of Sentences) Regulation* 2014 (NSW). That regulation permitted a correctional officer to discharge a firearm "if the officer believes on reasonable grounds that it is necessary to do so in order … to prevent the escape of an inmate". The Chief Justice rejected a submission made by the Crown that this provision did not raise the question of whether the correctional officer should allow an inmate to escape rather than shoot him, stating:

> "… The word "necessary" is a strong word … In the context of the discharge of a weapon in the direction of an inmate it embraces a consideration of whether or not the risks inherent in discharging a firearm at a person should be assumed or the prisoner should be allowed to escape now and be captured later… ."[102]

107 *Officer A* and the decisions concerning suppression orders to prevent prejudice to the administration of justice were, of course, made in different statutory contexts to s458. But a commonality is that they all concern interpretation of the word "necessary" in a context where the breadth of that word impacts on important common law rights. Section 458 and the decisions concerning suppression orders also have in common that, on their face, at least some of the permitted purposes involve significant value judgements in relation to the nature of the risk and its likelihood of eventuating.

108 In all the circumstances, I find that "necessary" for the purposes of s458(1)(a) is not limited to a question of "but-for" factual necessity, but may include questions of reasonableness and proportionality. This makes relevant the question of whether the decisions made by Dolman and Papworth were in accordance with the tactical plan and briefing documents. It also makes relevant whether arrest to prevent continuation was proportionate to the offence in all the circumstances.

Instruction to arrest

109 Section 458(1)(b) empowers a person to make an arrest on the instruction of a police officer who is empowered to make an arrest under s458. The defendant

---

101 [2022] NSWSC 1381 ("*Officer A*")

102 (*Ibid*) at paragraph [41]

relied upon this provision in relation to each of the three arrests, that is, the arresting officer made the arrest under the direction of another police officer, who was said to have formed the necessary beliefs on reasonable grounds.

Reasons for arrest explained

110 There is a final limit, not within the express words of s458, but not excluded by them. This is the common law principle that the grounds for arrest be explained to the person arrested. In the foundational decision of *Christie*, Lord Simonds described it as a "fundamental principle" that a person "is entitled to know" what are "the facts which are said to constitute a crime on [their] part'".[103]

111 At its essence, this principle is founded on the special protection that the common law gives the right to liberty, which has been described as "the most elementary and important of all common law rights".[104] A person is assumed to be entitled to liberty. If they are required to submit to restraints on that liberty, they should know why. This may give the person an opportunity to explain why arrest is not necessary or appropriate. At the least, it informs the person of the basis for the arrest and (assuming that basis to be lawful) the necessity to comply without resistance.[105]

112 Viscount Simon and Lord Simonds identified a number of exceptions to this principle in *Christie*:[106]

(a) if the person arrested resists arrest before the arresting officer can physically say the required words;

(b) if the person arrested must know the reason already;

(c) if arrest is necessary to secure a violent criminal;

---

103 *Christie* at 593 (Lord Simonds); at 587 (Viscount Simon)
104 *Trobridge* at 152, (cited by McHugh J in *Ruddock* at 632)
105 *Christie* at 585 (Viscount Simon) and 591 (Lord Simonds)
106 *Christie* at 587-8; see also at 593 (Lord Simonds)

(d) the technical or precise language of a charge is not required, what is required is that the person know the facts which found the arrest.

113 Section 458 does not expressly include a requirement to explain the reasons for arrest. However, the defendant accepted that the common law requirement to explain the reasons for arrest applied to arrest under s458. I consider that it was correct to do so – abrogation of this "fundamental principle" designed to safeguard the right to liberty would require express and unambiguous words.[107]

Summary of requirements of s458

114 In summary, the defendant bears the onus of establishing that Dolman (in the case of the first and second arrest) and Papworth (in the case of the third arrest):

(a) found Smit doing any act or so behaving or conducting herself or in such circumstances that they:[108]

(i) believed;

(ii) on reasonable grounds,

that she was guilty of breaching the CHO directions;

(b) believed on reasonable grounds that Smit's arrest was necessary for one or more of:

(i) ensuring the attendance of the offender before a court of competent jurisdiction;

(ii) preserving public order;

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

---

107 See also *Slaveski*, where the requirement to explain the reasons for arrest was assumed applicable to an arrest under s459.

108 Dolman in the case of the first and second arrests and Papworth in the case of the third arrest.

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

(c) directed the arresting officer[109] to arrest Smit.

115 It is a further requirement that the grounds of arrest be explained to Smit, unless there was a good reason for not explaining the grounds for arrest to Smit.

The relevant CHO directions

History of relevant CHO directions

116 The relevant CHO directions were contained in the "Stay Safe Directions (Melbourne) (No 2)", which came into effect on 28 October 2020, only three days prior to the protest.

117 These directions revoked the "Stay Safe Directions (Melbourne)", which were made on 27 October 2020 (that is, only one day earlier). These directions in turn revoked the "Stay at Home Directions (Restricted Areas) (No. 19)" and were part of a tranche of directions made on 27 October 2020, which included:

(a) the "Metro-Regional Work Travel Permit Scheme Directions";

(b) the "Restricted Activity Directions (Melbourne)"; and

(c) the "Workplace Directions (No 8)".

118 Prior to 27 October 2020, the "Stay at Home Directions (Restricted Areas) No 19", read together with the "Permitted Worker Permit Scheme Directions (No 8)", had the effect of prohibiting a worker from leaving their premises for the purpose of work unless they held a "Permitted Worker Permit". This requirement was not replicated in the "Stay Safe Directions (Melbourne)". Thus, from 27 October 2020, a worker could leave premises for the purposes of work, without holding a permitted worker permit.

---

109 Lee in the case of the first and second arrests and Elliott in the case of the third arrest.

119 "The Stay at Home Directions (Restricted Areas) No 19" had also listed five specific permitted reasons for leaving a premises:

(a) to obtain necessary goods or services;

(b) for care of other compassionate reasons;

(c) for work or education;

(d) for exercise or social interaction; and

(e) for other specified reasons.

120 Again, this requirement was not replicated in the "Stay Safe Directions", which provided that a person could leave their premises "for any reason" subject to certain conditions.

Relevant provisions of "Stay Safe Directions (Melbourne) (No 2)"

121 The three relevant directions for the purposes of the current proceeding are the direction to comply with face-covering requirements, the direction to not travel further than 25 kilometres from their premises or workplace, and the direction to not organise, or intentionally attend, a gathering of more than nine other persons for a common purpose.

122 The face covering requirement is contained in Direction 5(9). It provided (insofar as is relevant):[110]

> "*Face covering requirements*
>
> (9) A person may only leave the premises under subclause (1) if they:
> (a) wear a face covering at all times and;
> (b) if subclause (10) (other than subclause (10(a), (c), (d) or (e)) applies, carry a face covering at all other times.
>
> …

110 JCB 844

(e) the person has a physical or mental health illness or condition, or disability, which makes wearing a face covering unsuitable; or

…

(h) the nature of a person's work or education means that clear enunciation or visibility of the mouth is essential;"

123 The direction to not travel further than 25 kilometres from their premises or workplace is contained in Direction 5(1), read together with Direction 5(2A). Direction 5(1) states that:

"(1) A person who ordinarily resides in the Restricted Area during the stay safe period may leave the **premises** where the person ordinarily resides for any reason subject to subclauses (2) and (2A)."

124 Direction 5(2A) states:

"(2A) A person must not travel further than 25 km from:

(a) their premises if they leave for a purpose under clause 6 (necessary goods or services), 9(2) or (3) (exercise or social interaction outdoors), 10(1)(e) (place of worship) or 11(2)(i) (social gathering); or

(b) their workplace if they leave that workplace for a purpose under clause 9(2) (exercise outdoors),

… ."

125 It was accepted by the defendant that it was implicit in Direction 5(2A) that a person could travel further than 25 kilometres from their premises if they left for the purpose of work.

126 The direction not to organise or intentionally attend a gathering of more than nine other persons for a common purpose was contained in Direction 11(5). That direction provided (insofar as is relevant):

"(5) During the stay safe period, a person in the Restricted Area must not arrange to meet or organise or intentionally attend a gathering of, more than nine other persons (with any infant under one year of age not counting towards this limit) for a common purpose at a public place, except:

…

Note 3: subclause (5) does not prevent a person attending a public place (for example, a shopping centre) for a purpose (for example,

shopping), where other people are also likely to be attending that public place for a similar purpose. It prevents people from attending a public place intending to gather with other people for a common purpose (for example, meeting family or friends at the shopping centre).

…

(f) it is necessary to arrange a meeting or organise a gathering for one or more of the following purposes:

…

(ii) to attend or undertake work or education services in accordance with clause 8: … ."

127 It can be seen that the CHO directions changed rapidly in response to the circumstances in Victoria at the time. They were not elegantly drafted. Given the rapid rate of change and the complexity of the situations with which they were designed to deal (essentially every potential human-to-human interaction in Victoria), they cannot be interpreted with an expectation of the rigor and precision of Acts of Parliament.

Some red herrings

Whether or not Smit actually breached the CHO directions

128 The question of whether Smit was actually guilty of an offence that day is not relevant to the question of whether she was falsely imprisoned. An unlawful arrest cannot be rendered lawful, after the event, by proof of guilt. It follows that it would not be appropriate for the Court to reason, from a mere finding of guilt, to an inference that Smit in some way acted in a manner consistent with guilt on the day, which the police could detect from her demeanour. To allow such a path of reasoning would impermissibly undermine the protection afforded to the human right to liberty.

129 Conversely, it would not negate the lawfulness of an arrest under s458 for Smit to prove that she did not commit an offence. Section 458(1) requires belief on reasonable grounds of certain specific matters, no more no less. A belief may still be reasonable even if it transpires, ultimately, that it was incorrect. This is made

clear by s461 of the *Crimes Act*, which states that an apprehension made under a belief on reasonable grounds shall not cease to be lawful "where it subsequently appears or is found that the person apprehended did not commit the offence alleged".

Whether or not Smit was a "journalist"

130 A great deal of oral evidence and submissions was taken up with the question of how the word "journalist" should be defined and, in particular, whether a person who was overtly biased towards a particular cause fell within the definition of a "journalist".

131 The word "journalist" does not appear anywhere in the CHO directions in force at the time. It was permissible to for a person to travel further than 25 kilometres from their premises for the purpose of work.[111] It was also permissible not to wear a face covering if the nature of a person's work meant that clear enunciation or visibility of the mouth was essential.[112] And it was permissible to organise a gathering of more than ten people to attend or undertake work.[113] However, there was no definition of "work" or list of specific permitted occupations in force at the time. Genuine work as a journalist (however that is defined) may fall within the scope of these exceptions if the other criteria are met. However, there are dangers in seeking to elevate the word "journalist" to a word akin to a statutory term for which a precise definition must be obtained. It may be that the only answer which can be given to the question of whether a person is capable of working as a journalist, despite their overt and unashamed bias, is that it is a question on which reasonable minds may differ.

132 In any event, the question for determination in this proceeding is not whether Smit was a journalist, but:

---

111 This follows from Direction 5(2A) which imposes the 25-kilometre restriction only on departures for the purposes of obtaining necessary goods or services, exercise or social interaction outdoors, attending a place of worship and social gathering – see JCB 842.

112 Direction 5(10)(j) – see JCB 844

113 Direction 11(5)(f) – see JCB 851

(a) whether Dolman had reasonable grounds for believing:

(i) she was outside her 25-kilometre zone for a reason other than working; or

(ii) she was organising a gathering of more than ten people for a common purpose; and

(b) whether Papworth had reasonable grounds for believing that Smit was gathering with a group of ten or more people for a common purpose.

Whether or not Smit had a valid permit

133 Smit maintained throughout the day that she had a permit which permitted her to be present at Treasury Gardens that day. That permit was never provided to the police. Dolman never saw it, despite informing Smit at the time of the first arrest that it was not a valid permit.

134 However, as at 31 October 2020, the CHO directions no longer required work permits. The question for determination in this proceeding is, therefore, not whether Smit had a valid permit nor even whether Dolman believed on reasonable grounds that Smit had a valid permit, but whether Dolman believed, on reasonable grounds, that she was outside her 25-kilometre zone for a reason other than working.

Whether or not RDA was a "real" organisation

135 RDA was, by 31 October 2020, a registered corporation. Smit cross-examined Dolman and Papworth (and other police witnesses) about whether they knew, or could have known, that RDA was a "real" organisation.

136 I do not accept it was reasonable for police officers in the field to conduct independent online research into the people and organisations they came across on the day. It was reasonable for them to rely upon the police briefings and intelligence documents.

137 However, even if the fact of RDA's registration as a corporation was known to Dolman and Papworth, it would have little relevance to this proceeding. The registration of a corporation is a formal process that requires payment of a fee and completion of forms. It says very little, if anything, about the "legitimacy" of a business. The issue in this proceeding is not whether RDA existed as a legal entity, but whether Dolman and Papworth believed, on reasonable grounds, that Smit had committed a breach of the CHO directions and whether the other requirements in s458 were met.

Whether or not the police had power to issue a "move on" direction

138 On several occasions Dolman, and other police officers are heard to instruct Smit to move on, or to tell her that she had been issued with a "move on direction". Dolman also refers to her failure to comply with a direction to move on when speaking with other officers.[114]

139 Section 6 of the *Summary Offences Act* 1966 empowers a police officer to issue a move on direction. In brief, that power may be exercised if a police officer suspects on reasonable grounds that the person is breaching or likely to breach the peace; is endangering or likely to endanger the safety of another person; or their behaviour is likely to cause injury to a person or damage to property or is otherwise a risk to public safety. However, s6(5) states that the section does not apply to a person who is "demonstrating or protesting about a particular issue" or "speaking, bearing or otherwise identifying with a banner, placard or sign or otherwise behaving in a way that is apparently intended to publicise the person's view about a particular issue. That is, the move on direction in s6 cannot be used to move on someone who is there for the purpose of protest.

140 Neither party contended that Dolman had the power to issue Smit with a move on direction under s6 of the *Summary Offences Act*. The defendant did not point to any other source of "power" to issue a move on direction. Rather, the defendant

[114] See for example: bodycam footage of Elliott at 10.45am; 10.52am; 11.02am; 11.11am.

contended that the "direction" to move on was given as a precursor to Dolman forming the belief that it was necessary to arrest her to prevent her continuing an offence or for another permitted purpose.

141 The use of a move on direction to achieve this end is clunky, to say the least. Not all offences immediately cease to be committed when an offender moves on. Failing to wear a face-mask and being outside a person's 25km zone are good examples of this. Given this, with nothing more, it may not be reasonable for a police officer to conclude that arrest was necessary to prevent continuation of an offence merely because they failed to move on when directed to do so. It may be that a better direction would be one which included an explanation of the conduct which the officer believed was an offence and a direction to cease that conduct. This was effectively the approach suggested in the Trigger Points Ready Reckoner document.[115]

142 However, whether or not the police had the power to issue a move on direction is not an issue in this proceeding. It was not unlawful for Dolman to say the words "move on" to Smit. Nor was it (in and of itself) unlawful for Smit to fail to move on when those words were spoken to her. Rather, the question is whether Smit's failure to move on, when directed, provided a reasonable ground for Dolman's belief that her arrest was necessary for a permitted purpose under s458.

Was the first arrest lawful?

Did Dolman find Smit committing an offence?

143 The defendant submitted that Dolman believed, on reasonable grounds, that Smit was breaching the CHO directions by:

(a) failing to wear a face-mask;

(b) being more than 25 kilometres from her premises; and

[115] This is effectively the approach suggested in the Trigger Points Ready Reckoner document – see JCB 727

(c) organising a gathering of more than ten people for a common purpose.

144 The defendant further submitted that Dolman believed, on reasonable grounds, that Smit's arrest was necessary:

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

(b) to ensure Smit's attendance before a court;

(c) to preserve public order; and

(d) for the safety or welfare of members of the public or of Smit.

145 Smit submitted that Dolman had no reasonable grounds to believe she was failing to wear a face-mask, given she claimed to have a medical exemption and to have a letter of exemption, but Dolman had neither seen that letter, nor asked her the reason for her medical exemption. She accepted that she was more than 25 kilometres from her premises, but submitted that she had left her 25-kilometre zone for the purposes of her work as a journalist. She submitted she could not commit the offence of organising a gathering of more than ten people for a common purpose until that gathering actually took place. In any event, she submitted she was not the organiser of the protest. She maintained the protest was organised by Jonas and she was there in her capacity as a journalist.

What was Dolman's actual belief?

146 Dolman's evidence was that he believed, at the time of the first arrest, that Smit was breaching the CHO directions by:[116]

(a) failing to wear a face-mask; and

---

116 T724, L8-10; T726, L7-13; T726, L29-30; T741, L22-25; T766, L21-23; T793, L29-31; T794, L28 – T795, L9

(b) organising a gathering of more than ten people in breach of the CHO directions.

147 He expressly disclaimed reliance on the offence of being more than 25 kilometres from her premises for the purposes of the first arrest.

148 Notwithstanding Dolman's evidence, the defendant submitted I should find that, at the time of the first arrest, Dolman also believed Smit was breaching the CHO directions by being more than 25 kilometres from her premises. The defendant submitted that Dolman must have been mistaken in his recollection of his belief, given Smit provided an address in Pakenham in the first interaction.

149 I do not accept this submission. It is correct Smit's mother provided an address in Pakenham for Smit during the course of the first interaction. However, both Jonas and Smit are also heard to say that she resides in Hampton, which is within the 25km zone. It may be that Dolman had reasonable grounds for believing she was outside the 25-kilometre zone. However, s498 also requires Dolman to *actually* believe Smit was committing the relevant offence. Dolman stated on several occasions in oral evidence, quite clearly and specifically, that he did not believe Smit was breaching the CHO direction of being more than 25 kilometres from her premises at the time of the first arrest. I am not prepared to infer he was confused in his evidence on this point. To the contrary, on one occasion he specifically referred to the information obtained in the first interaction, but then went on to say that, at the point of the first arrest, the directions he considered to be in issue were failing to wear a mask and gathering:

> "So at that point, um, while we initially had spoken to her at the first point of contact in relation to failing to wear a mask, being outside the 25-kilometre limit and also, um, gathering for the purposes of a public demonstration, we at that point were talking to her about failing to wear a mask and gathering, ah, in a public place for the purpose of a demonstration."[117]

---

117 T726, L7-13

150 The question of whether Dolman believed on reasonable grounds that Smit was breaching the CHO directions by failing to wear a face-mask is difficult. Belief requires an actual state of persuasion, as opposed to a mere suspicion. The required belief was not just that Smit was not wearing a face-mask (evidently she was not), but that she did not have a physical or mental health illness, or condition or disability, which made wearing a face covering unsuitable. Although Dolman asserted, in oral evidence, on several occasions he believed[118] Smit was in breach of the face-mask requirements, he also accepted in cross-examination that:

(a) a medical condition may not be apparent to an observer;

(b) he was aware that Smit was not required to produce her a letter of exemption; and

(c) he had not asked for the reason for the claimed medical exemption because he was reluctant to enquire about a person's medical condition.

151 When asked whether his belief was based on his observations, he explained:

> "Ah, in part, Your Honour. So, um, we're not talking about whether I believed Ms Smit did or didn't – didn't have one. It's whether, um, she said she had one, she couldn't produce it, and we – I – I suspected, ah, on reasonable grounds that she did not suffer from a physical ailment or a mental ailment or a, ah – ah, physical impairment that would preclude her from being able to wear a mask … I concluded that it was unlikely that she had a, ah, proper medical reason … in order to satisfy myself or satisfy the directives."[119]

152 There is a distinction between a belief and a mere suspicion. A belief requires a positive state of persuasion based on actual material. The language Dolman used in this answer, and in the explanation he gave to Smit in the first interaction for why she would be issued an infringement notice, was more akin to a suspicion (which he believed required him to issue an infringement notice[120] to confirm whether Smit was in breach of the face-mask requirements) than the active state of persuasion required for a belief. However, Dolman maintained on several

118 T712, L12-20
119 T767, L22 – T768, L5
120 T772, L7-9

occasions that he believed Smit was breaching the face-mask requirements. On balance, I am prepared to accept that this was his actual belief at the time.

153 Dolman was consistent throughout his oral evidence that he believed Smit was breaching the CHO directions by organising a gathering of more than ten people. It is curious this belief was not reflected in any statements made by him on the day in the video footage tendered in evidence (including in his conversation with Lee where he explains the grounds for the arrest). Nevertheless, I accept this evidence on this issue.

Was this belief held on reasonable grounds?

154 In relation to wearing a face-mask, the grounds Dolman relied upon were:

(a) the intelligence suggesting that she was an active protestor;[121]

(b) the fact she did not appear to be suffering from any physical affliction,[122] although he subsequently appeared to resile from this;[123]

(c) her behaviour on the day indicating she was "more on the non-compliance side";[124] and

(d) she was unable to produce the exemption.[125]

155 The reasonableness of these grounds must be considered in view of:

(a) the recent change to the CHO directions which removed the requirement that a person have a letter of exemption if relying upon a medical exemption;

(b) the broad nature of the medical exemption, which required only that the wearing of a face-mask be "unsuitable";

---

121 T712, L12-14; T767, L15-18
122 T712, L15-20
123 T767, L18-20
124 T767, L17-18; T772, L17-29
125 T770, L4-5

(c) the briefing documents provided to Dolman included the "Trigger Points Ready Reckoner" which stated only that police may ask a person to confirm the lawful reason they are not wearing a face covering:

> Facemask – A person leaving their premises must comply with the face covering requirements ***Stay Safe Directions Melbourne or Stay Safe (Non-Melbourne) Directions (No 6)***"
>
> ***NB*** A person does not need a medical certificate stating that they have a lawful reason for not wearing a face covering. If a person has a lawful reason for not wearing a face covering, they do not need to apply for an exemption or permit. If a person is not wearing a face covering, police may stop the person and ask them to confirm the lawful reason they are not wearing a face covering.

(d) the reference in briefing and tactical documents to arrest for "blatant and obvious" breaches of CHO directions[126]. Failing to wear a fask-mask when claiming to hold a medical exemption, in circumstances where Dolman had no positive evidence Smit lacked a medical exemption, was not a blatant and obvious breach;

(e) the fact Smit confirmed, when asked, that she had a medical reason for not wearing a face-mask, which was a lawful reason for not wearing a face covering;

(f) the fact that (although not required to have one), Smit stated that she had a letter of exemption;

(g) the lack of any evidence that Smit was asked by Dolman, or any other police officer, to produce her letter of exemption and refused to do so; and

(h) Dolman's reluctance to ask Smit about her medical condition, because talking about a medical condition in groups of people could be embarrassing.[127]

---

126 See: JCB 699, JCB 591

127 T771, L29 – T772, L4

156 Given the breadth of the possible medical exemptions to wearing a face-mask, I do not accept that it was reasonable to draw any conclusions from the fact that Smit did not overtly appear to be suffering from a medical condition. In the circumstances, Dolman's belief that Smit did not have a lawful reason not to wear a face-mask amounted to an inference drawn from:

(a) his belief, based on the intelligence and her demeanour on the day, that she was the sort of person who would breach the CHO regulations; and

(b) the fact that she was one of five people claiming to be exempt and wearing a badge which said "EXEMPT".

157 As it transpired, the Court had evidence available to it that Smit was not entitled to claim a medical exemption. She admitted in cross-examination that she knew that her doctor did not believe she was entitled to an exemption. However, this is not relevant. Dolman had no such positive evidence that Smit was not entitled to claim the medical exemption. I am not satisfied that Dolman had reasonable grounds for believing (as opposed to suspecting) that Smit did not have an exemption from wearing a face-mask.

158 In relation to organising a gathering, Dolman relied upon:

(a) the intelligence documents he had received prior to the event, including Smit's Facebook post stating that she and the bus would be at the protest;[128]

(b) his assessment of the dominant and directing role she was playing within the group of people she was with in the first interaction;[129] and

(c) the fact that the group she was with had a megaphone and banner.[130]

---

128 T609, L1-4; T709, L30 – T710, L 3; T713, L9-10; T742, L31 – T743, L3; T746, L6-12; T756, L9-10; T761, L10-23

129 T711, L8-18; T743, L6; T747, L14-19; T747, L30 – T748, L4

130 T713, L11-15; T743, L3-5; T746, L12-15

159 I accept the intelligence documents included material which supported the inference that Smit was an organiser of the event. It is true, as Smit contended, that Jonas was described in those documents as "the organiser" of the protest. It is also true, as Smit contended, that she was described in those documents as a "journalist". However, Dolman was not required to take the statements in those documents on face value, without any regard to the context in which they appeared. I accept that a reasonable police officer could infer from the briefing documents that Smit was included as a POI because she was actively encouraging attendance at the protest. Smit's Facebook post stating she and the bus would be at the protest is a particular example of this, but more generally the repeated reference to her and the RDA in the intelligence summaries suggests an involvement in the protest that went beyond mere potential participation.

160 I also accept that, on several occasions in the first interaction and immediately prior to the first arrest, Smit acted as spokesperson for the entire group and that this also extended to directing the group as to particular next steps. The mere fact that a woman was assertive and articulate does not provide grounds for a belief that an offence was being committed. However, Smit's behaviour (as recorded in the video footage tendered in evidence) extended beyond being assertive and articulate, to positively challenging police with references to the Australian Constitution and other provisions said to prevent the police from acting as they proposed; speaking on behalf of other members in her group; and directing other members in their group as to how they should behave.

161 I accept it was reasonable for Dolman to form the view that Smit was part of a group that was there for the purposes of protest, as indicated by their possession of a banner and megaphone. She remained closely proximate to that group throughout the first interaction and in the period prior to the first arrest. She interacted with, and directed, members of the group. She claimed a close personal relationship with at least three members of the group (her partner, mother and father). She also claimed that two of the members of the group (her mother and

father) were working for RDA as her support people, notwithstanding the fact they were carrying protest material.

162 Finally, I accept it was reasonable for Dolman to form the view Smit was an organiser, notwithstanding the fact she claimed to be present as a journalist and was described in the intelligence documents as a journalist. Counsel for the defendant described Smit's submissions in relation to this issue as "form" over "substance". I accept the police were not bound to accept her express words at face value. They were entitled to interpret the words she used in the entire context, including the entirety of the intelligence documents, who she was with, her tone, facial expressions and what she and those she was with were doing at the time.

163 The grounds for Dolman's belief that Smit was an organiser can be contrasted with the available grounds for his belief that she lacked a medical exemption from wearing a face-mask. In relation to the question of whether she was an organiser, he relied upon positive material (intelligence and behavioural observations) which was directly relevant to the question of whether she was "organising" the protest.

164 Taking all these matters together, I accept there were reasonable grounds for Dolman to believe Smit was an organiser of the protest and that, accordingly, she was committing the offence of organising a gathering of more than ten people for the common purpose of protest.

165 For completeness, I note the issue in question is whether Dolman had reasonable grounds for his belief, not whether Smit actually was an organiser of the event. It may be that, properly interpreted, the CHO directions were more limited than Dolman believed. For example, the offence of organising may have been only completed once the gathering took place. The term "organising" may also be narrowly construed so as to exclude the type of steps taken by Smit. However, an

error of law, if based on reasonable grounds, may found a reasonable belief. In all the circumstances,[131] I am satisfied that Dolman held such a belief.

Did Dolman believe, on reasonable grounds, that arrest was necessary for a permitted purpose?

166 It can be inferred that Dolman believed the first arrest was necessary, to prevent the continuation of continuing the organising the protest; to protect the safety of the public; and to prevent a breach of the peace, from the following passages:

> "So if they left, um, then continuation, the organising the event – the ongoing organisation of the event would not continue, the preservation of the peace, um, would be affected, and safety of the public and the offender would also be affected. So therefore, arrest would no longer be necessary under 458."[132]
>
> …
>
> "The basis of the arrest was that she was breaching the CHO directives and that, um, because she was continuing the offence of organising the rally, um, because she was upsetting the peace, because safety, um, of herself and the public was paramount, ah, arrest was necessary."[133]

167 Nowhere in these passages does Dolman state he believed the first arrest was necessary to prevent the continuation of the offence of failing to wear a face-mask. This suggests that Dolman did not believe the first arrest was necessary for that purpose.

168 It is not sufficient for Dolman to believe that he was acting for a permitted purpose under s458. The defendant must also establish there were reasonable grounds for that belief. The first arrest involved Smit being taken to Lansdowne St and then detained while her address details were confirmed so that an infringement notice could be issued. Dolman did not directly explain *how and why* he believed the first arrest was necessary for a permitted purpose. Indeed, as events transpired, arresting Smit and taking her to Lansdowne Street for the purpose of issuing her

131 *Ruddock* at 626-627, paragraphs [41]-[46] and at 675, paragraph [229]
132 T725, L17-24
133 T725, L30 ─ T726, L4

an infringement notice appeared to attract further attention to her from media and supporters, thus providing her a platform to promote the protest.

169 The lack of direct evidence concerning *how and why* Dolman believed the first arrest was necessary for a permitted purpose makes it difficult to identify the grounds for his belief, and then to assess the reasonableness of those grounds.

170 For the following reasons, I am not satisfied Dolman believed, on reasonable grounds, that it was necessary to arrest Smit for the purpose of preventing her continuing to breach the CHO directions by failing to wear a face-mask:

(a) first, Dolman did not state in evidence that preventing Smit from continuing to wear a face-mask was a purpose of the first arrest;

(b) second, it is difficult to see how arresting Smit and taking her to Lansdowne Street for the purpose of issuing an infringement notice, prevents her continuing the offence of failing to wear a face-mask;

(c) thirdly, an alternative was to direct Smit to put on a face-mask and warn her that, if she did not, she would be arrested. There is no evidence that this was ever done. Nor was she informed, at the time of the first arrest, that she was being arrested for failing to wear a face-mask;

(d) finally, in a context where:

(i) police already had Smit's address details and so could issue her an infringement notice;

(ii) the CHO directions had been amended so that a letter of exemption was no longer required;

(iii) the exemptions to the face-mask requirements were very broad; and

(iv) the "Trigger Points Ready Reckoner"[134] did not appear to contemplate arrest for failure to wear a face-mask where a medical excuse is provided,

I am not satisfied that there were reasonable grounds for believing it was necessary (as I have held that term should be defined) to arrest and issue her with an infringement notice to prevent continuation of the offence of failure to wear a face-mask.

171 However, I am satisfied that Dolman believed, on reasonable grounds, that it was necessary to arrest Smit to prevent her breaching the CHO directions by organising a gathering of more than ten people:

(a) it was apparent from the extracts of his evidence above that his belief she was organising a protest was a more pressing concern than failure to wear a face-mask;

(b) in the circumstances, organising a gathering of more than ten people for the purpose of protest was a more serious offence than failure to wear a face-mask; and

(c) although Dolman did not expressly explain his grounds in evidence, I accept he may have reasonably believed that arresting Smit and taking her away from the chosen site of protest (near a tree in Treasury Gardens) could interrupt and prevent her continuing the offence of organising a protest.

172 I do not accept that arresting Smit was necessary to ensure her attendance before a court. Dolman was aware that Smit's address details had been obtained during the first interaction, so there was no need to arrest her in order to issue an infringement notice.

134 Which Dolman was provided - T696, L18-23.

173 I am also satisfied that, by reason of her organising a gathering of more than ten people for the purpose of protest, Dolman believed, on reasonable grounds, that it was necessary to arrest Smit to preserve public order and for the safety or welfare of members of the public. A significant purpose of the CHO directions, as in force on 31 October 2020, was to prevent a super-spreader event. A gathering of more than ten people for the purpose of protest carried with it the risk of such an event. In this context, it was reasonable for Dolman to believe that Smit's arrest, if that arrest prevented her continuing to organise the protest, was necessary for the purpose of preserving public order and for the safety or welfare of members of the public.

Was the reason for the arrest communicated to Smit?

174 I have found that Dolman believed, on reasonable grounds, that Smit was committing the offence of organising a gathering of more than ten people for the purpose of protest, in breach of the CHO directions. I have also found that Dolman believed, on reasonable grounds, that Smit's arrest was necessary for the purpose of preventing the continuation of that offence and, thereby preserving public order, and for the safety or welfare of members of the public.

175 However, this was not ever explained to Smit on the day. At the time of the first arrest, the only explanation given by Dolman to Smit was that he had been told she had produced a permit which was not valid. The production of a permit does not go to either the question of whether Smit had an exemption for wearing a face-mask, nor the question of whether she was organising a gathering of more than ten people for the purpose of protest.

176 Dolman initially claimed in evidence that he had told Smit he thought that they were there to organise a protest and they needed to leave the area.[135] However, after being shown the bodycam footage, he accepted this was not the case. Nowhere in any of the extensive footage leading up to, or after the first arrest, can Dolman

135 T722, L2-10

be seen explaining that the reason for the first arrest was that he believed Smit was organising a gathering of more than ten people for the purpose of protest. I do not accept he ever provided such an explanation in relation to the first arrest.

177 The defendant submitted Smit should have known the reason for the arrest; and that, accordingly, the principle in *Christie* did not apply. However, the CHO directions were complex and rapidly changing. It seemed from video footage of the day that Smit believed the reason she was arrested was because police did not believe she was there for work purposes, rather than specifically for organising the gathering. Indeed, even during the course of the trial, Smit did not seem to understand it was alleged that, at the time of the first arrest, she was organising (as opposed to participating) in a gathering of more than ten people for the purpose of protest. Further, Dolman's own initial assertion that he had explained he believed Smit was organising a protest, evidences an understanding that this needed to be explained to Smit. As he himself said:

> "I needed to make - make it clear that they were continuing to do the behaviour that was in breach of the CHO directives."[136]

178 Dolman accepted that the explanation he gave at the time of the arrest (that Smit had produced a permit which was not valid) was "cumbersome" and not "as precise as it should have been".[137] He also explained his view that, when dealing with protestors (such as he believed Smit to be), it was necessary to communicate simply and clearly and providing too much information may invite complaint and misunderstanding.[138] However, the explanation for the first arrest provided by Dolman was neither simple nor clear. It did not inform Smit of the real reason for her arrest. Smit was entitled to understand the specific CHO directions she was alleged to be breaching, or at least the specific conduct she was alleged to be committing. She may have ceased that conduct. She may have responded by explaining further the reasons she believed she had not organised the protest (as

---

136 T724, L3-5. This also accords with the scripts provided in the Trigger Points Ready Reckoner – see JCB 727

137 T864, L23-24

138 T702, L17-30

opposed to focusing on her claim to be a journalist). If told a reason at the time she was being arrested that a reason was her failure to wear a face-mask, she may have put one on. One may think that, given Smit's demeanour on the day, this was not very likely. However, it is possible; and the failure to explain the reason for her arrest ruled that possibility out. This works against one of the purposes of the requirement in *Christie*, which is to provide the person arrested the opportunity to complain about the arrest and seek to persuade the arresting person that arrest was not necessary or appropriate.

179 I find that Dolman did not comply with the requirement in *Christie* to explain the grounds for Smit's first arrest. Accordingly, the first arrest was not lawful.

180 For completeness (although for other reasons I have found that not wearing a face-mask did not provide a justification for arrest), this finding applies both to breaching the CHO directions by organising a gathering of more than ten people for the purpose of protest and breaching the CHO directions by not wearing a face-mask.

How long was Smit under arrest?

181 Smit was detained for approximately fifteen to twenty minutes as a result of the first arrest.

Were there any aggravating circumstances?

182 The pleaded aggravating circumstances that could relate to the first arrest were:

(a) the lack of a valid reason to make the arrest;

(b) the continued use of handcuffs; and

(c) police awareness that she was a journalist and permitted to be in Treasury Gardens;

183 I have held there was a valid reason for the arrest (that Dolman believed on reasonable grounds she was organising a gathering of more than ten people for the purpose of protest). Her claims to be a journalist did not provide a defence to

this offence. In relation to the use of handcuffs, I accept the evidence of the police witnesses that this was reasonable in the circumstances in order to prevent risk to the safety of members of the public, the police and to Smit herself. Although perhaps those handcuffs could have been removed earlier, I accept it was reasonable to leave Smit handcuffed for a period of about fifteen minutes, in circumstances were there were many people gathered around the police and Smit on or near Lansdowne Street and the situation could have become inflamed.

Was the second arrest lawful?

Did Dolman find Smit committing an offence?

184 The defendant submitted that Dolman believed, on reasonable grounds, that Smit was breaching the CHO directions by:

(a) not wearing a face-mask;

(b) being more than 25 kilometres from her premises; and

(c) organising a gathering of more than ten people for the common purpose of protest.

185 The defendant further submitted that Dolman believed, on reasonable grounds, that Smit's arrest was necessary:

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

(b) to ensure Smit's attendance before a court;

(c) to preserve public order; and

(d) for the safety or welfare of members of the public or of Smit.

186 Smit submitted there were no reasonable grounds for Dolman to believe that she was committing any of these offences, nor that Smit's arrest was necessary to a permitted purpose. She contended that Dolman had essentially arrested her for

being an assertive, vocal woman who knew her rights and was irritating him by refusing to comply with his (unlawful) direction to move on.

What was Dolman's actual belief?

187 In relation to the second arrest, Dolman gave evidence that he believed that Smit had breached the CHO directions by failing to wear a mask, being more than 25 kilometres from her premises and organising a gathering of more than ten people for the purpose of protest.[139]

188 For the reasons already given, I accept that Dolman had an actual belief that Smit was breaching the CHO directions by failing to wear a mask. I also accept that, at the time of the second arrest, Dolman believed she was breaching the CHO directions by being more than 25 kilometres from her premises and organising a gathering of more than ten people for the purpose of protest.

Was this belief held on reasonable grounds?

189 For the reasons already given:

(a) I do not accept there were reasonable grounds for believing that Smit was breaching the CHO directions by failing to wear a mask; and

(b) I do accept there were reasonable grounds for believing Smit was breaching the CHO directions by organising a gathering of more than ten people. If anything, those reasons were stronger by the time of the second arrest, given Smit's attitude and demeanour, and particularly her engagement with her supporters and determination to livestream during the first arrest.

190 In relation to being more than 25 kilometres from her premises, it was not in dispute that Smit was more than 25 kilometres from her premises. However, Smit claimed to be exempt from that requirement because she was present as a journalist. Here, it must be remembered that the question was not whether Smit was a journalist, nor even whether or not she was present in her capacity as a journalist,

139 T730, L2-17

but whether Dolman had reasonable grounds for believing she was not present for the purposes of work. I am satisfied he had reasonable grounds for this belief. The sole ground that Smit relied upon for being outside her 25-kilometre zone was that she was a journalist who had a work permit. It was reasonable for Dolman to believe a person could not both be an activist and a journalist at the same time. Given his belief (which I have held was based on reasonable grounds) that Smit was present to organise a gathering of more than ten people for the purpose of protest, it was therefore reasonable for him to believe she was not there for the purpose of working as a journalist. This is particularly so in the context of the intelligence documents to which Dolman was privy, especially in relation to Smit's Facebook post stating that she would be in the protest and her association with the bus. It is also supported by his observations of her demeanour, including her speaking on behalf of other people who were carrying the trappings of protest and her reliance upon constitutional provisions. There was no necessity to actually view Smit's permit in order to form these beliefs on reasonable grounds.

Did Dolman believe, on reasonable grounds, that arrest was necessary for a permitted purpose?

191 For the reasons already given, I do not accept that Dolman believed, on reasonable grounds, that Smit's arrest was necessary to prevent her continuing breaching the CHO directions by failing to wear a face-mask. Nothing significant had changed in this regard between the first and second arrest.

192 I accept Dolman believed, on reasonable grounds, that Smit's arrest was necessary to prevent her continuing to organise a gathering of more than ten people for the purpose of protest. If anything, the grounds for this belief were stronger in relation to the second arrest than the first, given his proposal (that she be arrested and bailed with conditions not to return) would have actually significantly prevented her continuing to organise the gathering. I also accept, for the reasons already given, that preventing Smit continuing the offence of

organising a gathering of more than ten people for the purpose of protest was necessary for public order and for the safety and welfare of members of the public.

193 Finally, I accept that Dolman believed, on reasonable grounds, that Smit's arrest was necessary to prevent her continuing to breach the CHO directions by being more than 25 kilometres from her premises. Dolman believed she had travelled more than 25 kilometres from her premises for the purpose of organising and participating in a protest at Treasury Gardens. Although she was never specifically directed to return to her 25-kilometre zone, she was directed by Dolman to move on. She refused to do so, maintaining she had an entitlement to be at the Treasury Gardens. In the circumstances, there were reasonable grounds for Dolman to believe it was necessary, to prevent Smit being outside her 25-kilometre zone, for her to be arrested and bailed on condition that she not return to Treasury Gardens. This would have removed her reason for being in Treasury Gardens and, it follows, her reason for being outside her 25-kilometre zone. Thus, it was necessary for to prevent the continuation of the offence.

Was the reason for the arrest communicated to Smit?

194 Smit was provided three reasons for the second arrest:

(a) failure to wear a face-mask;

(b) being outside her 25-kilometre zone; and

(c) failure to move on.

195 It was still not explained to her that Dolman believed she was committing a breach of the CHO directions by organising a protest of more than ten people.

196 However, the fact that she was breaching the CHO directions by being outside her 25-kilometre zone was explained to Smit. I have found that Dolman believed on reasonable grounds she was breaching the CHO regulations by being outside her 25-kilometre zone and that it was necessary for a permitted purpose to arrest her

to prevent the continuation of this offence. This is sufficient to satisfy the requirement in *Christie* and provide a lawful basis for Smit's arrest.

197 Accordingly, I am satisfied that the second arrest was lawful.

How long was Smit under arrest?

198 The second arrest continued for approximately thirty-five to forty-five minutes. Smit spent a considerable amount of this period sitting alone, handcuffed, in a brawler van.

Were there any aggravating circumstances?

199 Although I have found the second arrest was lawful, for completeness, I record that, although I am not satisfied there were aggravating circumstances, I do accept the second arrest would have been particularly upsetting for Smit. Sitting alone in the brawler van, not knowing if, and when, she would be moved and without any support or devices, must have been distressing for Smit. Indeed, she appeared distressed and shocked when the van door was opened and an officer removed, then replaced, her handcuffs. However, I do not think the duration of her period of confinement was unreasonable in the circumstances, particularly given the careful consideration that needed to be given to the question of whether it would be safe to process Smit indoors at a police station, given the COVID transmission risk. I also accept that handcuffing her and placing her in a brawler van was reasonable, both in terms of preparing her for the anticipated transport and in terms of preventing her continuing to breach the CHO directions by organising a gathering of more than ten people for the purpose of protest.

Was the third arrest lawful?

Did Papworth find Smith committing an offence?

200 Papworth's evidence was that he gave the direction to implement the tactical plan of cordon and arrest because he believed there was a group of more than ten people[140] for a common purpose[141] and he believed it was necessary to do so:[142]

(a) to prevent continuation of the offence; and

(b) to obtain address details of the offenders to ensure their appearance before the Court if that was required.

201 The grounds he provided for his belief there was a gathering of more than ten people for a common purpose were:[143]

(a) people were gathered in one area, standing together and talking with one another; and

(b) some people had placards and wore screen-printed t-shirts indicating they were part of a protest group.

202 Although he did not say so expressly, his contextual knowledge of the planned protest at the Treasury Gardens must have also fed into this belief.

What was Papworth's actual belief?

203 Papworth clearly had very little accurate recollection of the events of the day. He had no recollection of Smit being in the cordon, despite his knowledge of her as a person of interest. He relied on his belief that he had observed placards in the group, but there were no placards to be seen in any of the tendered video footage. He gave evidence that he formed the belief there was a group of more than ten people gathered for a common purpose, but he was unable to provide any more accurate information about the number of people present. The manner in which

140 T460, L21-2; T467, L24-27; T495, L25-27; T499, L11-16
141 T462, L16-27
142 T443, L13-15; T463, L12-15; T467, L4-6
143 T462, L22-27; T523, L23-28; T591, L4-10; T499, L12-30; T591, L4-10

his evidence was given left me with the impression it was a reconstruction based on his belief that he would have formed the required belief, rather than a direct recollection of the events of the day. However, as I will explain in more detail below, his view that there were more than ten people gathered in a group was corroborated by the evidence of Templeton, and other documents. Further, his lack of recollection (and inaccuracy of recollection in relation to placards) is understandable, given the lapse of time and the many protests he would have attended. It did not cause me to doubt his fundamental honesty. Nothing suggests that he would have implemented the tactical plan of cordon and arrest if he did not believe there was a group of more than ten people gathered for a common purpose.

204 I accept Papworth actually believed there was a group of more than ten people gathered for a common purpose and that it was necessary to implement the tactical plan of cordon and arrest for the purpose of preventing the continuation of this offence and obtaining arrest details.

205 The defendant also submitted that the arrest was made because it was necessary for the safety or welfare of member of the public. Papworth did not directly provide this as one of the grounds of his arrest. However, during the course of cross-examination, there was the following exchange:

> SMIT: Did you arrest me for the safety of welfare of members of the public or for myself?
>
> PAPWORTH: Arguably, Your Honour, the Chief Health Officer's directions were there for the safety of the public.
>
> SMIT: No, It's about your mind. Was – did you arrest me for the safety of others or myself in that moment?
>
> PAPWORTH: Well, through, the – through the preventing of the continuance of the offence, Your Honour….By extrapolation, that is.

206 Papworth did not include this in the grounds for his arrest when directly asked. Even in response to a direct question, he initially responded with a tenuous "arguably" and when pressed explained that it was only "by extrapolation" from his

goal of preventing the continuance of the offence. His recall of the events of the day and his state of mind was very limited. His answer appeared more like a consideration of an argument for arrest than a recollection of an actual belief. In the circumstances, I do not accept that, at the time he made the direction to implement the tactical plan, Papworth held an actual belief that the arrest was necessary for safety.

Was this belief held on reasonable grounds?

207 I address the numbers present in the group in more detail below when considering whether the implementation of the tactical plan of cordon and arrest was necessary. It suffices, for present purposes, to say the CHO directions do not define a "group" as people who are less than 1.5 metres from each other. Indeed, the CHO directions required a person to take reasonable steps to maintain a distance of 1.5 metres from all other persons who were not members of their household (even if gathered in a group).[144] I accept there were reasonable grounds for believing that a group of more than ten people had gathered at the time Papworth gave the direction to implement the tactical plan.

208 The key dispute between the parties was not whether ten people had gathered, but whether there were reasonable grounds for Papworth to believe that the group (including Smit) was gathering for a "common purpose". The defendant submitted there were.

209 In her evidence, Smit admitted that:

(a) she was part of the same community as the protestors;

(b) she was aligned with the "sentiments" of the protest; and

(c) she believed that "together we are all trying to save our country".[145]

144 Note 1 to Direction 5, JCB 842
145 T252, L24-25

210 Nevertheless, Smit submitted there were not reasonable grounds for Papworth to believe she was there for a common purpose with the rest of the group. She maintained that she was there as a journalist. She accepted she was there for a *similar* purpose, but said she was not there for a *common* purpose. She submitted that, given her claims to be a journalist, some investigation was required by Papworth before he implemented the tactical plan of cordon and arrest.

211 I pause to reiterate that the issue for determination is not whether or not Smit had a common purpose with the protestors, nor whether or not she was there as a journalist, but whether or not Papworth had reasonable grounds for believing Smit was part of a group of more than ten gathering for a common purpose in breach of the CHO directions.

212 The reasonableness of Papworth's belief must be assessed in the context of his knowledge of the planned protest that day, the police intelligence in relation to that protest, and the significant police presence. In that context, taken alone, the fact that a group of more than ten people were gathering in Treasury Gardens is reasonable grounds for a belief that they were there for the purpose of protest.

213 Papworth does appear to have incorrectly recalled there were placards present. However, there is, in the video footage tendered:

(a) prior to the first arrest, the large banner held by Jonas and John Smit;

(b) during the cordon, an Australian flag modified by affixing a large white heart planted in rocks just outside the cordon.

214 Although not technically placards, I think it is likely that this is the type of protest material that Papworth was recalling.

215 Papworth's recollection that there were people wearing screen-printed t-shirts was accurate. There were at least five people within the cordon wearing t-shirts with slogans, such as "FREEDOM", "SACK DAN ANDREWS" and "Freedom Fighter

2020". Of these, three people were wearing a t-shirt which read "Freedom Fighter 2020". One of the people wearing a "Freedom Fighter 2020" t-shirt was Smit.

216 Papworth had reasonable grounds for his belief that there was a gathering of more than ten people for the common purpose of protest.

217 In relation to whether Papworth had reasonable grounds for believing that Smit, in particular, was part of the group gathering for a common purpose:

(a) she was physically proximate to the group;

(b) she was wearing a t-shirt emblazoned with the words "Freedom Fighter 2020";

(c) throughout the video footage she could be seen interacting with people there for the purpose of protest. It is likely she was also doing this when observed by Papworth;

(d) she was holding a phone and microphone; and

(e) although by the time he gave evidence, Papworth could not recall Smit being there, he knew who she was and that she was named as a POI in police intelligence.

218 As her arrest became imminent, Smit claimed to be a journalist. However, unlike other journalists present, she did not leave the cordon with her hands on her head when directed to do so. In any event, her claim to be working as a journalist was not necessarily inconsistent with Papworth forming a belief, on reasonable grounds, that she was part of a gathering of more than ten for a common purpose. Direction 5(f) of the "Stay Safe Directions" permitted the organisation of a gathering *for the purpose* of undertaking work. However, there was no other work-based express exception for attending a gathering of more than ten people for a common purpose. The gathering Papworth identified was not organised for the purpose of work. Thus, even if Smit was performing "work", in the sense of income-earning

activity on that day, it would not exempt her from the requirement that she not gather with a group of more than ten for a common purpose. The fortuitous (for her) fact that she was able to earn some money from her activities would not negate the reasonableness of Papworth's belief that she was there for a purpose held in common with the other protestors present on that day.

219 The prohibition in the CHO directions was on meeting for a *common purpose*, not on meeting for a *common activity*. That Smit was furthering this purpose by not only being there, but also by livestreaming, and recording and posting videos, whereas others were furthering this purpose merely by being there, also did not negate the reasonableness of Papworth's grounds for believing she held a common purpose with the group. That purpose was to protest – that is, to join together in voicing their opposition to Dan Andrews and the COVID-19 lockdowns and restrictions.

220 I accept there were reasonable grounds for Papworth to believe that there was a group of more than ten gathering for a common purpose in breach of the CHO directions, and that Smit was part of that group.

Did Papworth believe, on reasonable grounds, that arrest was necessary for permitted purpose?

At the time he gave instruction

221 Papworth's evidence was that he believed the implementation of the tactical plan of cordon and arrest was necessary for two reasons: to prevent the continuation of the offence and to establish the identity of those people who were committing an offence.[146]

222 Before considering the permitted purposes relied upon, it is first necessary to determine the number of people that Papworth believed were gathering for a common purpose at the time he issued the direction to implement the tactical plan.

146 T463, L10-15

Papworth's own evidence, given repeatedly, was that he could recall no more than there was a group of more than ten.

223 The defendant submitted that it sufficed that Papworth formed the view that a group of more than ten had gathered for a common purpose.

224 Smit submitted that, even if there was a group of more than ten gathering for a common purpose, this fact alone was not sufficient to make it "necessary" for arrest within the meaning of s458. She said that there had to be many more than ten people gathering for there to be a blatant and obvious breach sufficient to justify arrest. Support for this submission can be found in:

(a) Templeton's evidence that he would not have approved the tactical response of a cordon if there were only thirteen to fifteen people there;[147] and

(b) the distinction drawn in the tactical plan between Tier 3 ("a group of more than 10… Must engage and enforce.") and Tier 4, a "Large group / mass gathering … Consider tactical response".

225 It is not necessary to decide this issue, because I am satisfied that, at the time Papworth gave the direction to implement the tactical plan, there were between twenty-five and thirty people gathered for a common purpose in breach of the CHO directions, and that this would have been apparent to Papworth at the time. I am satisfied that twenty to thirty people was a blatant and obvious breach of the CHO directions and fell within the definition of a large group/mass gathering for the purposes of Tier 4 of the tactical plan.

226 There is no footage of the point in time when Papworth gave the direction to implement the tactical plan. My finding that there were between twenty-five and thirty people in the group is an inference made on the basis of the following evidence:

147 T839, L17-20

(a) the touchstone for a "gathering" was not being less than 1.5 metres apart. There may be a "gathering", even if all members were socially distanced. Thus, the CHO directions expressly authorised meetings with up to nine other people for exercise or social interaction, but required reasonable steps to maintain a distance of 1.5 metres from all other persons;[148]

(b) it is reasonable to assume that Papworth honestly described the scene he observed to Templeton. I accept Templeton's evidence that he would not have approved the use of the cordon if Papworth said no more than that there were more than ten people gathering;

(c) Templeton's evidence was that he observed the cordon shortly after it formed and saw approximately thirty people within it. The quality of Templeton's recollection appeared more direct and precise than Papworth's;[149]

(d) it is difficult to count the people in the cordon in the available video footage, however there were at least seventeen people remaining within the cordon at the time Papworth gave the direction to those within the cordon to put their hands on their heads. Several people can be observed leaving the cordon before this time, including people who appeared to be present for the purpose of protest, such as a woman wearing a Freedom Fighter 2020 t-shirt, and the man called Justin who was involved in the first interaction;

(e) Elliott's bodycam footage recommences at 12.17am. She is heard to ask at about 12.18am, how many people are in the group, and suggests twenty or twenty-two people;[150]

(f) Smit comments, during a livestream video,[151] that there were about twenty-five people there, all socially distancing. She then gives a figure of twenty

---

148 Clause 9(4), "A person leaving under subclause (2) or (3) must take reasonable steps to maintain a distance of 1.5 metres from all other persons" at JCB 847

149 T838, L20-23; T835, L22-23

150 Elliott bodycam footage at 12.18am

151 Exhibit D11

people. The number of people she claims to be present then progressively reduces to ten, and then five. In a livestream video after the arrest,[152] Smit comments that there were about "fifteen people". She also says there were about 200 cops, which she says amounts to "ten cops per person". These estimates wildly vary, however I formed the view that her most generous, initial estimate was more likely to be accurate;

(g) an intelligence summary issued at 12.30pm on 31 October 2020 states that, at 11.30am, there were approximately fifty to sixty protestors spread out in small groups throughout Treasury Gardens and that at 12.15am, approximately twenty protestors were cordoned near Treasury Gardens;[153]

(h) a document headed "Post-Event Report – Demonstration" records that, at about 12.20am, a Tier-4 trigger was identified and a group of twenty-four people were cordoned and processed by way of infringement notice;[154]

(i) the Operation Prevail Enforcement Return for 31 October 2020 lists twenty-two infringement notices issued for "Unlawful/outdoor gathering – metro area" or "Gathering in Public" between 12.25pm and 12.59pm.

227 I am satisfied that, at the time Papworth gave the direction to implement the tactical plan of cordon and arrest, he believed on reasonable grounds that it was necessary to do so for a permitted purpose under s458.

At time of arrest

228 There is no evidence of the precise moment that Papworth issued the direction to implement the tactical plan of cordon and arrest. A video from the day recorded by "Zac" establishes that the cordon was already in place by at least 12.14pm.[155] The bodycam footage shows Smit's third arrest occurred at about 12.23pm. According to an intelligence summary with a report date and time of 12.30pm on

152 Exhibit D12
153 JCB 547
154 JCB 537
155 Exhibit P55

31 October 2020, at 11.30am there were approximately fifty to sixty protestors spread out in small groups "but no large cohesive group".[156] According to Watson's Day Book entry notes,[157] she spoke to Smit as she was being released at 11.40am. According to Aitken's Day Book entry notes, this conversation occurred at 11.55am. A video compiled by Smit and posted on the RDA website shows her speaking to the press for about three to four minutes and saying:

> "If we stay in groups of ten and we do our speeches, then we can have the event … so that is really great … They did highly suggest that we go home … but yeah, we are still going to have some speeches, so yeah, where is Morgan."[158]

229 She is then seen recording a livestream direct to camera for about two to three minutes, saying:

> "If you do want to hear the speeches and want to stay in groups of ten and wear a mask, we would really love you to come on down to Treasury Gardens … we are having the speeches legally and the police are getting to let us have the speeches."[159]

230 There is also video footage taken by "Rukshan",[160] which appears to commence after Smit is released and after she has spoken to the press, but before she livestreams (she can be seen doing so in the video). In this footage, at about the four-minute and-forty-nine-second mark, a group of people, including Smit, are seen walking together into Treasury Gardens from Lansdowne Street. According to Dolman's Day Book entry notes,[161] he was reposted to surround a group of persons unlawfully assembling at 11.45am. The time in Dolman's notes cannot sit together with the time recorded by Watson or Aitken, as the events described above would require at least seven-to-eight minutes between Smit's release and a group (including Smit) forming in Treasury Gardens. However, I think it unlikely the time he recorded would be wholly inaccurate. In the circumstances, it is probable that the direction to implement the tactical plan of cordon and arrest had

156 JCB 547
157 SCB 5
158 Exhibit D9
159 Exhibit D9
160 Exhibit P49
161 JCB 379 and 907

been given by 12 noon. There was, therefore, a temporal gap of at least ten minutes, and probably more than twenty minutes, between Papworth first issuing the instruction to implement the tactical plan of cordon and arrest and the point in time when Smit was actually taken into custody by Elliott.

231 Once Papworth gave his direction, the process then proceeded through three distinct phases. First, police formed up into the cordon, encircling the protestors and then slowly moving forward to reduce the size of the cordon. Second, Papworth issued instructions through a megaphone to those present to put their hands on their heads and move to the edge of the cordon to be arrested. Those who did so were arrested and processed. Third, PORT teams moved in to arrest those who remained in the cordon and had not put their hands on their heads. Throughout this period, Papworth remained to monitor the implementation of the tactical plan. He can be observed in the tendered footage closely monitoring the progress of the cordon and subsequent arrests.

232 Despite these three distinct phases, the defendant relied upon a single instruction, given by Papworth prior to the formation of the cordon, to implement the tactical plan of cordon and arrest. Papworth's stated basis for issuing this instruction was that:

(a) he believed, on reasonable grounds, there was a gathering of a group of more than ten people with a common purpose in breach of the CHO directions;[162] and

(b) he believed, on reasonable grounds, that arrest of the people within the cordon was necessary to prevent the continuation of that offence and to establish the identity of the people involved in the offending.[163]

233 It appears that Smit was, if not the last arrested, one of the last arrested in the group. She was standing by herself, surrounded by dozens of police officers. She

162 T460, L21-24, T462, L1-8, T463, L4-9
163 T463, L12-15

was clearly no longer committing the offence of gathering with a group of more than ten people with a common purpose in breach of the CHO directions. She had been prevented from continuing to commit the offence. There was no evidence that Papworth then formed a new reasonable belief which fell within the scope of s458 (for example, that Smit's arrest was necessary to prevent Smit organising the re-formation of a group of more than ten people elsewhere).

234 This raises a question – can Elliott rely on an instruction given by Papworth, who at the time he gave the instruction was empowered to arrest under s458, if, by the time she acts on that instruction, Papworth is no longer empowered to arrest under s458?

235 The defendant contended that Elliott could, and that s458 should be interpreted to allow an arrest to be made by a person instructed to arrest if, at the time of instruction, the person giving the instruction had the power to arrest. This amounted to a contention that the validity of the instruction to arrest continued even if, by the time of arrest, the person giving the instruction no longer had the power to arrest. It submitted that this interpretation ought be preferred because:

> "… it would be a perverse result if a group of 20 people are all to be arrested and after the first 11 are arrested, the remaining 9 can't be arrested because there's no longer a sufficiently large group."[164]

236 However, a number of matters tend against this interpretation:

(a) first, the principle of legality requires the Court to prefer an interpretation which has a lesser impact on the right to liberty;

(b) second, as a matter of grammar:

(i) the use of the conjunctive adverb "when" in the phrase "when instructed to do so", suggests that the arrest must be temporally connected to the

164 T1214, L26-31

instruction to arrest, that is, the time at which an arrest under s458(1)(b) can be made is "when" instructed to do so;

(ii) similarly, the continuous form of the verb "to have" is used in the phrase "by any police officer having power", suggesting that the person giving the instruction has an ongoing power to arrest;

(c) third, if this interpretation were adopted, it would create a situation where a police officer, by giving an instruction under s458(1)(b), could delegate a power of arrest to another person which was more extensive than the power they themselves held – that is, continued even once the police officer no longer had reasonable grounds for believing that arrest was necessary for one of the permitted purposes;

(d) fourth, it undermines the express legislative intent apparent in s458(3) that detention continue only so long as the reason for arrest "continues". Indeed, an alternative way to analyse the facts of this case is that an arrest was made once the cordon was in place and the people within it prevented from leaving. From that point on, s458(3) would operate to require release once the reason for arrest ceased;

(e) fifth, such an interpretation may have unintended ramifications beyond the particular circumstances of this case, which concern a tactical police response to CHO directions which are no longer in force;

(f) sixth, the result (that Smit could not be lawfully arrested for continuing an offence she was not, in fact continuing at the moment of arrest) is not perverse when one considers that the power to arrest under s458 is not available for the purpose of punishment, but for one of the four specified purposes in s458(1)(a), and survives only so long as arrest is necessary for one of those purposes; and

(g) seventh, as I have already noted, "necessary" is a strong word, which extends beyond "convenient, reasonable or sensible". It may be convenient for a police officer to issue a global instruction to arrest a large group of people; and then to be relieved of responsibility for turning their mind to whether an individual arrest is authorised under s458. It may also be convenient that, as Templeton put it, the police are able to "complete the act of what we did by … putting the cordon in place".[165] To borrow the words of Gaudron and McHugh JJ in *Plenty v Dillon*,[166] inconvenience "is not a ground for eroding fundamental common law rights".

237 There were dozens, perhaps even hundreds, of police officers present on that day to handle an unexpectedly small number of protestors. This was not a crisis situation, but the calm execution of a pre-organised tactical plan. As I have noted above, the tactical plan proceeded in three distinct stages. Perhaps, in other circumstances, the arrest of twenty people in quick succession may be viewed as a single act with no opportunity for further consideration, but that was not this case. There was time and opportunity for Papworth to consider whether the grounds for arrest continued as events unfolded and to adjust his beliefs accordingly. The seriousness of arrest for the individual rights of those arrested – and the limitations of s458 – required that consideration to occur.

238 Papworth's instruction to arrest may be viewed as an ongoing one. However, insofar as his instruction to arrest Smit was based on a belief that Smit was committing the offence of breaching the CHO directions by gathering in a group of more than ten people for a common purpose, and the arrest was necessary to prevent the continuation of that offence, it lacked reasonable grounds once it was reasonably apparent Ms Smit had been effectively prevented from continuing to commit that offence. Further, as Papworth himself conceded,[167] he did not have reasonable grounds for believing Smit's arrest was necessary to establish her

165 T844, L6-7
166 (1991) 171 CLR 635 at 654
167 T623, L16-21

identity. His said, in evidence, that he could not recall knowing she was in the cordon, however he did not deny that he knew she was there and thought he would have been made aware that she was there.[168] In any event, given the intelligence briefings naming her as a POI; his own prior knowledge of Smit;[169] and his role as Zone Commander, he ought reasonably have been aware of her identity, at least by the point in time when she was standing alone in the cordon, about to be arrested. I do not accept Papworth believed, on reasonable grounds, it was necessary to arrest Smit to establish her identity (and thereby ensure her attendance before a court).

239 It may have been possible for Papworth, at that point, to form a different belief on reasonable grounds that justified the continuation of his instruction to arrest (for example that arrest was necessary to prevent the commission of a further offence). However, there is no direct evidence to this effect.[170] The defendant submitted that I should infer that by "continuing" Papworth intended to mean "continuing, repeating or commissioning a further offence". Papworth was a senior police officer who appeared practised at giving evidence and chose his words carefully. I am not prepared to draw this inference.

240 I am not satisfied that Smit's third arrest was authorised under s458. Accordingly, her claim for false imprisonment in relation to this arrest is made out.

Was the reason for the arrest communicated to Smit?

241 Papworth communicated the reason for the arrest, that is, "you are a group that is in breach of the CHO's directions"[171] to everyone within the cordon via megaphone. Further, as a result of her conversation with Aitken and Watson, Smit was aware that, if she participated in a gathering of more than ten people for a

168 T468, L20 – T469, L2
169 See, for example: T453, L22-24; T454, L16-20; T458, L20-24; T459, L10-15; T471, L2-12
170 Although this issue was raised with the parties before Papworth was excused from giving further evidence.
171 Bodycam footage of Elliott at 12.20pm

common purpose, she was liable to be arrested. This requirement has been satisfied.

How long was Smit under arrest?

242 Approximately twenty minutes elapsed from the time Smit was arrested by Elliott until she was issued an infringement notice and allowed to leave.

Were there any aggravating circumstances?

243 I am not satisfied that there were any aggravating circumstances in relation to this arrest.

244 It would have been an intimidating, even frightening, experience to be within the cordon as it tightened. However, I have accepted that, at the time the direction to form the cordon was given, there were reasonable grounds for Papworth to believe that Smit was part of a gathering of more than ten people for a common purpose in breach of the CHO directions, and that arrest was necessary to prevent the continuation of the offence.

245 I have found that the fact that Smit claimed to be a journalist did not prevent Papworth forming this belief on reasonable grounds. Accordingly, this was not an aggravating factor.

246 Further, I accept that using large numbers of police in a tactical response of this kind reduces the risk of injury to those in the cordon, to bystanders, and to the police; and it was reasonable for the police to use the resources available to them in the circumstances.

247 Smit was not handcuffed at any time during the third arrest. Prior to her arrest, she is likely to have seen at least two others (including Jonas) arrested in a physical manner by members of the PORT team. Her upset at the manner of Jonas's arrest does not form part of her claim for false imprisonment. Her own arrest was gentle in the circumstances, and comprised of little more than Elliott taking hold of her arm and walking her from the cordon.

How much should be awarded for damages?

248 I have found that the first and third arrests were not lawful.

249 Of these, I find that the first arrest was the more distressing for Smit. This was the first time she had been arrested. She was placed in handcuffs. She appears visibly distressed in the footage of her shortly after her arrest, although she composes herself remarkably rapidly.

250 However, as I explained earlier, Smit's evidence was unreliable. She had a tendency to view everything through the lens of what would further her desired narrative as a freedom fighter and hero for her people. In accordance with this narrative, she did make frank admissions of her recovery from the adverse events of 31 October 2020. However, there was also a performative and melodramatic element to her claims of distress. She claimed that as a result of her arrest her reputation suffered and members of parliament no longer spoke to her. However, she was unable to provide any specific details of any person who thought less of her, or did not engage with her, as a result of the arrest. She claimed to be concerned about her reputation as she was walked from the arrest site to Lansdowne Street, yet supporters can be heard calling out messages of support. Smit herself proclaimed on the day that the police actions were "great PR for me"[172]. She relied upon her arrests to further her cause, both on the day and subsequently.

251 Further, she failed to call any other witnesses who could have given evidence of the impact of the arrests upon her, such as her partner Jonas or her parents Lise Smit or John Smit.[173] I am not satisfied that there was a good explanation for the failure to call these witnesses. I infer that their evidence would not have assisted Smit on the question of quantum of damages.

---

[172] Bodycam footage of Elliott at 10.47am

[173] Noting that the principle in *Jones v Dunkel* (1959) 101 CLR 298 (that an adverse inference may be drawn for failure to call a witness) was explained to Smit at a pre-trial directions hearing on 27 June 2024 and during the course of trial.

252 I accept that Smit was genuinely distressed because of the first arrest. Even after she composed herself, there was an element of bravado in her demeanour. However, I do not accept there were any long-term impacts on her reputation or mental health as a result, specifically, of this arrest.

253 I was also left with the impression that Smit's most significant source of distress on the day was that the police did not accept she was there for the purposes of work as a journalist. I have found that there were reasonable grounds for the police to form this view. Her distress at their refusal to accept that she was a journalist cannot be attributed to her false imprisonment. On the other hand, her distress at the arrest itself, and also her lack of understanding of the real reason for the first arrest, is compensable.

254 I have had regard to all of the cases referred to by the parties in relation to quantum. Each case must be decided on its own facts. However, what is clear from the authorities is that any wrongful arrest is, in and of itself, a serious matter. The first arrest was of relatively-short duration and did not involve any aggravating circumstances. However, the impact on Smit of this arrest ought not be trivialised. In all of the circumstances, I assess the damages for this arrest at $3,000.

255 In relation to the third arrest, I have found that the initial instruction to cordon and arrest was lawful. Accordingly, Smit cannot be compensated for any distress she felt because of being in this cordon. Nor can she be compensated for the distress she felt in observing Jonas being arrested. Her own actual arrest was relatively gentle. She was simply taken by the arm by Elliott and informed she was under arrest. She was then led to the processing table without any visible signs of distress. This arrest was also of relatively-short duration and did not involve any aggravating circumstances. As with the first arrest, I do not accept it impacted Smit to the extent she asserted in her evidence. Of the three arrests, this arrest clearly had the least impact upon Smit. No wrongful arrest is a trivial matter. However, in all the circumstances, I assess damages for this arrest at $1,000.

256 For completeness, as I have already noted, I consider the second arrest was the most distressing for Smit. Had I concluded this arrest was wrongful, I would have assessed damages at $5,000.

257 In summary, I award Smit a total of $4,000 damages for her false imprisonment in relation to the first and third arrests.
