CITATION:	*The Queen v Webb & Ors* [2017] NTSC 94
PARTIES:	THE QUEEN v WEBB, Timothy Edward Alexander and DOWLING, Franz and PESTORIUS, Margaret Cecila and PAINE, Andrew William and DOWLING, James Joseph
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NOS:	21712099 21712100 21712103 21712105 21712113
DELIVERED ON:	22 November 2017
DELIVERED AT:	Alice Springs
HEARING DATE:	22 November 2017
RULING OF:	Reeves J

CATCHWORDS:

CRIMINAL LAW **–** defences – where accused charged with entering a prohibited area (the Joint Defence Facility Pine Gap) and possessing a photographic apparatus under ss 9 and 17 of the *Defences (Special Undertakings) Act 1959* (Cth) – whether defences under ss 10.3 sudden or extraordinary emergency and 10.4 self-defence of the *Criminal Code Act 1995* (Cth) should be put forward for consideration by the jury – where accused believed the Joint Defence Facility Pine Gap was involved in facilitating drone strikes and bombing raids killing innocent civilians in foreign countries – whether accused discharged their evidential burden under s 13.2(2) of the *Criminal Code Act 1995* (Cth) – whether the accused's response was the only reasonable response – whether the accused believed conduct was a reasonable response – whether accused's subjective belief was reasonably held – whether conduct was necessary for self-defence – whether conduct was a reasonable response in the circumstances as perceived by the accused

Held: defences should not be put forward for consideration by the jury

Defence (Special Undertakings) Act 1952 (Cth) ss 9, 17
Criminal Code Act 1995 (Cth) ss 10.3, 10.3(2), 10.3(2)(b), 10.3(2)(c), 10.4, 10.4(2), 10.4(2)(a), 10.4(2)(b), 10.4(2)(c), 10.4(2)(d), 10.4(2)(e), 13.3, 13.3(2)

B v R [2015] NSWCCA 103, *Leichhardt Council v Geitonia Pty Ltd (No 6)* (2015) 209 LGERA 120; [2015] NSWLEC 51, *Loughnan* [1981] VR 443, *Mark v Henshaw* (1998) 85 FCR 555, *Nguyen v The Queen* [2005] WASCA 22, *Oblach v The Queen* (2005) 65 NSWLR 75; [2005] NSWCCA 440, *Perka* (1984) 14 CCC (3d) 385, *R v Katarzynski* [2002] NSWSC 613, *Rogers* (1996) 86 A Crim R 542, *Warnakulasuriya v The Queen* (2012) 261 FLR 260; [2012] WASCA 10

REPRESENTATION:

Counsel:

Plaintiff:	Mr McHugh SC and Ms Dobraszczyk
Defendants:	Self-represented

Solicitors:

Plaintiff:	Commonwealth Director of Public Prosecutions
Defendants:	N/A

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

The Queen v Webb & Ors [2017] NTSC 94
File Nos. 21712099, 21712100, 21712103, 21712105 and 21712113

BETWEEN:

THE QUEEN

AND:

TIMOTHY EDWARD ALEXANDER WEBB

AND:

FRANZ DOWLING

AND:

MARGARET CECILA PESTORIUS

AND:

ANDREW WILLIAM PAINE

AND:

JAMES JOSEPH DOWLING

CORAM: REEVES J

REASONS FOR RULING

(Delivered 22 November 2017)

The charges

[1] The five accused were charged under s 9 of the *Defence (Special Undertakings) Act 1952* (Cth) that on 29 September 2016 they entered a

prohibited area, namely the Joint Defence Facility Pine Gap (JDFPG), situated near Alice Springs in the Northern Territory of Australia.

[2] One of the accused, Mr Paine, was also charged under s 17 of the same Act that, on the same date and at the same place, he was in possession of a photographic apparatus.

The defences sought to be raised

[3] During the course of the trial, the accused sought to raise "defences"[1] under ss 10.3 and 10.4 of Part 2.6 of the *Criminal Code Act 1995* (Cth) (the *Criminal Code*).

[4] Those sections relevantly provide:

> 10.3 Sudden or extraordinary emergency
>
> (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in response to circumstances of sudden or extraordinary emergency.
>
> (2) This section applies if and only if the person carrying out the conduct reasonably believes that:
>
> (a) circumstances of sudden or extraordinary emergency exist; and
>
> (b) committing the offence is the only reasonable way to deal with the emergency; and
>
> (c) the conduct is a reasonable response to the emergency.
>
> 10.4 Self-defence

[1] Spiegelman CJ has questioned the appropriateness of this terminology in *Oblach v The Queen* (2005) 65 NSWLR 75; [2005] NSWCCA 440 at [28].

(1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence.

(2) A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary:

(a) to defend himself or herself or another person; or

(b) to prevent or terminate the unlawful imprisonment of himself or herself or another person; or

(c) to protect property from unlawful appropriation, destruction, damage or interference; or

(d) to prevent criminal trespass to any land or premises; or

(e) to remove from any land or premises a person who is committing criminal trespass;

and the conduct is a reasonable response in the circumstances as he or she perceives them.

The ruling sought

[5] Having heard all the evidence to be called by the Crown and the accused, the Crown sought a ruling that:

> Neither the defence under section 10.3, nor that under s 10.4 of the Criminal Code, raised by each of the accused, should be put forward for consideration by the jury in respect of any of the five accused on any of the charges in the indictment.

[6] On 22 November 2017, I made this ruling. My reasons for doing so are set out below.

[7] For the purposes of this ruling and without making any admissions as to the truth or accuracy of the facts upon which their beliefs are based, the Crown was prepared to accept that, as at 29 September 2016, each of the

accused believed that the JDFPG was a critical part of the satellite surveillance and communications systems whereby the US Defence Forces carried out drone strikes and bombing raids and thereby killed innocent civilians in countries such as Afghanistan, Iraq and Syria.

[8] In oral submissions, one of the accused, Ms Pestorius said that, while each of the accused had, in their evidence, placed emphasis on different aspects when they described their beliefs about these matters, they all believed that, in the period immediately before 29 September 2016, the use of the JDFPG to carry out such drone strikes had increased significantly and they all believed that the sustained nature of those attacks constituted an extraordinary emergency. She said they did not claim the emergency was a sudden emergency.[2]

The evidential burden

[9] In order to put these defences before the jury, the accused were required to discharge an evidential burden under s 13.3(2) of the *Criminal Code*. That section provides:

> A defendant who wishes to deny criminal responsibility by relying on a provision of Part 2.3 (other than section 7.3) bears an evidential burden in relation to that matter.

[10] The expression "evidential burden" is defined in s 13.3 of the *Criminal Code* to mean the burden of "adducing or pointing to evidence that

[2] In terms of s 10.3 of the *Criminal Code*.

suggests a reasonable possibility that **the matter exists or does not exist**".[3]

[11] The nature and extent of this burden was the subject of the following remarks by Simpson J in *B v R*: [4]

> Whether the appellant succeeded in discharging the evidential burden in relation to either defence was a question of law for the trial judge (s 13.3(5)). Such a burden may be discharged by "slender evidence". Any evidence adduced or pointed to in support of either defence must be taken at its most favourable to the appellant: *The Queen v Khazaal* [2012] HCA 26; 246 CLR 601 at [74].

The evidence of the accused

[12] The evidence the accused gave to attempt to discharge the relatively lenient evidential burden set by s 13.3 of the *Criminal Code* may be summarised as follows:

(a) Ms Pestorius

Ms Pestorius said that she entered the Prohibited Area at the JDFPG on 29 September 2016 to lament the people who had been killed in drone strikes and aerial bombings in the Middle East, Afghanistan and Africa. She claimed that she also intended to try to disrupt the operation of the JDFPG in order to stop the signals passing through that Facility that she believed were facilitating the drone strikes and bombings in question.

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3 (emphasis added).
4 [2015] NSWCCA 103 at [237].

Ms Pestorius said in her evidence-in-chief that the accused entered the Prohibited Area at the JDFPG to take direct action about these concerns after their attempts to effect changes to public policy had failed. Specifically, she said:

> And that's why we don't go to public policy to try and get change, because public policy has totally failed us and we are not here to try and influence public policy because public policy is a failure in this area. We have been trying in public policy for 15 years. And so we went there directly to try and stop the strikes, to try and stop that information going from A to B and from B to C and C down to some poor villager on the ground who is being killed in the middle of nowhere.

In cross-examination, Ms Pestorius said her attempts to effect change to public policy included making submissions and writing letters to Parliamentarians, speaking to members of the media. She also said she was a member of the Greens Party. By these means, she said she wanted to communicate her concerns about the use to which the JDFPG was being put to the wider public. However, she said she did not think these activities were "very effective … for the peace movement". In particular, she said:

> I do not trust in my ability to influence the parliament through anything I am doing. If the parliament respond to a change in values from the people at some point, or if the people force a response on the government, then Hallelujah, we will have change. But there are a lot of other steps before that. That is not my focus. That is the ordinary way of seeing power change and I think it's a failure of a way. I am a non-violent activist and being a non-violent activist is about disruption, stopping harms, facing up, witnessing, speaking truth to power. It's not about lobbying politicians so that they might change because they don't.

(b) Mr Paine

In evidence-in-chief, Mr Paine described his actions in entering the Prohibited Area at the JDFPG on 29 September 2016 as "non-violent civil disobedience". He said his approach was to go "to where it happens and try … to disrupt it". He said he and his fellow accused wanted to gain publicity for their actions and that was why he used Ms Pestorius' mobile telephone to live stream their activities within the Prohibited Area on Facebook. He also said that he wrote about their actions in entering the Prohibited Area afterwards "in the hope that that would continue in many ways to build peace in the world". He said that he thought those writings were published on a website called "closepinegap.com".

In cross-examination, Mr Paine said that he believed in "the power of social movement to bring change". That included, he said, "protests or processions". He said he had been involved in protests at the JDFPG before 29 September 2016. He also said: "There's many different ways that I hope to disrupt [the JDFPG]. Starting conversations is one. Occasionally walking up to the base is one."

(c) Mr Franz Dowling

In his evidence, Mr Franz Dowling said that he and his fellow accused had a mutual concern for the threat they thought was posed by the operations at the JDFPG to the lives of innocent civilians. He

said “this we considered an extraordinary emergency”. He said that they planned an action on 29 September 2016 and:

> we decided that this action would include a lament, so channelling my own and Margaret [Pestorius’] musical passion, we composed a piece of music that was composed in a way that paid tribute to those who – those innocent lives that had been destroyed or heavily impacted on by [the JDFPG’s] operations.

Mr Franz Dowling said that he thought “lobbying and of talking to parliamentarians and all of this” was ineffective. As to the reason why they went to the Prohibited Area at the JDFPG, he said:

> We saw this place as being a facility that allowed war crimes and deaths of innocence to happen and we went there and we prayed and we did what we could to try to disrupt this base and to try to bring people’s attention to this base and, ‘Hey, this is a horrible thing,’ and people need to know about this and people need to do something about this and so that was why we were there on that day …

In cross-examination, Mr Dowling said they planned to hold a lament inside the Prohibited Area on 29 September 2016, but they had not discussed disrupting the operation at the JDFPG, although he said he would have done that if he had been given the chance to.

(d) Mr Webb

In his evidence-in-chief, Mr Webb said that their conduct on 29 September 2016 was about "challenging injustice when it comes by". He said that:

> you can stand up whenever something does sort of come up that your conscience tells you that something is wrong in the world and you're allowed to do something about it - even if the wrongdoing has been carried out by the government itself.

In cross-examination, Mr Webb said that, on 29 September 2016, the action he took "was to go to the facility and assist [his] co-accused to play their musical instruments and lament". He said that as a member of the Peace Movement, he had been involved in protests, marches and vigils. He agreed those activities brought his concerns to the attention of "a wider audience" and were a "reasonable response" to his concerns about the JDFPG.

(e) Mr James Dowling

In his evidence-in-chief, Mr James Dowling described how he and his fellow accused went into the Prohibited Area at the JDFPG on 29 September 2016 as "lamenting all the killing that has been done and is being done and [the JDFPG's] role in that". He said that in:

> … late September 2016 a group of us came here to Alice Springs coinciding with the IPAN conference to lament and resist the role of [the JDFPG] in all this mindless killing whether by drones or fighter planes or people on the ground killing one another.

Furthermore, he said:

> So on that night in question we went onto the base as lots of people have explained already. Margaret and Franz played the lament on viola and guitar and we walked up that hill with the music playing, lamenting all the killing that has been done and is being done and [the JDFPG's] role in that. While we were walking up that hill I carried a large poster about a metre high by half a metre wide depicting a US strike in Baghdad [at] the start of the 2003 war.

In cross-examination, Mr Dowling said he did not acknowledge what he regarded as "unjust laws". He said he used his "informed conscience" to determine whether particular laws were just or unjust. He said he went to the Prohibited Area at the JDFPG on 29 September 2016, partly to lament and to "[resist] the war crimes of [the JDFPG], [and the] Australian Government" and to "resist the war machine". He said they were "part of a non-violent resistance to [the JDFPG]".

The elements of the s 10.3 defence

[13] The matters the existence of which the defence under s 10.3 were concerned with are the elements of that defence as set out in s 10.3(2). Those elements are that, in carrying out the conduct,[5] the accused "reasonably believe[d]":

(a) the circumstances of a sudden or extraordinary emergency existed; and

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5 that is, entering the JDFPG Prohibited Area.

(b) committing the offence was the only reasonable way to deal with that emergency; and

(c) the conduct was a reasonable response to that emergency.

[14] It is important to note that, if any one of the above three elements of the s 10.3 defence, or any one of the elements of the defence under s 10.4(2),[6] does not exist as a reasonable possibility on the evidence, the accused will have failed to discharge their evidential burden with respect to that defence.

The element in (a)

[15] The expression "sudden or extraordinary emergency" is obviously central to the element in (a) above). In *Warnakulasuriya v The Queen*,[7] (*Warnakulasuriya*) Pullin and Buss JJA made the following observations about the meaning of that expression. First, whilst noting that the words "sudden" and "extraordinary" bore their ordinary meaning, Pullin JA observed:[8]

> ... Clearly the concepts of "**sudden** emergency" and "**extraordinary emergency**" can overlap. An emergency can occur "suddenly" and require immediate action. An "**extraordinary emergency**" may develop over time but even an **extraordinary emergency** will eventually require some degree of immediacy in response to it as the trial judge correctly said.
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> (Emphasis in original)

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6 (see at [31] below).
7 (2012) 261 FLR 260; [2012] WASCA 10.
8 (2012) 261 FLR 260; [2012] WASCA 10 at [2].

[16] On the same topic, Buss JA said[9] that:

> 49 It is unnecessary for an emergency to be both sudden and extraordinary. The emergency may be either sudden or extraordinary: see *Nguyen v The Queen* [2005] WASCA 22 at [17] (Templeman J, Murray J agreeing and McLure J agreeing generally).
>
> 50 However, the concepts of a "sudden" emergency and an "extraordinary" emergency may, in a particular case, overlap. That is, an emergency may, in a particular case, be both "sudden" and "extraordinary".

[17] Additionally, Buss JA later referred[10] to the following pertinent observations of Templeman J in *Nguyen v The Queen*:[11]

> (a) It may be relevant, in deciding whether an emergency is ***sudden*** or extraordinary, to have regard to the time which elapsed between the accused becoming aware of the emergency, on the one hand, and his or her acting in response to it, on the other. However, delay is not a "determinative factor".
>
> (b) The Crown cannot negative the defence by proving that no ***sudden*** or ***extraordinary emergency*** in fact existed. Although the absence of an actual ***sudden*** or ***extraordinary emergency*** may be a relevant factor, the ultimate question is whether the accused reasonably believed, in terms of s 10.3(2)(a), that circumstances of ***sudden*** or ***extraordinary emergency*** existed.
>
> (Emphasis in original)

[18] As to the interaction between the subjective and objective components of the element in (a) above, Buss JA observed:[12]

> … This element incorporates a subjective component and an objective component. The subjective component is the existence of a

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9 (2012) 261 FLR 260; [2012] WASCA 10 at [49]–[50].
10 (2012) 261 FLR 260; [2012] WASCA 10 at [57].
11 [2005] WASCA 22 at [17].
12 [2005] WASCA 22 at [48].

> belief by the accused that circumstances of ***sudden* or *extraordinary emergency*** existed. The objective component is that any such subjective belief by the accused must have been reasonable.

[19] In this case, the element in (a) therefore calls for an objective assessment of the subjective reasonableness of the accused's beliefs that the circumstances of the extraordinary emergency described above[13] existed. Because of the value judgments that can intrude into this kind of analysis, particularly where the conduct in question involves a challenge to public policy, or the manner in which public authorities have enforced the law in a contentious area of political debate, in analogous situations, the genuineness of an accused person's beliefs has usually been assumed by the courts: see, for example, *Mark v Henshaw*[14] involving a trespass directed to expressing concerns about a "battery hen" farming operation. In this ruling, I propose to take the same approach. Accordingly, I will assume, for the purposes of this ruling and without determining the question, that the accused reasonably believed that the circumstances of the extraordinary emergency as outlined above existed as at 29 September 2016.

The elements in (b) and (c)

[20] On the two elements described in s 10.3(2)(b) and (c) above, Buss JA observed in *Warnakulasuriya* that:[15]

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13 at [7]-[8].
14 (1998) 85 FCR 555 at 559.
15 (2012) 261 FLR 260; [2012] WASCA 10 at [58] and [59].

> [58] As to s 10.3(2)(b), it is an element of the defence that, at the material time, the accused reasonably believed that "committing the offence [was] the only reasonable way to deal with the emergency". The term "the emergency" in s 10.3(2)(b) refers to the circumstances of ***sudden* or *extraordinary emergency*** within s 10.3(2)(a) that the accused reasonably believed existed. The element in s 10.3(2)(b) incorporates a subjective component and an objective component. The subjective component is the existence of a belief by the accused that committing the offence was the only reasonable way to deal with the circumstances of ***sudden* or *extraordinary emergency*** that he or she reasonably believed existed. The objective component is that any such subjective belief by the accused must have been reasonable.
>
> [59] As to s 10.3(2)(c), it is an element of the defence that, at the material time, the accused reasonably believed that "the conduct [was] a reasonable response to the emergency". The term "the emergency" in s 10.3(2)(c) refers to the circumstances of ***sudden* or *extraordinary emergency*** within s 10.3(2)(a) that the accused reasonably believed existed. The element in s 10.3(2)(c) incorporates a subjective component and an objective component. The subjective component is the existence of a belief by the accused that the conduct (that is, the conduct constituting the offence) was a reasonable response to the circumstances of ***sudden* or *extraordinary emergency*** that he or she reasonably believed existed. The objective component is that any such subjective belief by the accused must have been reasonable.
>
> (Emphasis in original)

[21] It can be seen that, under the element in (b), the question is whether the accused reasonably believed that breaking the law was the only reasonable alternative means of dealing with the extraordinary emergency they believed existed. Thus, that element requires, first, that the accused held a subjective belief that there was only one reasonable way to deal with the extraordinary emergency, namely committing the offence; and secondly, that their subjective beliefs in that respect were reasonably held.

[22] It can also be seen that under the element in (c), the questions are: whether the accused believed that the conduct concerned was a reasonable response to the extraordinary emergency; and whether that subjective belief was reasonably held.

[23] In *Oblach v The Queen*,[16] Spiegelman CJ[17] (with whom Sully and Hulme JJ concurred) referred to the report of the Criminal Law Officers' Committee of the Standing Committee of Attorneys-General and pointed out that the element in (b) in both ss 10.2(2) and 10.3(2) of the *Criminal Code* was concerned with the necessity for the conduct, and the element in (c) in both those subsections was concerned with the response to the threat in question. Furthermore, his Honour noted that the Committee's proposal to apply an objective test to both elements was intended to be an amalgam of common law principles and the equivalent provisions in the *Griffith Code*.[18]

[24] For the purposes of this ruling, it is worth reviewing the common law principles relating to the defence of necessity. As it happens, they were helpfully collated by Biscoe J in *Leichhardt Council v Geitonia Pty Ltd (No 6)*.[19] First, Biscoe J[20] set out the three elements of the defence at

16 (2005) 65 NSWLR 75; [2005] NSWCCA 440.
17 (2005) 65 NSWLR 75; [2005] NSWCCA 440 at [31]-[33].
18 See (2005) 65 NSWLR 75; [2005] NSWCCA 440 at [33]-[35].
19 (2015) 209 LGERA 120; [2015] NSWLEC 51 at [136]-[153].
20 (2015) 209 LGERA 120; [2015] NSWLEC 51 at [139].

common law as illuminated by the Full Court of the Supreme Court of Victoria in *Loughnan*[21] as follows:

> … there are three elements involved in the defence of necessity. **First, the criminal act or acts must have been done only in order to avoid certain consequences which would have inflicted irreparable evil upon the accused or upon others whom he was bound to protect**. The limits of this element are at present ill defined and where those limits should lie is a matter of debate. But we need not discuss this element further because the irreparable evil relied upon in the present case was a threat of death and if the law recognizes the defence of necessity in any case it must surely do so where the consequence to be avoided was the death of the accused. We prefer to reserve for consideration if it should arise what other consequence might be sufficient to justify the defence …
>
> The other two elements involved … can for convenience be given the labels, immediate peril and proportion, although the expression of what is embodied in those two elements will necessarily vary from one type of situation to another.
>
> **The element of imminent peril means that the accused must honestly believe on reasonable grounds that he was placed in a situation of imminent peril** … all the cases in which a plea of necessity has succeeded are cases which deal with an urgent situation of imminent peril. Thus if there is an interval of time between the threat and its expected execution it will be very rarely if ever that a defence of necessity can succeed.
>
> **The element of proportion simply means that the acts done to avoid the imminent peril must not be out of proportion to the peril to be avoided.** Put in another way, the test is: would a reasonable man in the position of the accused have considered that he had any alternative to doing what he did to avoid the peril? …
>
> (Emphasis added)

[25] Secondly, Biscoe J[22] referred extensively to the oft quoted judgment of Dickson J in the Supreme Court of Canada in *Perka v The Queen*[23] and the test which the court held should be applied, as follows:

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21 [1981] VR 443 at 448-449.

While necessity should be recognised as a defence through s 7(3) of the *Criminal Code*, it operates as an excuse rather than a justification. **As an excuse, necessity rests on a realistic assessment of human weakness, recognising that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impelled disobedience. The defence must, however, be strictly controlled and scrupulously limited to situations that correspond to its underlying *rationale*. That *rationale* is that it is inappropriate to punish acts which are normatively involuntary.** There are a number of tests for determining whether the wrongful act was truly the only realistic reaction open to the actor, one of which is the requirement that the situation be urgent and the peril be imminent. At a minimum, the situation must be so emergent and the peril must be so pressing that normal human instincts cry out for action and make a council of patience unreasonable. Another requirement is that compliance with the law be demonstrably impossible. If there is a reasonable legal alternative to disobeying the law then the decision to disobey becomes a voluntary one impelled by some consideration beyond the dictates of necessity and human instincts. One further requirement is of proportionality. The defence cannot excuse the infliction of a greater harm so as to allow the actor to avert a lesser evil. Accordingly, the harm inflicted must be less than the harm sought to be avoided. The defence does not fail merely because the accused were doing something illegal when the necessitous circumstances arose. On the other hand, the accused's fault in bringing about the situation later invoked to excuse his conduct can be relevant to the availability of the defence of necessity. If the necessitous situation was clearly foreseeable to a reasonable observer, if the accused contemplated or ought to have contemplated that his actions would likely give rise to an emergency requiring the breaking of the law, then it is doubtful that whatever confronted the accused was in the relevant sense an emergency. Mere negligence, however, or the simple fact that the accused was engaged in illegal or immoral conduct when the emergency arose, will not disentitle him from relying on the defence of necessity. Where the accused places before the court evidence sufficient to raise an issue that the situation created by external forces was so emergent that failure to act could endanger life or health and that, upon any reasonable view of the facts, compliance with the law was impossible, then the Crown must be prepared to meet that issue and there is no onus of proof on the accused.

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22 (2015) 209 LGERA 120; [2015] NSWLEC 51 at [140].

23 (1984) 14 CCC (3d) 385.

(Emphasis added)

[26] Thirdly, Biscoe J[24] set out the important parts of the judgment of Gleeson CJ in the New South Wales Court of Criminal Appeal in *Rogers*[25] as follows:

> 546 The corollary of the notion that the defence of necessity exists to meet cases where the circumstances overwhelmingly impel disobedience to the law is that **the law cannot leave people free to choose for themselves which laws they will obey, or to construct and apply their own set of values inconsistent with those implicit in the law**. Nor can the law encourage juries to exercise a power to dispense with compliance with the law where they consider disobedience to be reasonable, on the ground that the conduct of an accused person serves some value higher than that implicit in the law which is disobeyed.
>
> 547 **The relevant concept is of necessity, not expediency, or strong preference.** If the prisoner, or the jury, were free to consider and reject possible alternatives on the basis of value judgments different from those made by the law itself, then the rationale of the defence, and the condition of its acceptability as part of a coherent legal system, would be undermined. To adopt the language of Dickson J in *Perka*, the accused must have been afforded no reasonable opportunity for an alternative course of action which did not involve a breach of the law.

(Emphasis added)

[27] Finally,[26] his Honour made the following observations about the element in s 10.3(2)(c):

> As explained in *Loughnan* and *Rogers*, the third element means, in other words, that a reasonable man in the position of **the defendant would have considered that he had no alternative but to take the action that he took, which involved breaking the law, in order to avoid the peril**.
>
> (Emphasis added)

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24 (2015) 209 LGERA 120; [2015] NSWLEC 51 at [142] and [143].
25 (1996) 86 A Crim R 542 at 546 and 547.
26 (2015) 209 LGERA 120; [2015] NSWLEC 51 at [148].

The accused failed to discharge their evidential burden re the elements in ss 10.3(2)(b) and (c)

[28] With these principles in mind, I turn to consider whether the accused have discharged their evidential burden with respect to the elements in ss 10.3(2)(b) and (c). Even on the view most favourable to the accused, the summary of their evidence set out above demonstrates, in my view, that they have failed to discharge that evidential burden. First, with respect to the element in (b), there is no evidence that any of them reasonably believed that committing the offence of entering the Prohibited Area at the JDFPG on 29 September 2016 was the only reasonable way to deal with the extraordinary emergency they subjectively believed was posed by the activities being conducted at the JDFPG. To the contrary, their evidence shows that, both before and after 29 September 2016, they pursued the most obvious reasonable way to deal with the perceived extraordinary emergency, namely by lawful protest activities. Hence, their evidence shows that in the months and years before September 2016 and, indeed, since, they were, and have been, all actively involved in various legal protest activities, directed to agitating their concerns about the insidious use to which they believed the JDFPG was being put. More immediately, in the days leading up to 29 September 2016, they were all involved in legal protest activities outside the JDFPG and in the town of Alice Springs aimed at airing those concerns. Against this background, none of them identified any matter that altered that state of affairs on or about 29

September 2016 such that an illegal entry to the Prohibited Area on that date became "the only reasonable way" to deal with the extraordinary emergency that they believed existed. Instead, their evidence shows that, at about that time, they formed the view that their lawful protest activities were "ineffective". Having formed that view, they decided to commit the offence of entering the Prohibited Area in order to gain greater public attention to their opposition to the use to which they believed the JDFPG was being put. That is reinforced by the fact that they chose to publicise their illegal entry to the Prohibited Area by "live streaming" the lament they conducted there to Facebook. In all the circumstances, this was therefore neither a reasonable way to deal with the perceived extraordinary emergency, nor the only reasonable way in which to deal with it.

[29] For similar reasons, their conduct was not a reasonable response to the perceived extraordinary emergency within the terms of element (c) above. That is so essentially because, even accepting the genuineness of their concerns about the use to which they believed the JDFPG was being put, in all the circumstances, no response was required to that extraordinary emergency beyond continuing to pursue their longstanding and lawful protest activities to agitate their concerns about it. Put differently, their conduct of entering the Prohibited Area at about 4.00 am on 29 September 2016 and conducting a lament there for the victims of drone strikes and bombing raids in the Middle East and elsewhere was not, in any real sense, a response to the extraordinary emergency. They were not, in any real

sense, “impelled” to break the law out of their altruistic concerns and no necessity existed of the kind described in the authorities referred to above. Rather, their conduct was a pretext adopted by them to gain additional media coverage and greater public attention to their concerns. In all the circumstances, it was therefore not a response to the extraordinary emergency or, if it was, it was not a reasonable response to it.

[30] For these reasons, I do not consider the accused have adduced, or pointed to, any evidence that suggests that a reasonable possibility that the matter, or element, in either s 10.3(2)(b), or s 10.3(2)(c), existed. They have therefore twice failed to discharge their evidential burden under s 13.3 of the *Criminal Code*.

The elements of the defence under s 10.4

[31] Turning then to the defence under s 10.4 of the *Criminal Code*, the matters the existence of which that defence is concerned with are whether, in carrying out the conduct, namely entering the JDFPG Prohibited Area, the accused believed:

(a) that conduct was necessary for one of the reasons set out in 10.4(2)(a) to (e); and

(b) that conduct was a reasonable response in the circumstances as he or she perceived them.

[32] The reasons the accused have relied on are: to defend other persons (subsection 2(a)); and to protect the property of those persons from unlawful destruction, damage, or interference (subsection 2(c)).

[33] As Spiegelman CJ pointed out in *Oblach*,[27] there is a significant difference between the requirements of s 10.3 and those of s 10.4.[28] First, the belief stated in the chapeau to s 10.4(2) does not have to be reasonably held. Secondly, the test stated in the concluding words of s 10.4(2), with respect to the reasonableness of the response, is conditioned by the circumstances as perceived by the person concerned.[29]

[34] With respect to these two requirements, in *Oblach*,[30] Spiegelman CJ referred to the judgment of Howie J *R v Katarzynski*[31] and said that:

> … the test of whether or not the accused believed that his or her conduct was necessary was a completely subjective test. However, the element of reasonable response involved an entirely objective assessment of the proportionality of the accused's response to the situation which the accused subjectively believed he or she faced.

[35] Since the belief in s 10.4(2) is entirely subjective, there is all the more reason for me to adopt the approach I took with respect to the belief stated with respect to the element in s 10.3(2)(a) above.[32] The question which remains is whether the accused have adduced or pointed to any evidence

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27 (2005) 65 NSWLR 75; [2005] NSWCCA 440.
28 See *Oblach v The Queen* (2005) 65 NSWLR 75; [2005] NSWCCA 440 at [31].
29 See *Oblach v The Queen* (2005) 65 NSWLR 75; [2005] NSWCCA 440 at [38] and *B v R* [2015] NSWCCA 103 at [236].
30 (2005) 65 NSWLR 75; [2005] NSWCCA 440 at [51].
31 [2002] NSWSC 613 at [22]-[23].
32 See at [19] above.

that suggests a reasonable possibility that their response to the threat was reasonable in the circumstances as they perceived them to be.

[36] For similar reasons to those stated with respect to the element in s 10.3(2)(c) above, and making allowances for the difference in the test for reasonableness in s 10.4(2) as outlined above, I do not consider that there is any such evidence. As I have already observed above, even accepting the genuineness of their concerns about the use to which they believed the JDFPG was being put, they were not, in any real sense, "impelled" to break the law as they did and nor were they forced by necessity to do so.

[37] For these reasons, I considered that the accused had not discharged their evidential burden under s 13.3 of the *Criminal Code* with respect to the matters described in s 10.3(2)(b) and/or (c), or in s 10.4(2). Accordingly, I made the ruling set out at [5] above.