HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

DARWIN REGISTRY

APPLICATION FOR SPECIAL LEAVE TO APPEAL FROM THE FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY (D1/2025)

BETWEEN:

Asher Badari

First Applicant

Ricane Galaminda

Second Applicant

Lofty Nadjamerrek

Third Applicant

Carmelena Tilmouth

Fourth Applicant

and

Minister for Housing and Homelands

First Respondent

Chief Executive Officer (Housing)

Second Respondent

APPLICANTS' REPLY

Part I: This reply is in a form suitable for publication on the internet.

Part II: Argument

1. These submissions reply to those of the Respondents dated 17 July 2025 (**RSD1**). They should be read with and adopt the abbreviations used in the Applicants' submissions dated 26 June 2025 (**ASD1**).
2. The Respondents submit that this Court can accept that the relevant order of the FCNT was affected by an absence of jurisdiction (RSD1 [30]-[34]) or a denial of procedural fairness (RSD1 [35]-[38]). They do not withdraw their consent to the orders earlier filed on behalf of the parties (CAB 446-447, ASD1 [14]), but they now posit alternative means by which the orders the subject of this application could be construed and then suggest alternative ways for the Court to respond to those.
3. The better approach to understanding what occurred and what should be done in response by this Court is that set out at RSD1 [37.2]. This accords with the Applicants' position as set out at ASD1 [17]-[18], namely that:
   (a) the FCNT declined the referral at the hearing;
   (b) the FCNT then made an order dismissing the proceeding only to the extent of the referral (the scope of which was specified in the reasons); and
   (c) the FCNT did so without according the adversely affected parties, being the Applicants, procedural fairness.
4. The interpretation above is preferable to the approach set out at RSD1 [35]. That approach seems to add words to s 21(2) of the *Supreme Court Act 1979* (NT) which are not there. Accepting or declining a referral under that provision does not require an order of the Court. In this way, it does not matter whether the FCNT made an order to 'decline to accept' the referral. The oral indication at the hearing (RSD1 [17]) or the email from the chambers of the Chief Justice (RSD1 [18]) were enough to fulfil the requirements of s 21(2). It follows that the hypothesis in RSD1 [35] should not be accepted.
5. For the same reasons, the Applicants take no issue with the modifications to the proposed form of orders suggested at RSD1 [34] and [38].
6. The interpretation at [3] above is also preferable to the approach set out at RSD1 [35.2] and [37.1]. That approach posits that the terms of the order could be read literally and divorced from their context. While the proper approach to the construction of orders may be unresolved (RSD1 [36]), it would be anomalous for orders to be approached differently to other legal texts in this regard. There can no longer be debate that one properly construes

legislation[1] and contracts[2] having regard to the context of the contested text, without the need to first conclude that the text being construed is ambiguous.[3] The same approach is properly adopted in respect of orders.[4] Approaching the present order in that way, it should be construed to refer only to that part of the proceeding which was referred to the FCNT, despite what the terms of the order divorced from their context indicate (ASD1 [16]; RSD1 [36]).

7. As a final and new position, the Respondents posit that there may be no utility in permitting the Applicants to have a trial on the previously referred aspect of the Fourth Determination proceeding (RSD1 [39]-[41]). That position is hard to reconcile with the process the Respondents initiated in the FCNT concerning the declining of the referral (RSD1 [15]-[16]). It is also inconsistent with the orders they proposed after judgment by the FCNT (RSD1 [24]-[25]) and agreed in this Court (CAB 446-447, ASD1 [14]).

8. Those earlier positions of the Respondents were consistent with the justice of the outstanding proceeding. That proceeding concerns a different Determination and at least one different tenancy agreement, namely for Mr Nadjamerrek (ABFM 71-83). It will probably also concern a different rent policy. It will be determined after this Court has clarified how the statutory scheme is properly understood and after the usual pre-trial processes are undertaken, including any discovery and the filing of evidence. Any one of those differences might well lead to the proceeding being approached and resolved differently. This Court cannot now speculate as to how all those moving parts will ultimately rest, and what impact those will have on the question arising under s 41 of the RTA as it relates to the Fourth Determination. The Court should therefore do as the Respondents both proposed in the FCNT and agreed in this Court, namely: grant special leave, allow the appeal, and make orders necessary to permit that proceeding to continue (assuming that is needed when the grounds before this Court in the appeal proceeding are resolved).

9. Finally, the Respondents note that the Applicants could have, but did not, seek to correct the FCNT's order by the slip rule (RSD1 [27]-[29]). The order that was proposed by the

[1] *ENT19 v Minister for Home Affairs* (2023) 278 CLR 75, [86]-[87]; *AB (a pseudonym) v Independent Broad-based Anti-Corruption Commission* (2024) 278 CLR 300, [21].
[2] *Simic v New South Wales Land and Housing Corporation* (2016) 260 CLR 85, [78]; discussed by Steward J in the context of other judgments of this Court at *Commissioner of Taxation v The Trustee for the Michael Hayes Family Trust* (2019) 273 FCR 567, [29]-[32].
[3] *Wende v Horwath (NSW) Pty Ltd* (2014) 86 NSWLR 674, [61].
[4] *Nokia Corporation v Liu* (2009) 179 FCR 422, [29]; *Brown Brothers Waste Contractors Pty Ltd v Pittwater Council* (2015) 90 NSWLR 717, [166].

Respondents at that point (RSD1 [25]) is inconsistent with most of the interpretations of what occurred that they now put before this Court (RSD1 [31], [34], [35.2(b)], [37.1], [41]). In this sense, further reflection by the Respondents appears to have led them to think that a different course to the slip rule was appropriate.

10. Similarly, while the Applicants initially agreed with the order proposed by the Respondents below, as the special leave deadline approached it was not clear to the Applicants that such an avenue was both open and prudent. It was clear that the time for making the special leave application was approaching and authenticated orders were required to make it,[5] in respect of the Fourth Determination proceeding and what is now the appeal proceeding. That is why they sought authenticated orders and special leave to appeal. To the extent that was an error, that is reflected in the fact that the Applicants come to this Court willing to bear their own costs.

11. For those reasons, in addition to those earlier advanced, the orders previously agreed between the parties (CAB 446-447, ASD1 [14]), subject to the modification proposed at RSD1 [34] and [38], should be made.

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[5] *High Court Rules* 2004 (Cth) r 41.01.4(a).