HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

BETWEEN:

Asher Badari
First Appellant
Ricane Galaminda
Second Appellant
Lofty Nadjamerrek
Third Appellant
Carmelena Tilmouth
Fourth Appellant

and

Minister for Territory Families and Urban Housing
First Respondent
Minister for Housing and Homelands
Second Respondent

APPELLANTS' REPLY

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

Part II: Argument

1. These submissions reply to the Respondents', dated 17 July 2025 (**RS**). They adopt defined terms from that and as used in the Appellants' submissions, dated 26 June 2025 (**AS**).
2. **Factual matters:** There is no apparent dispute about three core facts. *First*, the Determinations adversely impacted each Appellant financially (AS [14(b)], [15], [19]; RS [19.3], [20.3], [23], fn 46). *Second*, the policy frameworks did not affect the Appellants' legal liability to pay rent (AS fn 13; RS [5]).[1] *Third*, the new policy gave only 'temporary' reprieve, after which time that practice and legal liability would coincide, such that the Appellants would be required to pay the 'full rent' (AS [12], fn 13; RS [5], [12], [13], [21]).
3. **Sections 41 and 42 of the RTA:** It can be accepted that the protection against rent increases by a landlord in s 41 'was always subject to the contingency that the Minister may exercise the' Determination power (RS [26], and in respect of s 42, RS [27]). However, it does not follow that if that contingency eventuated, the Appellants lost nothing. A contingent statutory entitlement or protection is still valuable as such, including for those like the Appellants whose tenancy agreement did not permit rent increases (RS [26]). Such tenants could choose to enter a new agreement allowing future rent increases under s 41. They might agree to that, for example, in exchange for major renovations. No such exchange is meaningful while a Determination is operative. While a Determination operates, if a dwelling became uninhabitable, an eligible person's only 'remedy' is to make themselves homeless (s 92(c) RTA) or keep their 'inadequate housing' (AS [27]) while travelling to and from Alice Springs or Darwin to seek compensation (CoA [145], [177]). These adverse impacts do not aid the statutory objective of 'the provision of housing' (AS [21], [25], [26]), nor of 'ensur[ing] that tenants are provided with safe and habitable premises'.[2]
4. Section 42 is not 'contingent on [the tenants'] rent being increased by their landlord' (contra RS [27], [60]).[3] Before a Determination applied, the Appellants could utilise s 42 any time they considered their rent had become excessive without ever having a rent increase (as in the cyclone example at AS [56]). Understood that way, by a valid determination, the Appellants and all impacted tenants also lose a third-party determination mechanism to protect them when their occupancy right reduces in worth.

[1] At most, the policy frameworks show awareness of the harshness of the legal liabilities from the Determinations. If it were otherwise, there would be no need for a policy by which rent was forgiven.
[2] *Residential Tenancies Act 1999* (NT) (**RTA**) s 3(d), read in light of *Housing Act 1982* (NT) (***Housing Act***) s 34.
[3] Contrast RTA s 42 with, for example, *Residential Tenancies Act 1987* (WA) s 32(2)(a).

5. If it is true that 'because their rent amounts were fixed by the determinations, for as long as they remained in force, their rent could not be increased by their "landlord"' (RS [27]), it is also true that each Determination had the effect that the Appellants' rent could not be decreased by agreement with their landlord, or by the NTCAT or 'any other person'.[4]

6. **Ground 1 – procedural fairness:** On the 'first question', the Respondents now accept that the Determination power is conditioned by an obligation to afford procedural fairness (RS [29], [37], [40], [53]). On the 'second question',[5] as to the content of such an obligation, the Respondents seek to raise a novel theory – the 'actual consideration approach' (RS fn 97) – that has not previously been raised in this proceeding, nor in this Court.

10 7. That new theory is not supported by logic, this Court's authority nor the evidence.

8. *As to logic*, even if one accepts that fairness requirements depend on the 'considerations' that the decision-maker 'proposes to take into account' (RS [47]) – the proposed considerations being a subset of the permissible considerations set by 'the subject matter, scope and purpose of the statute'[6] – a decision-maker may still need to hear from persons who may not be able to say anything about those proposed considerations.[7] Affording an opportunity to be heard could lead the decision-maker to change course, to replace or supplement what was previously thought to be an appropriate determinative consideration. 'The path of the law is strewn with examples… of fixed and unalterable determinations that, by discussion, suffered a change.'[8]

20 9. That is why the 'actual consideration approach' frustrates the instrumental rationale for procedural fairness (cf RS [34]). By contrast, requiring a decision-maker to hear from persons about a permissible consideration, even if it is not a then-proposed consideration, better ensures that the decision-maker makes the most fully informed, and thus optimal, choice of the considerations informing the decision. The 'actual consideration approach' also frustrates the dignity rationale for procedural fairness by denying a voice to those about to be impacted by an exercise of governmental power.[9] Both rationales are relevant where,

[4] *Housing Act* s 23(4).
[5] This does not indicate agreement with RS [31]-[39] on the first question, particularly that a Determination might increase a person's rent but 'not have an adverse effect on each person in their individual capacity' (RS [36]).
[6] ***Kioa*** *v West* (1985) 159 CLR 550, 619.
[7] See, for a case in which the decision-maker could 'devise their own criteria' but still had to afford procedural fairness, *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487, 516.
[8] ***Nathanson*** *v Minister for Home Affairs* (2022) 276 CLR 80, [50]-[51]*; Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44*,* [154]; see also *Kioa*, 633.
[9] *Nathanson*, [50], [51], [81], [89], [90]; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, [144]-[145]. As to its link with discretionary decisions made by inflexible policy, see Adam Perry, 'The Flexibility Rule in Administrative Law' (2017) 76(2) *The Cambridge Law Journal* 375, 392-7.

as here, the power is one that may be exercised subject to conditions capable of tailoring the application of any 'policy' to an individual's circumstances (AS [24(d)], [49]).[10] Indeed, the first six times the Determination power was exercised in its current form, the Minister made a class determination which required adjustment for (a) the 'standard' of each particular dwelling within the class as compared with 'the average dwelling provided by the' CEOH, as well as (b) the location of each dwelling in the class, among other things.[11]

10. Relevantly here, if the Determination power was to be exercised solely for reasons of public finance, procedural fairness of even the most minimal content could 'realistically' (cf RS [48]) have led to a re-consideration of the approach. Ms Tilmouth might have said that that aim was better achieved by uniform rent for her house in Laramba and one also with two bedrooms in the next community, Anmatjere (contrary to the First Determination). Mr Badari might have suggested that public finances were best served by lowering the rent for his home, and imposing rent referable to the actual number of bedrooms including where the dwelling has more than four bedrooms, as under urban determinations (AS [54]).

11. *As to authority*, the 'actual consideration approach' was so-named by Aronson and others. In the passage where this label was coined, those authors acknowledge that their theory is in tension with Brennan J in *Kioa v West*: 'When the repository is bound *or is entitled to have regard to the interests of an individual*, it may be presumed that observance of the principles of natural justice conditions the exercise of the power, for the legislature can be presumed to intend that an individual whose interests are to be regarded should be heard before the power is exercised.'[12] Nothing said by this Court since has disturbed that analysis.

12. The present power has 'no positive indications' but it is one in respect of which 'the repository … is entitled to have regard to individual interests'.[13] (The Respondents do not deny as much.) It follows that Parliament intended not just that the obligation of procedural fairness attach, but that it have some content such that a person 'should be heard'.

13. *As to the evidence*, the 'actual consideration approach' depends on the Court being able to identify the 'actual consideration' that was the '*exclusive* focus' for the decision-maker (RS

[10] *Housing Act* s 23(2); see, by analogy, *TAB Limited v Racing Victoria Limited* [2009] VSC 338, [48].
[11] Determinations under s 23 of the *Housing Act* in Northern Territory, *Government Gazette,* No. G48, 5 December 2001, 6-7; No. G3, 22 January 2003, 5-6; No. G49, 10 December 2003, 3-4; No. G2, 12 January 2005, 6-7; No. G2, 12 January 2005, 6-7; No. G1, 4 January 2006, 4-5.
[12] *Kioa,* 619 (emphasis added), quoted at Aronson, et al., *Judicial Review of Administrative Action and Government Liability* (7th ed, 2022) 430 [8.110], and referred to at 431 [8.120], as well as (6th ed, 2017) at 434-5 [7.180]. The theory – without the label – has been included since the first edition of that book (1st ed, 1996) at 436-439. See, to similar effect, *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 398.
[13] *Kioa*, 619.

[51], [52]). The Respondents submit that the 'actual consideration' for each impugned exercise of the Determination power was some combination of 'public finance' and 'high level general policy' (RS [50]-[51]). They do not identify precisely what that policy was.

14. The Ministerial Briefing for the First Determination did not use the word 'policy' and noted 'Nil' financial matters (ABFM 222-223). Household income (and, implicitly, the predicted financial hardship the Determinations would cause) was apparently the consideration that informed the discounting of the 'operational cost model' (RS [10]). This is not purely policy-based reasoning; it is taking into account individual interests. If the Minister was motivated by protecting or increasing public finances all 109 communities would have been covered by all four Determinations and the implementation of the second stage rent would not have been repeatedly delayed by the later determinations (AB [14(b)], [25]). Those delays were pragmatic: those implementing the rent change were not ready to do so and the weather was not conducive (ABFM 149-150, 230-231). Disorganisation and bad weather were the 'actual consideration' motivating the later Determinations (contra RS [15]-[16]).

15. This case thus demonstrates the dangers of 'placing too much weight upon classification as a policy or political decision'.[14] To use this classification as the discrimen for when procedural fairness reduces to nothingness would make the law uncertain and unworkable: decision-makers would not know whether their decision is sufficiently policy-based as to excuse them from fulfilling a procedural fairness obligation.

16. At most, the exercises of the Determination power here involved the application of policy, not its formulation (AS [36(c)], contra RS [51]).[15] That is especially apparent in the fact that the 'model' was not uniformly nor inflexibly applied: communities were added and subtracted, those with more than four bedrooms were not charged on a per bedroom basis, the change was deferred, and the 'operational cost' was discounted, apparently by reference to household incomes (RS [10]). For the above reasons, the Respondents' contention that procedural fairness reduced to nothingness in this case should be rejected.

17. **Ground 2 – unreasonableness:** The Respondents' primary response to this ground is to emphasise that the Determinations were to operate as just 'one component' of the overall 'rent framework' (RS [55]). This seems to acknowledge that, if they were to operate in isolation, the Determinations might be more difficult to intelligibly justify. However, the

[14] *Castle v Director General State Emergency Service* [2008] NSWCA 231, [8]. As an example of the obligation having content where public finance and policy were significant considerations (being Medicare funding allocation), see *Blyth District Hospital Inc v South Australian Health Commission* (1988) 49 SASR 501, 509-510.
[15] See further, as to conditions, *TAB Limited v Racing Victoria Limited* [2009] VSC 338, [48].

Determinations were, on the evidence, ultimately intended to operate in isolation. That is the effect of s 23(4) of the *Housing Act* (even assuming that somehow does not extend to a 'temporary' 'arrangement' like the 'Safety Net Policy') (RS [12], [21]). Thus, this Court should assess the legal reasonableness of the changes to the legal liability to pay rent unmitigated by the 'Safety Net Policy' since that was the ultimate legal effect that the Determinations were intended and expected to have (cf RS [58]).

18. The Respondents' submissions otherwise proceed on two misunderstandings which infect their portrayal of the factual position and make their rent calculations unreliable.

19. *First*, there is no evidence that any of the Appellants ever agreed to pay rent in the amounts set out in the Previous Framework. What the Respondents thus rely on for their history and calculations (at RS [5], [7], fn 21, [19], [22]-[24], [26]) is a bureaucratic document of their Department. That Department is not 'the landlord' (RS [26]). What the landlord (being the CEOH) implemented by agreement with each tenant was not the Department's document. Those so-called 'full rent' numbers only appear on internal Departmental records (RS [7]).

20. *Second*, what the Respondents claim were rent 'rebates' were, at law, rent reductions. Rent reductions can be, and were, affected for Mr Badari, Ms Galaminda and Mr Nadjamerrek by agreement, in accordance with RTA s 46(1)(b). Those were reductions not 'rebates' because two of the requirements to qualify as a rebate under *Housing Regulations* r 5 did not exist. *First*, only those not 'adequately housed' could be an 'eligible person' (AS [27]). The Respondents' only witness swore that each Appellant was 'adequately housed' (RBFM 426). Thus, none of the Appellants was an 'eligible person' and only such persons could be granted a rebate. *Second*, there was no evidence the body corporate empowered by that regulation ever granted each Appellant a rebate (such power relating only to '*a* dwelling', not a class), nor delegated that power to someone else (under *Housing Act* s 14 (not s 31A)). The conclusion that they were reductions is factually significant because once it is accepted that each lowering of rent was not a rebate, the lowest rent rate is the only one which each Appellant was required by contract to pay by reason that s 41 did not allow their rent to then be increased (RS [26]). That was so until s 41 ceased to protect the tenant from rent increases, namely when a Determination applied to them (contra RS [19], [22]-[24]).

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