HIGH COURT OF AUSTRALIA

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Details of Filing

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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' OUTLINE OF ORAL SUBMISSIONS

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

Part II: Outline of propositions intended to be advanced in oral argument

1. In 2022, for the first time since the power was introduced in the *Housing Act 1982* (NT) (**Housing Act**), the Minister imposed rents on tenants of about 5,000 homes, on three occasions. Those tenants had four key things in common: they resided in one of 109 remote NT communities; they were party to an individual contract with a statutory corporation called Chief Executive Officer (Housing) (**CEOH**); they had individually-agreed rent for their particular home; and each of them was, in CEOH's opinion, of 'limited means' and not 'adequately housed' (*Housing Regulations 1983* (NT) (**Regulations**) r 3).
2. Those last criteria had two roles: they defined to whom CEOH can 'let' a 'dwelling' (r 4) and they defined who was able to receive a rebate (r 5). 'All people who live in remote communities are eligible for public housing' under those criteria (RBFM 432).
3. Each exercise of the power in s 23 of the Housing Act (**Determination power**) had non-pecuniary and pecuniary impacts on tenants, the Northern Territory (**NT**) and CEOH.
4. For tenants, the non-pecuniary impacts were losing access to the limit on rent rises under s 41 of the *Residential Tenancies Act 1999* (NT) (**RTA**) and to third-party review of whether their rent was excessive under s 42 of the RTA. The pecuniary impacts on tenants varied depending on individual circumstances. Each Appellant was impacted by all three Determinations, and each suffered a significant rent rise as a result (ABFM 85, 345-349). Each Determination introduced a two-stage rent change. One impact of each Determination made after the first Determination was to defer the time when the second stage took effect. Each such deferral cost most tenants money. Another pecuniary impact arose from the Determinations imposing rents on an oscillating list of communities (ABFM 391-394).
5. For the NT, the non-pecuniary impact was a rent system that was 'easy to administer for government' because rent was $70 per bedroom (unless it was for one of the 172 dwellings with more than four bedrooms (CAB 168[158], ABFM 144[11], 381-382)). The pecuniary benefit to the NT was $9.7 million per annum (ABFM 232, CAB 125[90]).
6. **The nature of the Determination power:** The Determination power impacts at least three different rights or interests: contractual rights upon which, among other things, a person has arranged their financial affairs; property rights, being those held in the money paid for rent and those entitlements which flow from a lease; and the base human need for shelter.
7. Those rights or interests are reflected in the purpose of the Determination power and the Housing Act more generally. Those were also directed towards protection of the basic need for shelter of indigent Territorians. Read in context and in light of the purposes of the

statutory scheme, the Determination power is to be exercised in a way that promotes the provision of housing as well as rental of dwellings that are 'safe and habitable', and subject to 'fair rent' (Housing Act, short title, Part 3 title, s 34, with RTA s 3(d) and (e)). The rent is to be 'fair' including by using the Determination power in respect of very small classes (compare ABFM 171), as well as there being express statutory authority to put bespoke conditions on any determination under Housing Act s 23(2) (compare JBA 1004).

8. **Procedural fairness:** The Determination power was conditioned by the requirement to afford procedural fairness to those to be impacted by its exercise, and that obligation had content. That the Determination power required procedural fairness to be afforded is consistent with the text, context and history of the power (JBA 863; 408, 446; 80-81).[1]

9. For this ground to fail, the Court must be satisfied that the accepted obligation of procedural fairness has no content at all. This is because none of the Appellants (ABFM 129[9], 130[2]-[3], 132[6], 134[3]-[4], 136[4], 384), and no remote community tenants were notified of the proposed change in, nor heard in any form before, each Determination (ABFM 218, 372).

10. The Respondents now submit (at [47]-[51]) that there is no content to the procedural fairness obligation when the '*exclusive*' actual consideration was 'high level general policy'.

11. The evidence shows that that was not the exclusive actual consideration, nor a consideration at all for at least two of the challenged Determinations. Rather, the First Determination was designed to be 'affordable to all parties' (ABFM 144[11]) and to overcome poor record keeping. There were 'nil' financial matters to note (ABFM 222). The evidence does not mention policy. No explanation is given for the list of impacted communities, nor why it was appropriate for tenants of 'limited means' to be deprived of access to the protections in RTA ss 41 and 42. The same can be said for the Second and Third Determinations. As for the delay to the second stage that they caused, policy played no role: it was a pragmatic need brought on by the combination of a pandemic, weather, staffing capacity and 'concerns by the housing and legal sectors' (ABFM 149[22]-[23], 230). The evidence does not support there being one *exclusive* actual consideration for the Determinations.

12. Logic also conflicts with the adoption of the exclusive actual consideration theory. Assuming there was an exclusive actual consideration that motivated each Determination about which one might think the impacted tenants had nothing of utility to say, there were at least three categories of responses they could offer that could have changed the Minister's

[1] *Disorganized Developments Pty Ltd v South Australia* (2023) 97 ALJR 575 (***Disorganized Developments***), [32]; *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44, [25], [154]; *Housing Amendment Act 2000* (NT).

course: that the Minister should consider something else alongside the proposed consideration ('other than X'); that the Minister's proposed consideration did not match the proposed form of implementation ('not X'); or that the Minister's proposed consideration would have unintended consequences ('impact of X') (JBA 715, 745).[2]

13. The impacted tenants could have said something meaningful about each of those. Giving them that opportunity would have promoted rationales for procedural fairness itself: avoiding bad decisions by exposing them to the 'strongest possible criticism', avoiding post-decision discontent and promoting dignity (JBA 385-386; 678, 688, 690-691).[3]
14. Authority also stands in the way of the exclusive actual consideration theory (JBA 519).[4]
15. Resort to policy being the motivating force for the exercise of a statutory power similarly does not here deprive the procedural fairness obligation of content. It is only the formulation of policy, not its application, that can be immune from procedural fairness (JBA 866, 715).[5]
16. **Legal unreasonableness:** The Determinations were irrational, arbitrary or unjust, including having regard to the purposes of the statutory scheme (above at [7]) and legislative history (JBA 1015). Those conclusions require close analysis of the facts (JBA 628).[6]
17. Irrationality and arbitrariness are apparent from the Determinations treating unlike dwellings alike, and like dwellings unlike one another; from them imposing per bedroom rent rates which were not 'uniform'; from them leaving those with less bedrooms effectively subsidising those with more; and from them impacting an arbitrarily oscillating list of communities. The examples of rents in Arumbera, Ilparpa and Anthepe illustrate the arbitrary outcomes from these features (ABFM 392, 171, 26, 31, 36, 41).
18. Similarly, the Determinations were arbitrary because they did not impose the 'cost-based model' they were said to reflect. Further, their impacts were unfair especially in depriving those of 'limited means' of any mechanism to temper the blunt effect of the Determinations since they were unconditioned and barred access to RTA ss 41 and 42.

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[2] *The State of South Australia v O'Shea* (1987) 163 CLR 378 (***O'Shea***), 388, 418.
[3] *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, [143]-[144]; *Nathanson v Minister for Home Affairs* (2022) 276 CLR 80, [51], [81], [89]-[90].
[4] *Kioa v West* (1985) 159 CLR 550, 619.
[5] *Disorganized Developments,* [43]; *O'Shea*, 388.
[6] *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, [84].