



HIGH COURT OF AUSTRALIA

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**IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY**

BETWEEN:

JASON MALLARD

Appellant

and

HOMES VICTORIA

Respondent

**SUBMISSIONS OF
THE VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION
SEEKING LEAVE TO BE HEARD AS *AMICUS CURIAE***

PART I: CERTIFICATION

1 These submissions are in a form suitable for publication on the internet.

PART II: BASIS OF LEAVE TO BE HEARD AS *AMICUS CURIAE*

2 The Victorian Equal Opportunity and Human Rights **Commission** seeks leave to be heard as *amicus curiae* in the proceeding.¹ The Commission seeks leave only to make written submissions on the issue of whether the “human rights” set out in Pt 2 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) are “legally recognised rights or interests of individuals” for the purpose of the common law presumption of procedural fairness: see **AS [37]; RS [44]**. The Commission does not seek to make oral submissions.

10 PART III: REASONS FOR LEAVE TO BE HEARD AS *AMICUS CURIAE*

3 The Commission is a body corporate, continued in existence by s 154 of the *Equal Opportunity Act 2010* (Vic) (**EO Act**). The functions of the Commission include those conferred on it by the Charter.² Section 40(1) of the Charter provides that the Commission “may intervene in, and may be joined as a party to, any proceeding before any court or tribunal in which a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter”. That function is facilitated by the requirement in s 35 that a party to a proceeding must give notice to the Commission if “a question of law arises that relates to the application of [the] Charter or a question arises with respect to the interpretation of a statutory provision in accordance with [the] Charter” (in the Supreme Court or County Court) or a “question is referred to the Supreme Court” under s 33.

4 Section 40(1) of the Charter does not appear to enable the Commission to intervene in this proceeding, the term “court” being defined as “Supreme Court, the County Court, the Magistrates’ Court, the Children’s Court or the Coroners Court”.³ The Commission is, however, empowered by s 160(c) of the EO Act to “assist a court or tribunal, as *amicus curiae*” in “proceedings where the Commission is satisfied that it would be in the public interest for the Commission to assist the court or tribunal as *amicus curiae*”, with the leave of the “court or tribunal”. The EO Act does not define “court or tribunal”, but the

¹ *High Court Rules 2004* (Cth), rr 42.08A, 44.04.

² See Charter, ss 1(3)(b); EO Act, s 155(1)(c).

³ Charter, s 3(1). The proceeding is not in federal jurisdiction; it is therefore unnecessary to explore the question of whether s 40(1) is a provision that would be applied by s 79(1) of the *Judiciary Act 1903* (Cth) and, if so, whether the word “court” would be construed more broadly: see *Rizeq v Western Australia* (2017) 262 CLR 1 at [81] (Bell, Gageler, Keane, Nettle and Gordon JJ).

expression is broad enough to include this Court. In *Charisiou v The King* (M41/2026), the Commission applied for leave in reliance on s 160(c), and leave was granted.

5 Having formed the state of satisfaction required by s 160(c) (evidenced by the making of this application), the Commission seeks the Court’s leave to appear as *amicus curiae*. The following considerations support a grant of leave.

6 *First*, the Commission brings a long-term and institutional perspective to the construction and operation of the Charter, arising as a result of the various functions that are conferred upon it by s 40 of the Charter. That includes presenting an annual report to the Attorney-General that examines, among other things, the interaction of the Charter with the
10 common law: para (a)(i). The written submissions that the Commission seeks to advance are directed to that topic.

7 *Second*, the Commission has an interest in the operation of the Charter that is unique and distinct from that of the State of Victoria more generally, as recognised by the separate rights of intervention afforded to the Commission (s 40) and the Attorney-General of Victoria (s 34).⁴ Here, the Commission seeks to make submissions that depart from the position adopted by the Respondent.

8 *Third*, as occurred in *Momcilovic v The Queen*,⁵ had the Commission intervened in the Court of Appeal in this case, it would have been “taken to be a party” to the appeal and been able to make submissions accordingly: s 40(2). However, the Commission is unable
20 to intervene in every matter raising the Charter and makes decisions based on information available to it at the time. Its capacity to intervene in proceedings in the Court of Appeal is limited. There will therefore be proceedings — such as this one and *Charisiou* — where important issues⁶ concerning the Charter are raised in this Court but where the Commission did not intervene below.

9 *Fourth*, the question on which the Commission seeks to make submissions is unresolved. The Commission is not aware of any prior decision in which the question has been

⁴ See also Charter, s 35, which requires notice to be given to both the Attorney-General and the Commission. Note also s 35(2), which does not require notice to be given to the Attorney-General if the State is a party to the relevant proceeding

⁵ See (2011) 245 CLR 1 at [128] (Gummow J).

⁶ As to the matters that the Commission generally considers in the context of considering whether to exercise its right of intervention, see Commission’s “Charter intervention guidelines” (May 2018) at <https://www.humanrights.vic.gov.au/resources/charter-intervention-guidelines/>.

squarely addressed. If the Court resolves the question in this proceeding, that will finally resolve the issue.

10 *Fifth*, the Court “should have” the Commission’s proposed submissions to assist it to reach a correct determination”, being submissions on issues “not fully argued” or not “fully covered” in the parties’ submissions (at least those filed to date).⁷

11 *Sixth*, in circumstances where the Commission does not seek leave to make oral submissions, a grant of leave ought not add materially to the parties’ preparation for the hearing or the length of the oral hearing itself.⁸

PART IV: PROPOSED SUBMISSIONS

10 A INTRODUCTION

12 “There is a strong common law presumption that a statutory power which is capable of having an adverse effect on legally recognised rights or interests of individuals is impliedly conditioned on the observance of procedural fairness”.⁹ The Commission contends that the “**human rights**” set out in Pt 2 of the *Charter* are “legally recognised rights or interests of individuals” for the purpose of that presumption.

B HUMAN RIGHTS ARE LEGALLY RECOGNISED

13 The Appellant contends that “legal recognition is not a prerequisite to the engagement of the presumption of procedural fairness”: **AS [47]**. The Respondent resists that argument: **RS [54]-[58]**. The Commission does not take a position on that issue. It instead proceeds
20 on the assumption that “legal recognition” is a requirement for rights or interests to attract the presumption.

14 On that assumption, the Commission advances the following six points in support of the proposition that “human rights” are “legally recognised” for the purpose of the procedural fairness presumption. Those points apply with equal, if not greater force, if there is no “legal recognition” requirement at all.

⁷ *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at [6], [7(3)] and [7(5)] (the Court).

⁸ *Roadshow Films* (2011) 248 CLR 37 at [4] (the Court).

⁹ *Badari v Minister for Territory Families and Urban Housing* (2025) 100 ALJR 30 at [17] (the Court); *Mpwerempwer Aboriginal Corporation RNTBC v Minister for Territory Families and Urban Housing as delegate of the Minister for the Environment* [2026] HCA 23 at [84] (Gordon, Steward, Gleeson and Beech-Jones JJ), [157] (Jagot J).

15 *First*, the proposition that “human rights” are legally recognised is supported by the text of the Charter:

15.1 The Victorian Parliament enacted the Charter, on behalf of the people of Victoria, “recognising that all people are born free and equal in dignity and rights” (Preamble);

15.2 The “main purpose” of the Charter is to “protect and promote human rights” — one distinct way in which it does that is by “setting out the human rights that Parliament specifically seeks to protect and promote” (s 1(2)(a));

10 15.3 That is done in Pt 2 of the Charter, which “sets out the human rights that Parliament specifically seeks to protect and promote” (s 7(1)).

16 *Second*, the presumption of procedural fairness is a common law principle of statutory construction — it is one of the “rules of interpretation accepted by all arms of government in the system of representative democracy”.¹⁰ The rule “proceeds upon the assumption” that the Victorian Parliament, being aware of the common law notions of justice and fairness, “would have intended that they apply to the exercise of a power” capable of adversely affecting the legally recognised rights or interests of individuals.¹¹ In circumstances where the Victorian Parliament has expressly enacted the Charter with the intention of protecting and promoting human rights, and specifically set them out in Pt 2 of the Charter (s 7(1)) as one of the five distinct means of protecting and promoting human rights that are identified in s 1(2),¹² there is no difficulty in also assuming that the Victorian Parliament intended that such rights would be afforded the same degree of protection, from a procedural fairness perspective, as other legally recognised rights and interests. Indeed, the alignment of “human rights” with other legally recognised rights and interests for the purpose of the procedural fairness presumption has the benefit of attributing to the Victorian Parliament a rational and consistent legislative intention,

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¹⁰ *Zheng v Cai* (2009) 239 CLR 446 at [28] (the Court). See also *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [97] (Gummow, Hayne, Bell and Crennan JJ).

¹¹ See *Saeed* (2010) 241 CLR 252 at [11]–[12] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

¹² Setting out the rights is the first mentioned means of protecting and promoting the rights – in addition to the mechanisms provided in ss 32(1) and 38(1), which are the second and third mentioned means, respectively.

acknowledging that many “human rights” overlap with common law rights already within the scope of the presumption.¹³

17 *Third*, there is no “fundamental inconsistency” between the proposition that “human rights” are legally recognised for the purpose of the presumption and the scheme established by the Charter: cf **RS [46]**. It involves no “substantial extension of the common law of procedural fairness”: cf **RS [47]**. It simply involves the existing common law of procedural fairness operating upon circumstances created by statute. That is not novel: for example, a “visa” is an entirely statutory creature and no person has a “right” to a visa,¹⁴ yet a statutory power to grant a visa is a power that attracts the procedural fairness presumption.¹⁵

18 In support of its argument about “fundamental inconsistency”, the Respondent relies specifically on ss 38(1) and 39 of the Charter, but neither section supports the argument.

18.1 The “additional and supplementary”¹⁶ obligations imposed on “public authorities” by s 38(1) of the Charter are not the only means by which the Charter seeks to regulate the decision-making processes of decision-makers. Not every person who exercises a statutory power is a “public authority”: see s 4. Section 32(1) of the Charter also affects the proper construction of provisions that confer statutory powers on decision-makers, outside the operation of s 38(1).

18.2 In truth, s 38(1) supports the proposition that “human rights” are legally recognised. One of the obligations imposed by s 38(1) is the obligation for a “public authority”, in making a decision, to give “proper consideration to a relevant human right”.

(a) Compliance with the “proper consideration” obligation requires a decision-maker, if they are a “public authority”, to “(1) understand in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision;

¹³ See, eg, *Momcilovic* (2011) 245 CLR 1 at [444] (Heydon J); Pearce, *Statutory Interpretation in Australia* (10th ed, 2024) at 300-305 [5.72].

¹⁴ See *Migration Act 1958* (Cth), s 4(2) (“this Act provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the only source of the right of non-citizens to so enter or remain”).

¹⁵ See, eg, *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57; *Saeed* (2010) 241 CLR 252. See also *Mpwerempwer Aboriginal* [2026] HCA 23, concerning the grant of a statutory water licence.

¹⁶ See *Bare v IBAC* (2015) 48 VR 129 at [322]-[323], [326], [388]-[389] (Tate JA); *HJ v The Queen* (2021) 64 VR 270 at [154] (Beach, Kyrou and Kaye JJA); *Thompson v Minogue* (2021) 67 VR 301 at [80] (Kyrou, McLeish and Niall JJA).

(2) seriously turn his or her mind to the possible impact of the decision on a person's human rights and the implications for the affected person; (3) identify the countervailing interests or obligations; and (4) balance competing private and public interests as part of the exercise of justification".¹⁷

(b) *Badari* reaffirmed that "[w]hen 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".¹⁸

10 (c) In undertaking the first, second and fourth of those steps for the purpose of complying with the "proper consideration" obligation, a decision-maker is at least entitled (if not bound) to have regard to the interests of the individual whose human rights may be affected by the exercise of the power. Thus, consistent with *Badari*, the fact that the "proper consideration" obligation at least entitles a decision-maker to consider a person's human rights is consistent with the proposition that "human rights" attract the procedural fairness presumption.

18.3 Section 39 is merely a limitation on the circumstances in which a person may seek any "relief or remedy on a ground of unlawfulness arising because of this Charter".
20 It does no more than impose a restriction on the on the ordinary "standing" requirements.¹⁹

18.4 That some specific human rights also have a procedural aspect does not alter the analysis: cf **RS [47]**. Procedural fairness — encompassing the hearing rule — can of course be described as "procedural". But so can a wide range of other conditions that might be imposed on decision-makers by a statute. For example, a requirement that a decision maker take into account particular considerations before making a decision — of which the "proper consideration" obligation in s 38(1) of the Charter

¹⁷ *Thompson* (2021) 67 VR 301 at [83] (Kyrou, McLeish and Niall JJA). At the fourth step, a "public authority will need to make a broad and general assessment of whether the impact that its conduct will have upon a relevant human right is appropriate in all the circumstances".

¹⁸ *Badari* (2025) 100 ALJR 30 at [35] (the Court), quoting *Kioa v West* (1985) 159 CLR 550 at 619 (Brennan J).

¹⁹ See generally *Forestry Corporation of New South Wales v South East Forest Rescue Inc* (2025) 99 ALJR 794 at [8]-[12] (the Court).

is an example²⁰ — may be described as a “procedural” requirement. There is nothing unusual in a statutory scheme having multiple “procedural protections”, which may reinforce one other: cf **RS [48]**.

19 *Fourth*, the concept of “legal recognition” should not be understood narrowly. The reasoning of Brennan J in *Kioa* continues to be foundational to the modern understanding of the presumption.²¹ It is therefore important to recall that his Honour there observed that the presumption “may apply to any statutory power which is apt to affect any interest possessed by an individual whether or not the interest amounts to a legal right or is a proprietary or financial interest or relates to reputation”.²² In *Plaintiff S10*, Gummow, Hayne, Crennan and Bell JJ expressly agreed with that observation.²³ Their Honours also
10 quoted, with apparent approval, Brennan J’s further observation that:²⁴

It is hardly to be thought that a modern legislature when it creates regimes for the regulation of social interests — licensing and permit systems, means of securing opportunities for acquiring legal rights, schemes for the provision of privileges and benefits at the discretion of Ministers or public officials — intends that the interests of individuals which do not amount to legal rights but which are affected by the myriad and complex powers conferred on the bureaucracy should be accorded less protection than legal rights.

20 That further observation recognises that relevant rights or interests may have their
20 foundation in statutory regimes.²⁵ And, once it is recognised that a statutory permit scheme (for example) may give rise to rights or interests of a kind that may attract the presumption, it is difficult to see why a statutory scheme designed to protect and promote “human rights” should not also give rise to rights that attract the presumption.

21 *Fifth*, the Respondent submits that one “important doctrinal purpose” served by the “legal recognition” requirement is that “it assists in identifying and delimiting why certain interests do not attract the presumption of procedural fairness”: **RS [56], [58]**. Assuming the “legal recognition” requirement serves that purpose, the proposition that “human

²⁰ See *Thompson* (2021) 67 VR 301 at [91] (Kyrou, McLeish and Niall JJA), noting that “the adjective ‘proper’ means that the standard of consideration must be higher than that generally applicable at common law to taking into account relevant considerations”.

²¹ See, eg, *Saeed* (2010) 241 CLR 252 at [11], [13], [19] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Badari* (2025) 100 ALJR 30 at [34]-[35] (the Court).

²² (1985) 159 CLR 550 at 619.

²³ *Plaintiff S10* (2012) 246 CLR 636 at [66].

²⁴ *Kioa* (1985) 159 CLR 550 at 616-617.

²⁵ See also *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at [76] (the Court), explaining the interest that attracted the presumption in *Plaintiff S10* as being “the interest of an applicant in the actual or potential relaxation of a legal prohibition on his or her continued presence in Australia”.

rights” are “legally recognised” sits comfortably with it. The protection of “human rights” is not about protecting hurt feelings or legitimate expectations. To the contrary, one of the founding principles of the Charter is that human rights are “essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom”: Preamble. The rights are primarily drawn from the *International Covenant on Civil and Political Rights (ICCPR)*, which the Attorney-General recognised (in the second reading speech for the Bill that became the Charter) represented “democratic civil and political rights and values which transcend political differences and have widespread acceptance in our community”.²⁶

- 10 22 *Sixth*, the Respondent submits that the other “important doctrinal purpose” served by the “legal recognition” requirement is that it “clarifies the scope and content of the interests that attract the presumption”, which makes it possible for an “an administrative decision-maker to readily identify, before a decision is made, the interests likely to be affected and the persons who hold those interests”: **RS [56], [58]**. Again, assuming the “legal recognition” requirement serves that purpose, the proposition that “human rights” are “legally recognised” also sits comfortably with it. Those rights are explicitly set out in Pt 2 of the Charter, making them readily identifiable by decision-makers.
- 23 The Commission makes one final observation. Whether the presumption is attracted in any given case depends on an assessment of whether, as a matter of statutory construction, a power is *capable* of being exercised in a way that has an adverse effect on the legally recognised rights and interests of individuals. That is a forward-looking assessment to be made at the level of the statute, not a backward-looking assessment about how the power has in fact been exercised in a particular case: cf **AS [37]; DS [44]-[45]**. Thus, in a case involving human rights, what must be determined is whether, as a matter of construction, the statutory power is capable of being exercised in a way that adversely affects (i.e. “limits”) the human rights of individuals.
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²⁶ Legislative Assembly, *Parliamentary Debates* (4 May 2006) (**Second Reading Speech**) at 1289; see also at 1291; Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill* (2006) at 8.

PART V: ESTIMATED TIME

24 The Commission does not seek to make oral submissions.

Dated: 14 August 2026

Sarala Fitzgerald

Sarala Fitzgerald
03 9225 6448
fitzgerald@vicbar.com.au

Counsel for the Commission

Thomas Wood

Thomas Wood
03 9225 6078
twood@vicbar.com.au

ANNEXURE TO THE SUBMISSIONS OF THE COMMISSION

Pursuant to paragraph 1 of Practice Direction No 1 of 2024, this annexure sets out the constitutional provisions, statutes and statutory instruments referred to in the submissions.

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1.	<i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic)	Comp 15	Preamble, ss 1, 7, 32, 35, 38	Act in force when the Decision was made and at all times since	18 September 2023
2.	<i>Equal Opportunity Act 2010</i> (Vic)	Current	ss 154-155, 160	Functions as at date of Commission's application	14 August 2026