



HIGH COURT OF AUSTRALIA

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

BETWEEN:

JASON MALLARD

Appellant

and

HOMES VICTORIA

Respondent

RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUES

2. On 18 September 2023, Homes Victoria decided to begin implementing a policy of the Victorian Government (**Decision**). The policy is to demolish and redevelop Melbourne’s 44 public housing towers by 2051, commencing with three towers in Flemington and North Melbourne (**Towers**) and two others in Carlton (**Redevelopment Program**): TJ [3], [29]-[30] (**CAB 8, 17-18**); CA [14]-[15] (**CAB 110-111**).¹ The Decision was made by the Chief Executive Officer of Homes Victoria, Simon Newport, pursuant to s 15(1)(a) of the *Housing Act 1983* (Vic), which empowers Homes Victoria to “develop any land ... vested in [it]”.
 3. The appeal raises four questions:² (1) Is the exercise of the power in s 15(1)(a) conditioned by a duty of procedural fairness? (2) If so, what was the content of that duty? (3) If the Decision was made without affording procedural fairness, was any such failure material? (4) If so, what relief should be ordered?

PART III: SECTION 78B NOTICE

4. No notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV: MATERIAL FACTS

5. The proceeding, as commenced by Barry Berih, sought to challenge Cabinet’s decision to approve the Redevelopment Program. The proceeding was summarily dismissed because Cabinet’s decision was held to be not justiciable.³ Notwithstanding the dismissal, Mr Berih amended his claim, with leave of the trial judge,⁴ to challenge the Decision.
6. Melbourne’s public housing towers, including the Towers, were built between the 1950s and the 1970s: TJ [1] (**CAB 8**). They are affected by “many issues ... that render them unfit for modern living”: TJ [241] (**CAB 87**). Their physical condition is deteriorating and they do not meet contemporary building standards for structural performance to withstand earth movement, fire safety, insulation, noise control, accessibility for people

¹ The decision of the trial judge is *Berih v Homes Victoria (No 4)* [2025] VSC 169 (Richards J) (**TJ**). The decision of the Court of Appeal is *Mallard v Homes Victoria* [2025] VSCA 339 (**CA**).

² The appellant has put the first three questions in issue. To the extent necessary, Homes Victoria relies on its notice of contention annexed to the affidavit of Sarah McKellar-White affirmed 31 July 2026 in respect of the second and third questions.

³ *Berih v Victoria (No 2)* [2024] VSC 230 at [46], [75] (Richards J); TJ [21] (**CAB 16**).

⁴ *Berih v Victoria (No 2)* [2024] VSC 230 at [76]-[79] (Richards J).

with disabilities, and dwelling amenity: TJ [233] (**CAB 82-84**). The trial judge accepted that Homes Victoria “must do something” to address these issues: TJ [9](g), [262] (**CAB 11, 94**).

7. A further, equally significant, reason for the Decision is that the Redevelopment Program will substantially increase the amount of housing, providing 1,300 more homes on the Towers sites (TJ [127], [241] (**CAB 52, 87**)) and around 7,400 more homes across all sites, including 10% more social housing:⁵ TJ [260] (**CAB 93-94**).

8. Retrofitting the Towers is not feasible (TJ [126], [258] (**CAB 51, 93**); CA [201] (**CAB 157**)) and would not increase housing supply: TJ [260] (**CAB 93-94**). Further, since retrofitting would require substantial works which could not be done while renters remain in their homes, it would require renters to relocate to alternative accommodation for an extended period, which would have a similar impact on renters as demolition and redevelopment: TJ [259] (**CAB 93**). All residents of the Towers who relocate to alternative housing will have a right of return to the site on completion of the redevelopment, based on their ongoing eligibility and needs: TJ [245] (**CAB 88**).

9. The Towers were selected in the first group to be redeveloped because there was newly constructed social housing nearby, within 100 metres of the Towers: TJ [244] (**CAB 88**).⁶ Mr Newport considered that the availability of this nearby housing would help to reduce the impact of redevelopment on renters by “[k]eeping communities together”⁷ and “keeping people connected and as close to the neighbourhoods as possible”.⁸

10. The Decision was a “necessary first step” in the implementation of the Redevelopment Program, “a large and complex exercise that will involve many other decisions and will take decades to complete”: TJ [27] (**CAB 17**). Those subsequent decisions “are subject to their own processes, comprising both procedural requirements and substantive criteria, some of which [are] statutory and some of which [are] applied as a matter of policy”: CA [128] (**CAB 143**).

⁵ “Social housing” refers to both public housing and housing owned, controlled or managed by a participating registered agency: *Housing Act*, s 4(1) (definition of “social housing”).

⁶ Affidavit of Simon Newport sworn 30 September 2024 (**Second Newport Affidavit**), [24]-[25] (**ABFM 71-72**); evidence of Simon Newport (**Newport Evidence**): T91.12 (**ABFM 171**). During the relocation process, renters in the Towers were invited to tour new developments in Victoria Street, Flemington and Abbotsford Street, North Melbourne: see affidavit of Louisa Bassini affirmed 30 August 2024 (**Bassini Affidavit**), exhibits LB-38, LB-39, LB-40 (**RBFM 27-38**).

⁷ Newport Evidence: T41.21-22 (**ABFM 121**); see also at T90.18 (**ABFM 170**) and Second Newport Affidavit, [24] (**ABFM 71-72**).

⁸ Newport Evidence: T41.24-26 (**ABFM 121**).

11. After the Premier announced the Redevelopment Program on 20 September 2023 (TJ [29] (CAB 17-18)), Homes Victoria began communicating with renters in the Towers about the Redevelopment Program: TJ [207] (CAB 76).⁹ In October 2023, Homes Victoria wrote to renters, saying that “[m]oving house takes time, some renters may choose to move straight away into new homes soon to be complete [in Flemington and North Melbourne], while others may need more time to work through the options available. No-one is required to move immediately”.¹⁰
12. Each person who rents housing from Homes Victoria is party to a residential rental agreement governed by the *Residential Tenancies Act 1997* (Vic) (**RT Act**).¹¹ The Decision could not, and did not, terminate or otherwise alter any rental agreement.¹² After the Redevelopment Program was announced, many renters chose to terminate their rental agreements¹³ and enter into new rental agreements for different housing.¹⁴
13. Social housing renters who wish to move to a different social housing property can apply through the Victorian Housing Register.¹⁵ There are lengthy waitlists.¹⁶ Tenancies are allocated according to priority categories,¹⁷ which include renters whose current property is to be redeveloped.¹⁸ The Decision meant that renters in the Towers received “Priority Access” to transfer to different social housing, whereas they would previously have fallen within the lowest priority “Register of Interest” category (unless they satisfied the criteria for another priority access category, such as having special housing needs).¹⁹
14. Following the announcement of the Redevelopment Program, Departmental staff met with individual households to discuss the Program, the relocation process, and the renters’

⁹ Departmental staff doorknocked on homes to speak with renters, set up information booths with interpreters in communal spaces at the Towers, and convened community forums: Second Newport Affidavit, [39] (ABFM 74-75).

¹⁰ Affidavit of Simon Newport sworn 5 March 2024 (First Newport Affidavit), exhibit SN-1 (RBFM 12, 14). Cf Bassini Affidavit, [5] (ABFM 33); TJ [190] (CAB 70).

¹¹ *Housing Act*, s 14(1)(g).

¹² *Residential Tenancies Act*, s 91B.

¹³ *Residential Tenancies Act*, s 91C.

¹⁴ Second Newport Affidavit, [45] (ABFM 76); TJ [191] (CAB 70).

¹⁵ *Housing Act*, s 142A; Second Newport Affidavit, exhibit SAN-2 pages 203, 216 (RBFM 57, 70).

¹⁶ Bassini Affidavit, exhibit LB-44 (ABFM 56-64).

¹⁷ *Housing Act*, s 142E; Victoria, *Government Gazette*, No S 229, 18 May 2018, 1-8: see Second Newport Affidavit, exhibit SAN-2 pages 115-126 (RBFM 39-50).

¹⁸ Second Newport Affidavit, exhibit SAN-2 page 119 (RBFM 43).

¹⁹ First Newport Affidavit, [34] (RBFM 9). The appellant submits that, if renters in the Towers refuse two reasonable offers of housing, they will lose their priority status and thus be subject to a direct affectation of rights or interests sufficient to attract the requirements of procedural fairness: AS [33]. This point was not part of Mr Berih’s case at trial and the appellant should not be permitted to raise it on appeal. In any event, a renter choosing to decline two reasonable offers of accommodation in order to pursue other rights under the RT Act is not a direct consequence of the Decision.

housing preferences, health, social supports, cultural and educational needs.²⁰ Renters were encouraged to “share [with staff] the people, places and services that [were] important to [them]”.²¹ The goal of the relocation process is to find alternative housing for renters that meets their household’s needs and, where requested and possible, is within their existing neighbourhood, so they can maintain community connections.²²

15. Homes Victoria makes all reasonable efforts to ensure relocation is achieved by agreement with renters.²³ It would only give a notice to vacate to a renter in the Towers as a measure of last resort²⁴ and none have been given due to the Redevelopment Program.

PART V: ARGUMENT

10 A. NO DUTY TO AFFORD PROCEDURAL FAIRNESS

16. Whether the exercise of a statutory power is conditioned by a duty to afford procedural fairness is a question of statutory construction.²⁵

A.1 The power in s 15(1)(a)

17. The *Housing Act* establishes Homes Victoria as a body corporate with the normal incidents of legal personality, constituted by its Chief Executive Officer: s 9(2)-(2A). Homes Victoria has the powers, discretions, functions, authorities and duties conferred or imposed by or under the *Housing Act* or any other Act: s 9(3)-(3A).
18. Part III of the *Housing Act* sets out Homes Victoria’s powers as to property. Section 15 confers powers to develop and manage land. Section 15(1)(a) provides that “Homes Victoria may for the purposes of this Act and for all purposes ancillary to those purposes ... develop any land which is vested in Homes Victoria ...”. “Development”, in relation to land, includes “the construction or demolition of a building on the land”, “the carrying out of works in, on, over or under the land”, and “the redevelopment of the land”: s 4(1).
- 20 19. Section 15(1)(a) does not confer any power to alter legal rights. Its effect is simply to ensure that the development of land falls within the scope of Homes Victoria’s legal authority: CA [116] (**CAB 141**).²⁶ It confers a bare legal capacity, the exercise of which

²⁰ Second Newport Affidavit, [41] (**ABFM 76**).

²¹ Bassini Affidavit, exhibit LB-40 (**RBFM 37**).

²² Second Newport Affidavit, [44] (**ABFM 76**).

²³ Second Newport Affidavit, [44] (**ABFM 76**).

²⁴ Second Newport Affidavit, [49] (**ABFM 77**).

²⁵ *Disorganized Developments Pty Ltd v South Australia* (2023) 280 CLR 515 at [32] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); *Badari v Minister for Territory Families and Urban Housing* (2025) 100 ALJR 30 at [17] (the Court).

²⁶ *Kathleen Investments (Australia) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 at 128-130 (Barwick CJ), 137-138 (Gibbs J), 141-143 (Stephen J), 152-153 (Mason J), 155-156 (Jacobs J).

is subject to the general law: CA [117]-[120] (**CAB 141**).²⁷ That law includes statutes regulating land use and development, such as the *Planning and Environment Act 1987* (Vic) and the *Building Act 1993* (Vic). It also includes the common law and statutory rights of third parties, such as the rights of renters under their rental agreements and the *RT Act*. In exercising the power in s 15(1)(a), Homes Victoria must take the general law “as [it] finds it, and must suffer the civil and criminal consequences of any breach”.²⁸

20. Section 15(1)(a) therefore differs from the powers at issue in the foundational cases on procedural fairness and property rights, including *Cooper v Wandsworth Board of Works*,²⁹ *Sydney Corporation v Harris*,³⁰ and *Twist v Randwick Municipal Council*.³¹

10 Each of those cases concerned a true power to demolish a building, free of the constraints otherwise applying under the general law. The power in s 15(1)(a) is not of that nature.

21. Moreover, the power is not spent upon the making of an initial decision to develop land. Rather, its exercise may be ongoing over an extended period and involve numerous decisions and actions, some of which may involve the exercise of other statutory powers.

22. The appellant contends that s 15(1)(a) is conditioned by a duty to afford procedural fairness because of the express terms of the *Housing Act* or by implication from the common law presumption. Both arguments should be rejected.

A.2 No express duty of procedural fairness

- 20 23. The appellant asserts that an express duty of procedural fairness arises from the words “for the purposes of this Act” in the chapeau of s 15(1) and the objects of the *Housing Act* in s 6(1)(f)-(h): AS [20]-[21]. There is no such duty.

24. The words “for the purposes of this Act” condition all powers in Pt III of the *Housing Act*. They ensure that Homes Victoria’s powers may be lawfully exercised only for a proper purpose. They do not require that every exercise of power must give effect to all, or any particular, of the objects in s 6(1) or the purposes of the *Housing Act* more broadly.³² A decision may promote only some purposes of the *Housing Act*, and still be

²⁷ *Davis v Commonwealth* (1988) 166 CLR 79 at 108 (Brennan J); *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at [132], [135] (Gageler J).

²⁸ *Plaintiff M68* (2016) 257 CLR 42 at [135] (Gageler J), citing *Clough v Leahy* (1904) 2 CLR 139 at 155-156 (Griffith CJ).

²⁹ (1863) 14 CB (NS) 180; 143 ER 414.

³⁰ (1912) 14 CLR 1.

³¹ (1976) 136 CLR 106.

³² See *Capello v Roads and Maritime Services (NSW)* (2019) 100 NSWLR 259 at [39]-[42] (Payne JA; Brereton JA and Emmett AJA agreeing).

“for the purposes of this Act”. The *Housing Act* leaves to Homes Victoria the discretion to determine how best to achieve its objects and purposes: TJ [110](d) (**CAB 45**).

25. By contrast, where Parliament intended to impose procedural requirements on the exercise of powers in the *Housing Act*, it did so expressly.³³ No such requirements were imposed on the power in s 15(1)(a). The objects relied on by the appellant (s 6(1)(f)-(h)) do not express a requirement of procedural fairness. They use general, aspirational terms (“to promote”, “to seek”) and extend well beyond the categories of persons to whom an obligation of procedural fairness might be owed (“other community groups”, “all persons and groups of persons involved in housing”) and the circumstances which might give rise to such an obligation (“major ... policy issues”).³⁴

A.3 Common law presumption of procedural fairness does not apply

26. There is a strong common law presumption that the exercise of a statutory power which is capable of having an adverse effect on legally recognised rights or interests of an individual is impliedly conditioned on the observance of procedural fairness, unless clearly displaced by the statutory scheme.³⁵ Three important points should be made about the nature of those statutory powers which attract the presumption.
27. *First*, the presumption is concerned with statutory powers which adversely affect a person’s **legally recognised rights or interests**. The concept of “legally recognised rights” encompasses a person’s legal rights, duties, powers, and privileges, such as liberty³⁶ and property rights.³⁷ The concept of “legally recognised interests” encompasses interests that do not amount to legal rights but are nevertheless recognised by common law or statute, such as reputation,³⁸ confidentiality,³⁹ parent-child relationships,⁴⁰ and obtaining or retaining statutory rights or privileges.⁴¹

³³ See, eg, *Housing Act*, ss 14(1)(a), (1)(g), (2), 16(6)-(7), Sch 2 Pts I-II.

³⁴ TJ [119] (**CAB 49**); CA [122] (**CAB 142**), quoting *R (Moseley) v Haringey London Borough Council* [2014] WLR 3947 at [38] (Lord Reed; Lady Hale and Lord Clarke agreeing).

³⁵ *Disorganized Developments* (2023) 280 CLR 515 at [33] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); *Badari* (2025) 100 ALJR 30 at [17] (the Court).

³⁶ *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at [76]-[77] (the Court).

³⁷ *Disorganized Developments* (2023) 280 CLR 515 at [28] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

³⁸ *Annetts v McCann* (1990) 170 CLR 596 at 599 (Mason CJ, Deane and McHugh JJ), 608-609 (Brennan J); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 577-578 (Mason CJ, Dawson, Toohey and Gaudron JJ).

³⁹ *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 429-430 (Brennan J; Gaudron J agreeing), 473 (McHugh J).

⁴⁰ *J v Lieschke* (1987) 162 CLR 447 at 458, 462 (Brennan J; Mason, Wilson, Deane and Dawson JJ agreeing).

⁴¹ *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342; *Kioa v West* (1985) 159 CLR 550 at 616-617 (Brennan J); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [66], [69] (Gummow, Hayne, Crennan and Bell JJ).

28. *Secondly*, the presumption is concerned with adverse effects on the rights and interests of persons **as individuals**, in a way that differs from the effects on the rights and interests of the public or a class of the public.⁴²
29. *Thirdly*, the adverse effects on a person's individual rights or interests must arise "**by force of the statute**".⁴³ There must be a sufficiently direct connection between the exercise of the statutory power and the requisite effect on rights or interests for the power to attract the presumption. If an exercise of the power only affects a person's rights or interests indirectly or consequentially (eg, through the intervening conduct of another person or the subsequent action of the decision-maker), it may not attract the requirements of procedural fairness.⁴⁴
30. Section 15(1)(a) is not a power of that nature. It is a broad, policy-laden power,⁴⁵ which gives Homes Victoria the legal capacity⁴⁶ to develop land (which any landowner has),⁴⁷ subject to the general law. As the Court of Appeal held (at [120] (**CAB 141**)), "it is concerned with the internal authority of the agency rather than arming Homes Victoria with powers that, by force of statute, affect external rights or interests of third parties". The present case is therefore not analogous to the cases cited at AS [25], where the exercise of each relevant power was, by force of the statute, apt to alter legal rights with respect to property.⁴⁸ The same is true of *Plaintiff M61*.⁴⁹ Contrary to AS [31], the exercise of the power in that case — a power to consider whether a statutory power should

⁴² *Disorganized Developments* (2023) 280 CLR 515 at [34] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); *Badari* (2025) 100 ALJR 30 at [37]-[38] (the Court).

⁴³ *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at [16] (Kiefel CJ and Gageler J).

⁴⁴ See, eg, *R v Ludeke; Ex parte Customs Officers' Association of Australia* (1985) 155 CLR 513 at 520-521 (Gibbs CJ; Dawson J agreeing), 528-529 (Brennan J), 530 (Deane J); *Kioa* (1985) 159 CLR 550 at 634 (Deane J); *Saraceni v Australian Securities and Investments Commission* (2013) 211 FCR 298 at [6]-[16] (North J), [122]-[136] (Jacobson J; Gilmour J agreeing).

⁴⁵ TJ [110](e) (**CAB 45**); See also Victoria, *Parliamentary Debates*, Legislative Assembly, 15 September 1983, 651 (Mr Cathie, Minister of Housing).

⁴⁶ CA [110]-[111] (**CAB 139-140**), citing *Griffith University v Tang* (2005) 221 CLR 99 at [82] (Gummow, Callinan and Heydon JJ) and *King v Ombudsman* (2020) 137 SASR 18 at [93] (Doyle J; Parker J and Tilmouth AJ agreeing). See also *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 119 (Kitto J).

⁴⁷ CA [117] (**CAB 141**).

⁴⁸ CA [131] (**CAB 143**); *Badari* (2025) 100 ALJR 30 (Ministerial power to determine the rent to be paid for a dwelling); *Disorganized Developments* (2023) 280 CLR 515 (power to declare land a prescribed place, which made it an offence for certain persons to enter it); *Harris* (1912) 14 CLR 1 (power to require an owner or tenant to take down, secure or repair a building, and for the council to take those steps if the owner or tenant failed to do so); *Cooper* (1863) 14 CB (NS) 180; 143 ER 414 (power to demolish or alter a house). See also *Twist* (1976) 136 CLR 106 (power to order an owner to demolish a building, and for the council to take that step if the owner failed to do so); *Delta Properties Pty Ltd v Brisbane City Council* (1955) 95 CLR 11 (power to prohibit the erection of dwellings on land).

⁴⁹ *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319.

be exercised — “had the consequence of depriving [a claimant] of their liberty for longer than would otherwise have been the case”, and therefore “directly affected” the “right of a claimant to liberty from restraint at the behest of the Australian Executive”.⁵⁰

31. None of the appellant’s three arguments as to why the exercise of the power in s 15(1)(a) is apt to affect legally recognised rights and interests are made out. The power does not have that effect.

32. **Right to security of tenure.** The appellant’s first argument is that the power in s 15(1)(a) is apt to adversely affect a renter’s “right to security of tenure”.

10 33. In relation to land, “security of tenure” describes the protection given by the law to a person’s interest in land. In the present context, it refers to renters’ legal rights under their rental agreements and the *RT Act*.⁵¹ The appellant’s reference to the “right to security of tenure” therefore distracts from the relevant question as to whether the power in s 15(1)(a) is apt to adversely affect those legal rights.

20 34. The short answer to that question is “no”. The exercise of the power in s 15(1)(a) leaves unaltered both the substantive rights under a rental agreement and the *RT Act* (eg, the right to exclusive possession, the right to quiet enjoyment, the rent payable) and the procedural obligations of a residential rental provider when seeking to exercise their rights under the agreement or the *RT Act*: TJ [114](b) (**CAB 46-47**); CA [126]-[128] (**CAB 142-143**). At most, a decision under s 15(1)(a) to develop land alters the factual background against which renters’ rights are enjoyed, but does not alter those rights.

35. The appellant submits that the Decision adversely affected renters’ security of tenure because it “resulted in every renter being told that they will have to move”: AS [27], quoting TJ [190] (**CAB 70**). The statement at TJ [190] paraphrased the evidence (see [11] above) and does not accurately reflect its full content. But in any case, neither the Decision nor Homes Victoria’s subsequent communications with renters about the Redevelopment Program affected the renters’ property rights. The appellant points to the fact that, one year into the Redevelopment Program, a significant proportion of the renters had decided to move out of the Towers: see TJ [191] (**CAB 70-71**). That did not occur by force of s 15(1)(a), but because those renters chose to accept offers of alternative

⁵⁰ *Plaintiff M61* (2010) 243 CLR 319 at [76]-[77] (the Court).

⁵¹ The *RT Act* provides “appropriate security of tenure” (s 3A(b)) for renters by requiring that rental agreements only be terminated in certain circumstances and by certain procedures: see Pt 2 Div 9, Pts 7-8.

accommodation.⁵² Their existing rental agreements were terminated by agreement under s 91C of the *RT Act*.

36. The appellant also submits that the Decision adversely affected renters' security of tenure because it satisfied "a necessary statutory precondition to the issue of a notice to vacate" in s 91ZY(1)(a) of the *RT Act*: AS [28]-[29]. Section 91ZY(1) provides that a residential rental provider may give a renter a notice to vacate rented premises if:

- (a) the residential rental provider intends to demolish the premises—
 - (i) in the case of a building owned by a residential rental provider containing 5 or more rented premises, immediately after the last renter vacates; or
 - (ii) in any other case, immediately after the termination date; and
- (b) the residential rental provider has obtained all necessary permits and consents to demolish the premises.

37. Where Homes Victoria enters into a residential rental agreement pursuant to s 14(1)(g) of the *Housing Act*, its rights and obligations are governed by the agreement and the *RT Act*. The agreement cannot be terminated except in accordance with the *RT Act*.⁵³ Section 91ZY(1) gives all residential rental providers⁵⁴ the right to terminate by giving a notice to vacate in defined circumstances. The appellant's submission erroneously focuses attention not on whether the power to develop land in s 15(1)(a) is conditioned by procedural fairness but on a different power under a different statutory provision.

38. In any event, the Decision did not satisfy the condition in s 91ZY(1)(a): CA [129]-[130] (**CAB 143**); cf TJ [114](b) (**CAB 46-47**). *First*, s 91ZY(1)(a) requires that the residential rental provider intend to demolish the premises "immediately after" the last renter vacates or the termination date in the notice to vacate, as the case may be. The word "immediately" takes its meaning from its context, "but in its ordinary signification it involves the notion that there is, between two relevant events, no intervening space, lapse of time or event of any significance".⁵⁵ The required intention is not merely to demolish the premises at some point in the future after the relevant event, but to demolish the premises at a time that is sufficiently precise that it can be said that the demolition is intended to occur "immediately after" the relevant event. That intention may not exist if,

⁵² There was no evidence before the trial judge about the reasons that any of those renters decided to move.
⁵³ *RT Act*, s 91B.

⁵⁴ See *Garlett v Housing Authority* [2026] WASCA 102 at [86] (Mitchell, Archer and Seaward JJA).

⁵⁵ *Litster v Forth Dry Dock & Engineering Co Ltd* [1990] 1 AC 546 at 567 (Lord Oliver), quoted in *Loizos v Carlton & United Breweries Ltd* (1994) 117 FLR 135 at 138 (Kearney J; Angel J agreeing); *Macquarie Health Corp v Federal Commissioner of Taxation* (1999) 96 FCR 238 at [100] (Hill, Sackville and Finn JJ).

for example, things need to be done before demolition can occur — such as obtaining the permits and consents required by s 91ZY(1)(b) — and the likely time to do those things is uncertain.⁵⁶ The condition in s 91ZY(1)(b) reinforces the view that s 91ZY(1) only entitles residential rental providers to give a notice to vacate when they are ready to demolish premises immediately upon obtaining vacant possession.

39. *Secondly*, on the factual findings made by the trial judge, the Decision did not satisfy the condition in s 91ZY(1)(a). The trial judge found that the Decision “carrie[d] with it an intent to demolish the [Towers]”: TJ [114](b) (**CAB 46-47**), but there was no finding as to the intended timing of demolition or whether it satisfied the immediacy requirement. That is unsurprising, given that Mr Berih first advanced the argument regarding s 91ZY(1)(a) in his closing submissions in reply⁵⁷ and the intended timing of the demolition was not addressed in evidence.⁵⁸ The only evidence relevant to the intended timing of the demolition was to the opposite effect: Mr Newport explained that the implementation of the Redevelopment Program and the demolition of the Towers would be contingent on the making of a series of further decisions over an extended period, each subject to their own processes: see [10] above.⁵⁹ That evidence weighs heavily against any conclusion that, when making the Decision, Mr Newport formed an intention about the timing of demolition that satisfied the condition in s 91ZY(1)(a).

40. In any event, even if the Decision supplied the intention required by s 91ZY(1)(a), it did not “enliven[...] the statutory process to terminate the appellant’s tenancy” (AS [29]). The statutory power to give a notice to vacate is not enlivened until both criteria in paragraphs (a) and (b) are satisfied. The permits and consents required before the Towers could be demolished include a building permit under the *Building Act*,⁶⁰ the report and consent of the responsible authority under the *Planning and Environment Act*,⁶¹ and permits and approvals under local government laws.⁶² There was no finding that those

⁵⁶ See, by analogy, *Pridewell Properties (London) Ltd v Spirit Pub Company (Managed) Ltd* [2026] EWHC 953 (Ch) at [68]-[70] (Fancourt J).

⁵⁷ Plaintiff’s Closing Submissions in Reply: T370.23-371.29 (**RBFM 140-141**).

⁵⁸ Aside from a passing reference in Mr Newport’s affidavits to a “schedule of demolition and construction works in respect of the [Towers]”: First Newport Affidavit, [20] (**RBFM 7**); Second Newport Affidavit, [51] (**ABFM 78**).

⁵⁹ See also Second Newport Affidavit, [32]-[33] (**ABFM 73**).

⁶⁰ *Building Act*, s 3(1) (definition of “building work”), Pt 3.

⁶¹ *Building Act*, s 29A; *Planning and Environment Act*, s 13.

⁶² See, eg, City of Moonee Valley, *Activities and General Amenities Local Law 2018*, cl 3.2; Melbourne City Council, *Activities Local Law 2019*, cl 9.1-9.2.

permits and consents had been obtained when the Decision was made. Mr Newport's evidence was that they had not.⁶³

41. Accordingly, even if the Decision satisfied s 91ZY(1)(a), it did not adversely affect renters' property rights so as to attract the requirements of procedural fairness. As the Court of Appeal held, "the mere forming of an intention ... can have no impact whatsoever" on a renter's property rights unless and until the residential rental provider obtains all necessary permits and consents as required by s 91ZY(1)(b) and, further, decides to issue a notice to vacate and then to pursue the procedure under the *RT Act* for regaining possession: CA [129]-[130] (**CAB 143**); see also TJ [114](b) (**CAB 46-47**).
 10 Even then, whether a possession order is granted is a decision for the Victorian Civil and Administrative Tribunal (**VCAT**), taking into account the criteria set out in the *RT Act*.⁶⁴

42. ***Interest in maintaining home.*** The appellant's second argument is that the power in s 15(1)(a) is apt to adversely affect a renter's interest in "maintaining" their home. The argument is put in two ways.

43. The first relies on common law authorities, some of which emphasise the significance of the home: AS [36]. However, as the appellant acknowledges, those statements were made in the context of unlawful interference with or entry to premises. A person's home was affected in those cases because their property rights were infringed. The cases provide no authority for treating the sanctuary of a person's home as an interest recognised or
 20 protected by the law separate from the property rights that create that sanctuary. As discussed above, the power in s 15(1)(a) does not authorise any interference with property rights. Contrary to AS [38], the Decision did not and will not "remove the tenants from their 'castle and fortress'" or "deprive them of their 'sanctuary'". That will only happen if some other decision is taken, including if renters in the Towers choose to accept offers of alternative accommodation (as some have) or if Homes Victoria decides to pursue the statutory procedure under the *RT Act* (which it has not done) and **VCAT** grants a possession order: TJ [114](a) (**CAB 46**); CA [126]-[132] (**CAB 142-144**).

44. The second way the argument is put relies on the right not to have a person's home unlawfully or arbitrarily interfered with in s 13(a) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic): AS [37]. The courts below dismissed the appellant's
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⁶³ First Newport Affidavit, [39] (**RBFM 9**); Second Newport Affidavit, exhibit SAN-2, p 275 (**RBFM 96**).

⁶⁴ *RT Act*, ss 330 and 330A. See also *Keasey v Director of Housing* (2022) 66 VR 45 (Niall, Emerton and Whelan JJA); and *Garlett* [2026] WASCA 102 (Mitchell, Archer and Seaward JJA).

Charter claims. Both courts held that, in making the Decision, Homes Victoria gave proper consideration to relevant human rights for the purpose of s 38(1): TJ [158]-[161] (**CAB 61-62**); CA [216]-[218] (**CAB 160**). Although both courts accepted that the Decision “interfered with” renters’ homes (TJ [205] (**CAB 75**); see also CA [158]-[159] (**CAB 148**)), the Court of Appeal held that the interference was not arbitrary and so did not limit the right: CA [176]-[179] (**CAB 152**). Further, both courts held that any limit was reasonable and demonstrably justified under s 7(2), so the Decision was compatible with human rights: TJ [262] (**CAB 94**); CA [192]-[204] (**CAB 155-157**). Special leave to raise a *Charter* ground was refused. The appellant nevertheless submits that the finding that the Decision interfered with renters’ homes for the purposes of s 13(a) means that it adversely affected a legally recognised interest and attracted the requirements of procedural fairness. The submission should be rejected.

45. *First*, both courts held that s 13(a) brought in “broader considerations” than the types of rights and interests that might attract the presumption of procedural fairness: CA [153] (**CAB 148**); TJ [187] (**CAB 69-70**). The matters the trial judge relied on to find that the Decision interfered with the renters’ homes (TJ [190]-[191] (**CAB 70-71**)) did not engage the presumption. The Decision did not satisfy the condition in s 91ZY(1)(a): see [37]-[39] above. The communications with the renters were the consequence of subsequent decisions and conduct by Homes Victoria, not the Decision itself. And, for the reasons discussed at [52]-[53] below, the subsequent dispersal of the community in the Towers did not occur by force of the statute and did not affect renters as individuals.
46. *Secondly*, the appellant’s approach is fundamentally inconsistent with the scheme established by the *Charter*. The *Charter* protects the human rights set out in it through, relevantly, the obligations imposed on “public authorities” by s 38(1), which makes it unlawful for a public authority to act in a way that is incompatible with a human right (determined in accordance with s 7(2)) or to fail to give proper consideration to a relevant human right in making a decision. Section 39 only permits a person to challenge an act or decision “on a ground of unlawfulness arising because of this Charter”, which includes unlawfulness under s 38(1), if they are first entitled to challenge the act or decision on a non-*Charter* ground.
47. In addition, certain *Charter* rights include specific procedural protections,⁶⁵ which “leads to the inevitable conclusion that the legislature did not intend to provide procedural

⁶⁵ See, eg, *Charter*, s 21(4)-(7), 23(2), 24-25.

protections for all rights”,⁶⁶ other than by the procedural limb of s 38(1). In particular, while the concept of “arbitrariness” in s 13(a) has a procedural aspect, it differs from procedural fairness.⁶⁷ While “arbitrariness” includes conduct that is “unpredictable”, the conduct must also be substantively “unjust or unreasonable in the sense of not being proportionate to the legitimate aim sought”: CA [171] (**CAB 151**).⁶⁸ As the Court of Appeal observed (at [174] (**CAB 151**)), “both the process by which the limitation is imposed and the objective impact of it will be relevant to that assessment”.

48. The appellant’s submission would attach a procedural fairness requirement to the right in s 13(a) (and all other *Charter* rights) that is additional to, and different from, the “proper consideration” requirement in s 38(1). The appellant seeks to deploy the *Charter* rights, divorced from the mechanisms of the *Charter* itself, to justify a substantial extension of the common law of procedural fairness, notwithstanding that Parliament plainly did not intend to create such protections when enacting the *Charter*. The common law of procedural fairness should not be developed in that way.

49. ***Interest in maintaining community***. The appellant’s third argument is that the power in s 15(1)(a) is apt to adversely affect a renter’s interest in maintaining the community in the Towers. This argument should be rejected.

50. ***First***, maintaining a community is not a legally recognised interest.

(1) The appellant refers to four of the objects of the *Housing Act* (AS [41]-[44]), two of which do not refer to “community” at all: s 6(1)(f), (h). The other two objects refer to “community” in the context of seeking the participation of “tenants and other community groups” in the management of public housing (s 6(1)(g)) and co-ordinating the provision of ancillary “community services and amenities” (s 6(1)(j)). These objects cannot plausibly be read as legally recognising an interest in maintaining a community constituted by the renters in a particular location.

(2) The appellant also refers to a recital in an intergovernmental agreement ratified by the *Housing Act*: AS [45], referring to s 29A and Sch 3A. The recital provides no assistance. It contains a bare reference to “the management of ... dwellings and

⁶⁶ *Bare v Independent Broad-based Anti-corruption Commission* (2015) 48 VR 129 at [181] (Warren CJ).

⁶⁷ The concept of arbitrariness also appears in the right in s 21(2) of the *Charter*.

⁶⁸ Quoting *Thompson v Minogue* (2021) 67 VR 301 at [51]-[55] (Kyrou, McLeish and Niall JJA). See also *WBM v Chief Commissioner of Police (Vic)* (2012) 43 VR 446 at [103]-[113] (Warren CJ).

estates”. The agreement concerned the provision of Commonwealth financial assistance to the States and the Northern Territory and expired in 1993.

- (3) Finally, the appellant refers to two decisions concerning Article 8 of the *European Convention on Human Rights*: AS [46].⁶⁹ Both decisions involved orders to evict persons from their property. Article 8 does not provide any independent recognition of, or protection for, an interest in maintaining community in the absence of some interference with a person’s home itself.

51. The difficulties presented by the lack of legal recognition are underscored by the vague nature of the asserted interest: see AS [7], [39]-[40]. It is unclear how a community is to be identified, whether different communities exist around the Towers, or what would constitute a sufficient alteration of a community to engage the requirements of procedural fairness. That does not provide a sound basis for the operation of the presumption.
52. *Secondly*, the power in s 15(1)(a) is not itself capable of adversely affecting the asserted interest in maintaining a community. The dispersal of the community in the Towers has occurred because renters have accepted offers of alternative accommodation, not by force of the statute. If the contrary were true, it would follow that Homes Victoria would be required to afford procedural fairness to a renter even if all it proposed to do was to agree to requests from other renters to leave the Towers because that would potentially affect the first renter’s interest in maintaining their community. That cannot be right.
- 20 53. *Thirdly*, to the extent that the power in s 15(1)(a) is apt to affect the maintenance of a community, it does not affect renters as individuals. It necessarily affects them only as members of the community (ie, a class of the public).
54. ***Rights and interests that are not legally recognised.*** The appellant submits, in the alternative, that “legal recognition is not a prerequisite to the engagement of the presumption of procedural fairness”, both as a matter of authority and because, in light of the requirement that an interest be “directly” affected, there is “little need for a supplementary criterion that further delimits the rights and interests whose direct affectation enlivens the presumption”: AS [47]-[48]. That submission should be rejected.

⁶⁹ Citing *Connors v United Kingdom* (2005) 40 EHRR 9 at [82]; *Yordanova v Bulgaria* (Unreported, European Court of Human Rights, 24 April 2012) at [118](ii), [121].

55. As to authority, the appellant identifies some cases in which courts, or individual judges, have referred simply to “interests”, rather than “legally recognised interests”: AS [47].⁷⁰ But as those cases involved legally recognised rights or interests, it was unnecessary for any such distinction to be drawn. They are not authority for the appellant’s proposition.
56. As to utility, the legal recognition criterion serves two important doctrinal purposes. *First*, it assists in identifying and delimiting why certain interests do not attract the presumption of procedural fairness. As the appellant accepts, at the very least the presumption does not apply to an exercise of power that affects only a person’s interest in not having their feelings hurt or their legitimate expectations disappointed: AS [50]. Some distinguishing
10 criterion, in addition to directness of effect, is needed.
57. The appellant suggests, as the relevant criterion, the concept of dignity. Human dignity is a value that may be protected by the law. Indeed, it is protected through the specific rights and mechanisms in the *Charter*. But as a concept expressed at the level of generality posited by the appellant — that is, “the idea of a certain status that ought to be accredited to all persons and taken seriously in the way they are ruled”⁷¹ — it provides no real guidance about where the line of demarcation should be drawn. The question left unanswered by the appellant is why a person’s emotional interests, legitimate expectations or “bare commercial interests” are irrelevant to their capacity to be “the author of their own life” (AS [49]) and, therefore, beyond the scope of procedural fairness.
- 20 58. *Secondly*, legal recognition clarifies the scope and content of the interests that attract the presumption.⁷² As a practical matter, for the presumption to afford protection, it must be possible for 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, so that the decision-maker can give those persons an opportunity to be heard.

B. CONTENT OF ANY PROCEDURAL FAIRNESS OBLIGATION

59. Even if s 15(1)(a) of the *Housing Act* is subject to a requirement of procedural fairness, the content of the obligation depends on the particular circumstances,⁷³ including the nature of the power, the interests of the individual, and the interests and purposes which

⁷⁰ Citing *Kioa* (1985) 159 CLR 550 at 617 (Brennan J); *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at [82] (the Court); *Plaintiff M61* (2010) 243 CLR 319 at [74] (the Court); *Badari* (2025) 100 ALJR 30 at [34] (the Court); *Annetts* (1990) 170 CLR 596 at 599 (Mason CJ, Deane and McHugh JJ).

⁷¹ AS [49], quoting Waldron, “How Law Protects Dignity” (2012) 71 *Cambridge Law Journal* 200 at 202.

⁷² *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 38-39 (Brennan J).

⁷³ *Badari* (2025) 100 ALJR 30 at [16] (the Court).

the statute seeks to advance.⁷⁴ In this case, the obligation did not require the renters to be heard before the Decision was made.

60. The Decision was an adoption by Homes Victoria of a “general policy”,⁷⁵ which turned on considerations which went beyond the individual interests of the renters (ie, the feasibility of retrofitting the Towers and the object of increasing housing availability): TJ [118] (**CAB 48-49**). It was not an application of a policy to an individual⁷⁶ and did not affect individual renters differently from each other.⁷⁷

10 61. Further, because s 15(1)(a) confers an ongoing legal capacity to carry any development project through to completion, the Decision was just the beginning of the process. The implementation of the Redevelopment Program will depend on Homes Victoria making many further decisions over an extended period, each subject to its own process: see [10] above. Some of those decisions will involve the continuing or repeated exercise of the power in s 15(1)(a); others may be taken under other statutory provisions. For example, if Homes Victoria were ever to issue a notice to vacate to a renter in the Towers, that would involve an exercise of power under s 14(1)(g) of the *Housing Act*, the rental agreement and the relevant provisions of the *RT Act*.⁷⁸

20 62. In the circumstances, an opportunity to be heard can be afforded *during* the exercise of the power and before any decision is taken which would affect the legally recognised rights or interests of renters as individuals. The evidence establishes that renters have had the opportunity to be heard on the continuing exercise of the power to redevelop the Towers, including on the timing and impacts of relocation: see [11], [14] above. Similarly, it can be expected that an opportunity to be heard will be given in future. Accordingly, to the extent required, “the decision-making process, viewed in its entirety, entail[ed] procedural fairness”.⁷⁹

⁷⁴ *Badari* (2025) 100 ALJR 30 at [34] (the Court).

⁷⁵ *Disorganized Developments* (2023) 280 CLR 515 at [43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); *Winneke* (1982) 151 CLR 342 at 398 (Wilson J); *South Australia v O’Shea* (1987) 163 CLR 378 at 389 (Mason CJ), 411 (Brennan J), 418-419 (Deane J); *Quin* (1990) 170 CLR 1 at 60 (Dawson J).

⁷⁶ *Disorganized Developments* (2023) 280 CLR 515 at [43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), referring to *O’Shea* (1987) 163 CLR 378 at 387 (Mason CJ).

⁷⁷ For example, if the Decision affected renters by satisfying the condition in s 91ZY(1)(a) of the *RT Act*, the condition must have been satisfied for renters of all 44 towers whose premises Homes Victoria intended to demolish. Cf *Badari* (2025) 100 ALJR 30 at [37]-[38] (the Court).

⁷⁸ See *Garlett* [2026] WASCA 102 at [83] (Mitchell, Archer and Seaward JJA).

⁷⁹ *O’Shea* (1987) 163 CLR 378 at 389 (Mason CJ), quoted in *Ainsworth* (1992) 175 CLR 564 at 578 (Mason CJ, Dawson, Toohey and Gaudron JJ).

63. Put another way, even if the content of procedural fairness in respect of the initial Decision to begin implementing the Redevelopment Program was reduced to nothingness,⁸⁰ it was the first of many decisions necessary to carry out the redevelopment and renters can be, and have been, given an opportunity to be heard in respect of later decisions affecting their individual rights and interests.

C. MATERIALITY

64. In most cases, a failure to afford procedural fairness will only result in jurisdictional error if it satisfies the usual threshold of materiality articulated in *LPDT*.⁸¹ The general rule is that “an error will only be jurisdictional if the error was material to the decision that was made in fact, in the sense that there is a realistic possibility that the decision that was made in fact *could* have been different if the error had not occurred”.⁸²
65. The appellant submits that decisions made under s 15(1)(a) fall within the *unusual* category of decisions where an error is jurisdictional without requiring any threshold of materiality: AS [57].⁸³ That suggestion should be rejected. Given the broad and beneficial purposes of the power conferred by s 15(1)(a), the range of decisions capable of being made under it, and the potential consequences of invalidity, Parliament should not be taken to have intended that every decision made under s 15(1)(a) would be invalid for failure to accord procedural fairness irrespective of whether that failure was material to the decision. Moreover, as addressed at [25] above, the objects in s 6(1)(g) and (h), on which the appellant relies, are expressed in general, aspirational terms and refer to participation by or consultation with many persons other than renters, including “community groups” and “all persons and groups of persons involved in housing”. Parliament cannot have intended that any and every decision made under the *Housing Act* concerning the development or management of social housing would be affected by jurisdictional error if “community groups” or “all persons and groups of persons involved in housing” have not participated in that decision making.
66. For the same reasons, the objects of the *Housing Act* do not support the appellant’s alternative submission that there is a lower threshold of materiality for a decision under

⁸⁰ Cf *Badari* (2025) 100 ALJR 30 at [34]-[35] (the Court).

⁸¹ *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321.

⁸² *LPDT* (2024) 280 CLR 321 at [7] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ; Beech-Jones J agreeing) (emphasis in original) (citations omitted).

⁸³ Cf *LPDT* (2024) 280 CLR 321 at [6] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ; Beech-Jones J agreeing), referring to apprehended or actual bias and unreasonableness in the final result.

the *Housing Act*, which results in a decision being affected by jurisdictional error if there is a realistic possibility that the tenants could have had “something to say which is relevant to the decision to be taken”: AS [59]. *R (Osborn) v Parole Board*⁸⁴ did not concern materiality (as is conceded at AS fn 72) and provides no support for the view that the objects of the *Housing Act* import a lower standard of materiality.

67. The appellant can therefore only succeed if he proves that there is a realistic possibility that the Decision could have been different if the error had not occurred.⁸⁵ The trial judge was not persuaded that anything that Mr Berih or other renters might have said could realistically have changed the Decision. The reasons for the Decision were that some action needed to be taken about the state of the Towers, retrofitting was not feasible, and either retrofitting or redeveloping would involve relocating renters. Homes Victoria was aware of the impacts of relocation on renters and her Honour was “not persuaded that a better understanding of these impacts could realistically have changed the Decision”: TJ [126] (**CAB 51-52**). Additionally, the Redevelopment Program will substantially increase the amount of housing on the Towers sites, and her Honour was “not satisfied that anything that Mr Berih or other Group Members might have said could have changed that reality”: TJ [127] (**CAB 52**).

68. At trial, Mr Berih conducted his case on the basis that “had Homes Victoria consulted with the residents of Towers before it made the Decision, there is a realistic possibility that Homes Victoria would not have decided (at least at that time) to commence the Redevelopment Program *to progressively retire and redevelop the towers by 2051*”.⁸⁶ In particular, Mr Berih claimed that “there is a realistic possibility that Homes Victoria would decide, at the very least, not to demolish the Towers until Homes Victoria had obtained, and considered, a study addressing the feasibility of renovating and retrofitting the Towers with upgraded services”.⁸⁷ Mr Berih’s evidence was that, if he had been given an opportunity to be heard before the Decision was made, he “would have advocated for the renovation of the towers, not for a knock down”: TJ [124] (**CAB 50-51**).

69. The trial judge found that retrofitting the Towers would not be feasible to address the problems with them, would not achieve the objective of increasing housing supply, and

⁸⁴ [2014] AC 1115 at [68] (Lord Reed; Lord Neuberger, Lady Hale, Lord Kerr and Lord Clarke agreeing).

⁸⁵ *LPDT* (2024) 280 CLR 321 at [10] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ; Beech-Jones J agreeing).

⁸⁶ Plaintiff’s Submissions dated 4 October 2024, [71] (**RBFM 123**) (emphasis added).

⁸⁷ Plaintiff’s Submissions dated 4 October 2024, [71] (**RBFM 123**). See also Plaintiff’s Closing Submissions and Closing Submissions in Reply: T220.14-223.22, 400.18-401.1 (**RBFM 136-139, 142-143**).

would still require renters to relocate for an extended period: TJ [258]-[260] (**CAB 93-94**). Those findings were upheld by the Court of Appeal: CA [201]-[202] (**CAB 157**). The appellant did not seek special leave to challenge those findings, and properly conceded at the special leave application that “he cannot now argue that the issue of materiality should be decided on the premise that retrofitting the towers was feasible”.⁸⁸

70. Before this Court, the appellant submits, for the first time, that there was a realistic possibility that the Decision could have been different with respect to the *sequence* in which the 44 towers will be redeveloped. His materiality argument is now directed to Homes Victoria having “selected the Towers to be demolished first”: AS [62]. The appellant should not be allowed to raise this new point on appeal.

71. Focussing on this aspect of the Decision regarding the *order* in which the 44 towers would be demolished (which was an aspect of the Government’s *Housing Statement*) raises entirely different factual issues from that aspect of the Decision regarding whether to demolish or retrofit them. There are no “exceptional circumstances”⁸⁹ that would justify a departure from the case run at trial. In particular, this is a point that Homes Victoria could possibly have met by further evidence at the trial.⁹⁰ Homes Victoria could have adduced further evidence from Mr Newport about the decision to commence the Redevelopment Program with the Towers (and the two other towers in Carlton) as opposed to other towers. That evidence could have addressed the information which Mr Berih would have said favoured commencing the Redevelopment Program with other towers and whether the decision about sequencing could have been different.

72. There was only limited evidence before the Court regarding sequencing. In answer to questions from the trial judge, Mr Newport gave evidence about why the Towers were selected among the first to be demolished out of the 44 towers.⁹¹ In summary, the availability of newly constructed social housing nearby would better enable renters from the Towers to relocate nearby and keep communities together. Mr Berih did not cross-examine Mr Newport about this evidence. Given the case that Mr Berih advanced with respect to materiality, Homes Victoria was not on notice of any need to adduce evidence about whether the decision to commence the Redevelopment Program with the

⁸⁸ *Mallard v Homes Victoria* [2026] HCATrans 30 at lines 241-246.

⁸⁹ *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481 at 483 (the Court).

⁹⁰ *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598 at [51] (Gleeson CJ, McHugh and Gummow JJ).

⁹¹ Newport Evidence: T90.8-T91.20 (**ABFM 170-171**); see also T100.30-T101.8 (**ABFM 180-181**).

Towers could have been different. Nor was the trial judge able to make findings on those questions with the benefit of having seen and heard all of the evidence.

D. RELIEF

73. If the appeal is dismissed, Homes Victoria seeks its costs of the appeal. If the appeal is allowed, there are two problems with the declaratory relief sought by the appellant: it extends to all 44 towers, despite the fact that the case has at all times been confined to the Towers; and it is expressed in terms of the “invalidity” of the Decision, despite the fact that the Decision had (and has) no legal force.⁹² If the appeal is upheld, any declaratory relief should be in the following terms:⁹³ “In making the Decision, Homes Victoria failed to afford the Group Members an opportunity to be heard”.⁹⁴

PART VI: ARGUMENT ON THE RESPONDENT’S NOTICE OF CONTENTION

74. Homes Victoria’s argument on the notice of contention is addressed in Part V-B and Part V-C above.

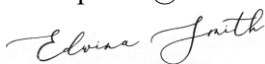
PART VII: ESTIMATE OF TIME

75. Homes Victoria estimates it will require approximately 2¼ hours for oral submissions.

Dated: 31 July 2026



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⁹² See *New South Wales v Kable* (2013) 252 CLR 118 at [52] (Gageler J); *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at [40] (Bell, Gageler and Keane JJ); *Maxwell v Department of Trade and Industry* [1974] QB 523 at 542 (Lawton LJ), quoted in *Ainsworth* (1992) 175 CLR 564 at 596 (Brennan J).

⁹³ Consistently with the form of the declaration sought in the Amended Writ and Reformulated General Indorsement of Claim: see [3], [6] and para A of the prayer for relief (**RBFM 20, 21, 24**).

⁹⁴ See, eg, *Ainsworth* (1992) 175 CLR 564 at 582 (Mason CJ, Dawson, Toohey and Gaudron JJ), 597 (Brennan J); *Plaintiff M61* (2010) 243 CLR 319 at [104]-[105] (the Court); *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 1 at [61], [63]-[64] (Kiefel CJ, Gageler and Gleeson JJ; Gordon, Edelman and Jagot JJ agreeing).

ANNEXURE TO RESPONDENT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable dates
1.	<i>Building Act 1993</i> (Vic)	Authorised Version 136 (1 March 2023 to 1 December 2023)	s 3, Pt 3	Act in force when the Decision was made	18 September 2023
2.	<i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic)	Authorised Version 15 (Current)	ss 7, 13, 21, 23-25, 38-39	Act in force when the Decision was made and at all times since	18 September 2023
3.	<i>City of Moonee Valley, Activities and General Amenities Local Law 2018</i>	-	cl 3.2	Instrument in force when the Decision was made	18 September 2023
4.	<i>Housing Act 1983</i> (Vic)	Authorised Version 80 (10 May 2023 to 20 May 2025)	ss 4, 6, 9, 13-18, 29A, 142A, 142E, Sch 2 Pts I-II, Sch 3A	Act in force when the Decision was made	18 September 2023
5.	<i>Melbourne City Council, Activities Local Law 2019</i>	-	cl 9.1-9.2	Instrument in force when the Decision was made	18 September 2023
6.	<i>Planning and Environment Act 1987</i> (Vic)	Authorised Version 155 (28 June 2023 to 4 June 2024)	s 13	Act in force when the Decision was made	18 September 2023
7.	<i>Residential Tenancies Act 1997</i> (Vic)	Authorised Version 104 (1 September 2023 to 21 May 2024)	ss 3A, Pt 2 Div 9, Pts 7-8	Act in force when the Decision was made	18 September 2023