HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD AND GLEESON JJ

ASHER BADARI & ORS APPELLANTS

AND

MINISTER FOR TERRITORY FAMILIES AND
URBAN HOUSING & ANOR RESPONDENTS

Badari v Minister for Territory Families and Urban Housing
[2025] HCA 47
Date of Hearing: 3 September 2025
Date of Judgment: 3 December 2025
D7/2025

ORDER

1. *Appeal allowed.*

2. *Order 1 of the Court of Appeal and the Full Court of the Supreme Court of the Northern Territory on 24 January 2025 be set aside and in lieu thereof it be ordered that:*

   (a) *the appeal in proceeding AP 13/22 (2237775) is allowed; and*

   (b) *the determinations made on 23 December 2021, 27 April 2022 and 2 September 2022 pursuant to s 23 of the* Housing Act 1982 *(NT) are quashed.*

3. *The respondents pay the appellants' costs in this Court, and below in the Court of Appeal and the Full Court of the Supreme Court of the Northern Territory and at first instance in the Supreme Court of the Northern Territory.*

On appeal from the Supreme Court of the Northern Territory

Representation

M L L Albert with M A Benn for the appellants (instructed by Australian Lawyers for Remote Aboriginal Rights)

C L Lenehan SC with R S Amamoo for the respondents (instructed by Solicitor for the Northern Territory)

CATCHWORDS

Badari v Minister for Territory Families and Urban Housing

Statutes – Construction – *Housing Act 1982* (NT), s 23 – Power of Minister to make determinations regarding rent to be paid for dwelling or class of dwelling – Where rent determined by Minister is to be paid despite anything to the contrary in existing tenancy agreement – Where Minister made determinations without giving notice to any tenant or inviting any tenant to make submissions on the proposed change in rent – Whether Minister owed duty to afford procedural fairness – Whether content of duty to afford procedural fairness included obligation to give hearing – Whether failure to afford procedural fairness was material – Whether determinations were legally unreasonable.

Words and phrases – "content", "determination", "duty of procedural fairness", "eligible person", "fair rent", "general policy", "individual rights and interests", "judicial review", "landlord", "lease", "legal unreasonableness", "let a dwelling", "materiality", "natural justice", "not adequately housed", "prior notice", "procedural fairness", "public housing", "rebate", "remote communities", "rent", "residential accommodation", "safety net", "statutory power", "submissions", "tenancy agreement", "tenant".

Housing Act 1982 (NT), ss 6, 14, 15, 16, 17, 23, 34, 37.
Housing Regulations 1983 (NT), regs 3, 4, 5.
Residential Tenancies Act 1999 (NT), ss 3, 41, 42, 46.

1 GAGELER CJ, GORDON, EDELMAN, STEWARD AND GLEESON JJ. The four appellants, who live in remote communities in the Northern Territory, lease dwellings from the Chief Executive Officer (Housing) (the "CEOH") pursuant to the *Housing Act 1982* (NT) and the *Housing Regulations 1983* (NT). The Minister for Territory Families and Urban Housing and the Minister for Housing and Homelands are the respondents to this appeal. All of the appellants were parties to tenancy agreements with the CEOH. By a determination made by the first respondent (who was, at the time, the minister responsible for the *Housing Act* (the "Relevant Minister")) on 23 December 2021 pursuant to s 23 of the *Housing Act*, the method for calculating the rent payable for dwellings in various remote communities, including the dwellings leased by the appellants from the CEOH, changed (the "First Determination"). The First Determination was successively replaced by three further determinations. These are described below. This appeal (in D7/2025) is concerned only with the first three (of four) determinations (the "Determinations").[1]

2 The Relevant Minister did not give notice to any tenant, including the appellants, before issuing each of the Determinations. Nor did they invite any tenant to furnish submissions on the proposed change to the method of calculating rent. The appellants sought judicial review of the Determinations in the Supreme Court of the Northern Territory, on two grounds: that the appellants were not afforded procedural fairness; and that each Determination was legally unreasonable.

3 The application for judicial review was dismissed by the Supreme Court.[2] An appeal from that judgment was dismissed by the Court of Appeal and the Full Court of the Supreme Court of the Northern Territory (hereinafter the "Court of Appeal").[3] The appellants now appeal from that judgment to this Court. The grounds of the appeal are as follows:

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1 A related application for special leave to appeal to this Court (in D1/2025), which concerns the fourth determination made on 1 February 2023, was heard at the same time as this appeal. The Court will deliver judgment on that special leave application separately.

2 *Badari v Minister for Territory Families and Urban Housing* [2022] NTSC 83.

3 *Badari v Minister for Territory Families and Urban Housing* (2025) 393 FLR 73.

"The Court of Appeal erred in concluding that the power of a Minister to determine rents for public housing under s 23 of the *Housing Act* 1982 (NT) was not conditioned by a requirement to afford procedural fairness.

The Court of Appeal erred in concluding that it was not legally unreasonable to exercise s 23 of the *Housing Act* 1982 (NT) in respect of each of the determinations made on 23 December 2021, 27 April 2022, and 2 September 2022 including when each:

a. took no account of the proximity of each affected premises to government, health and education services, especially when compared to determinations made in relation to urban premises; and/or

b. departed, without explanation or justification, from the model endorsed by the stake-holder advisory group, upon which the determinations were purportedly based."

4 For the reasons given below, the appeal to this Court should be allowed on the basis of the failure by the Relevant Minister to afford procedural fairness to the appellants. Given that conclusion, it is unnecessary to address the ground of appeal concerning legal unreasonableness.

The legislative framework

5 The entity by the name of the CEOH was established by the *Housing Act*.[4] The functions of the CEOH include providing, and assisting in the provision of, residential accommodation.[5] For that purpose, the CEOH has the power to "let premises".[6]

6 Pursuant to s 23 of the *Housing Act*, the Relevant Minister may determine the rent to be paid for a dwelling or a class of dwelling. Section 23 was the source of the power to make each of the Determinations. It provided, at the time the Determinations were made:

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4 *Housing Act*, s 6(1).

5 *Housing Act*, s 15(a).

6 *Housing Act*, s 16(2)(e).

> "(1) The Minister may, from time to time, by *Gazette* notice determine the rent to be paid for a dwelling or a class of dwelling.
>
> (2) A determination under this section may be subject to conditions that the Minister thinks fit.
>
> (3) A determination under this section is to specify the date on which the rent will become payable for the dwelling or the class of dwelling.
>
> (4) The rent to be paid for a dwelling is the rent determined from time to time under subsection (1) and the rent is to be paid despite anything to the contrary contained in the tenancy agreement entered into in respect of the dwelling or in any arrangement or agreement, or alleged arrangement or agreement, between the tenant of the dwelling and any other person (including the Chief Executive Officer (Housing), the former Commission, the Territory or their employees or agents)."

7 Pursuant to s 37(1) and (2)(e) of the *Housing Act*, the Administrator of the Northern Territory may make regulations to "make provision for and in relation to the letting of dwellings by the [CEOH] to certain classes of persons and their employees". The *Housing Regulations* are made under the power in s 37.

8 Pursuant to reg 4(1) of the *Housing Regulations*, the CEOH "may let a dwelling to an eligible person". An "eligible person" is defined to mean a person who is, in the opinion of the CEOH, "of limited means" and "not adequately housed".[7] It was not in dispute that the appellants were each an "eligible person". Pursuant to reg 4(2)(a), and subject to reg 5, the rent of a dwelling to an eligible person is to be determined under s 23 of the *Housing Act*. Regulation 5 permits the grant of rebates to an eligible person by the CEOH. It provides:

> "The Chief Executive Officer (Housing) may, in its discretion, grant a rebate of the whole of the rent payable in respect of a dwelling by an eligible person, or of such portion of that rent as it thinks fit, and for such period as it thinks fit."

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7 *Housing Regulations*, reg 3.

9 The *Residential Tenancies Act 1999* (NT) (the "*RT Act*") applies in relation to premises let under the *Housing Act*.[8] The objects of the *RT Act* include ensuring that tenants are provided with safe and habitable premises under tenancy agreements and enjoy appropriate security of tenure, as well as facilitating landlords receiving a "fair rent" in return for providing safe and habitable accommodation to tenants.[9]

10 The appellants relied upon several provisions of the *RT Act*. The first is s 41. It provides that a landlord may increase the rent payable under a tenancy agreement only if the right to increase the rent and the amount of the increase, or the method of its calculation, are specified in the agreement. The second is s 42. It provides that on the application of a tenant, the Northern Territory Civil and Administrative Tribunal may declare that the rent payable under a tenancy agreement is "excessive". Upon making such a declaration, the Tribunal may specify the rent payable and vary the tenancy agreement by reducing the rent.[10] Reference was also made to s 46(1)(b), which provides that the rent payable under a tenancy agreement may be reduced by mutual agreement between the tenant and the landlord.

Facts

11 The facts were largely not in dispute. Over 5,000 dwellings were affected by the Determinations. Mr Asher Badari (the first appellant) and Ms Ricane Galaminda (the second appellant) were parties to a tenancy agreement dated 2 November 2011 in respect of a four-bedroom house, in which they live, in Gunbalanya in Arnhem Land. Mr Lofty Nadjamerrek (the third appellant) was a party to a tenancy agreement dated 14 December 2022 in respect of a two-bedroom house also located in Gunbalanya. Ms Carmelena Tilmouth (the fourth appellant) was a party to a tenancy agreement dated 20 October 2020 in respect of a three-bedroom house located in Laramba in the Central Desert.

12 The exact amount of rent that had been payable prior to the Determinations under these tenancy agreements was disputed. It differed from tenant to tenant. In the tenancy agreement for Mr Badari and Ms Galaminda, and the tenancy agreement for Mr Nadjamerrek, the rental amount was left blank. The appellants submitted nonetheless that Mr Badari and Ms Galaminda prior to the issue of the

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8 *Housing Act*, s 34.

9 *RT Act*, s 3(d)-(e).

10 *RT Act*, s 42(4)(a).

Determinations paid joint rent of $81 per week; Mr Nadjamerrek's rent was submitted to have been $99 per week. Ms Tilmouth's tenancy agreement stipulated that the rent payable was $140 per week. The respondents disputed these figures. It was also disputed whether the three appellants living in Gunbalanya had been granted rebates in accordance with reg 5 of the *Housing Regulations*, or whether they had received rent reductions under s 46(1)(b) of the *RT Act*. However, it was not in dispute that the three appellants living in Gunbalanya had received some form of rental assistance. It was otherwise not known whether Ms Tilmouth had been the recipient of any rental assistance, including a rebate.

13 The primary judge found that the old system (prior to the First Determination) of determining the amount of rent payable was considered to be inefficient, complex and difficult to administer. Due to fluctuations in household income, the amount of rent required frequent reassessment. In 2018, the Government of the Northern Territory resolved to implement what was thought to be a simplified and more consistent scheme for determining the rent payable by tenants in public housing in remote communities. To that end, the Stakeholder Advisory Group (the "SAG") was formed with representatives from a number of bodies, such as the North Australian Aboriginal Justice Agency. The SAG considered a number of methodologies for determining the base rent payable. It ultimately decided that a model which applied a fixed amount per the number of bedrooms in a given dwelling should be adopted. The Northern Territory Cabinet approved "the new model" in December 2021. An important feature of the new model was a safety net, under which the rent payable would not exceed 25 per cent of total household income "to ensure tenants are not placed under rental stress" (the "Safety Net"). The Safety Net reflected the Government's intention that the rent be "affordable" for tenants.

14 The First Determination determined the weekly rent payable for dwellings in communities listed in Sch 1 of that Determination, which were also of a class specified in col 1 of Sch 2 of that Determination. Schedule 1 was intended to list all of the remote communities in the Northern Territory containing dwellings leased pursuant to the *Housing Regulations*. It included both Gunbalanya and Laramba. It mistakenly failed to include some remote communities. Schedule 2 specified four classes of dwellings: a one-bedroom dwelling; a two-bedroom dwelling; a three-bedroom dwelling; and a dwelling with four or more bedrooms. It also specified two fixed rates of rent for each class of dwelling, with the first rate payable until 1 May 2022 (known as the "interim period") and the second rate payable thereafter. For the interim period, the amount payable was equal to the maximum "full rent" payable for new or rebuilt buildings under the previous regime. Each appellant nonetheless contended that under this new model their rent increased. The respondents did not appear to dispute that the "full rents", either in

the interim period or afterwards, were greater than the amounts the appellants contended they were paying under the previous regime. But the exact figures remained unclear. That lack of precision is of no moment. All tenants were affected in their own particular ways. It was, however, estimated that, under the new model, revenue from rent would increase by $9.7 million per annum.

15 On 27 April 2022, the Relevant Minister made a new determination (the "Second Determination"). It revoked the First Determination and delayed the expiration of the interim period until 4 September 2022. It included six additional communities. It otherwise followed the model of the First Determination. On 2 September 2022, the Relevant Minister made a further determination (the "Third Determination"). It revoked the Second Determination and delayed the expiration of the interim period until 5 February 2023. The respondents submitted that during the interim period the previous policy concerning rebates continued to apply to the appellants and the other tenants, which meant the appellants (potentially with the exception of Ms Tilmouth where the evidence was unclear) were in the same position they had been in prior to the Determinations. A further fourth determination was made on 1 February 2023 after the delivery of judgment by the primary judge, which removed some communities from Sch 1 (the "Fourth Determination").

The duty to afford procedural fairness (first ground of appeal)

The respondents' concession

16 The respondents correctly drew a distinction between whether the exercise of a power is conditioned upon observance of the principles of natural justice and, if so, what the principles of natural justice require in the particular circumstances.[11] The respondents conceded that the exercise of the power conferred by s 23 of the *Housing Act* was indeed conditioned on the obligation to observe procedural fairness.

17 The respondents' concession was correctly made. Whether a statutory power is conditioned by a need to afford procedural fairness is a question of statutory construction. 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

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11 See *Kioa v West* (1985) 159 CLR 550 at 612.

fairness.[12] As Kiefel CJ, Gageler, Gleeson and Jagot JJ observed in *Disorganized Developments Pty Ltd v South Australia*:[13]

> "Decisions made in the exercise of statutory powers that affect the rights of individuals with respect to property are a category of cases that has a long history of attracting a duty of procedural fairness as a matter of 'fundamental justice', 'long-established doctrine' and a 'deep-rooted principle of the law', subject to displacement by Parliament through express words or necessary implication in the relevant statute."

18 The power exercised here by the Relevant Minister in the making of each of the Determinations directly and personally affected each of the appellants, as well as all other tenants the subject of each Determination. Each Determination changed, without prior notice, the very basis upon which rent would be paid for the homes of individuals who have limited means. It impacted upon each tenant as an individual.[14] That is because the application of each Determination to each individual was particular to them: it turned on the number of bedrooms in their leased home and altered the particular terms and conditions of their individual tenancy agreement. The Safety Net might then apply to reduce an individual tenant's rent.

19 Consequently, the power in s 23 of the *Housing Act* attracts the common law presumption. The presumption was not displaced. It follows that the exercise of the power was conditioned on the need to afford procedural fairness.

20 The real issue was what the obligation to provide procedural fairness required the Relevant Minister to do in the circumstances.

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12 *Disorganized Developments Pty Ltd v South Australia* (2023) 280 CLR 515 at 536-537 [33]; *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 622 [367].

13 (2023) 280 CLR 515 at 535 [28] (footnotes omitted). See also *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180 [143 ER 414]; *Sydney Corporation v Harris* (1912) 14 CLR 1 at 14; *Delta Properties Pty Ltd v Brisbane City Council* (1955) 95 CLR 11 at 18; *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395-396.

14 See *Kioa v West* (1985) 159 CLR 550 at 584, 619, 634.

The appellants' case

21 The appellants contended that the minimum requirement mandated by the duty to afford procedural fairness was the giving of effective and reasonable notice of the content of each proposed determination to all tenants, and to each tenant a reasonable opportunity to be heard. It was unnecessary for the appellants to spell out what might or might not constitute reasonable notice or a reasonable opportunity. That would, of course, all depend on the particular circumstances. It was nonetheless sufficient, it was said, for the appellants to observe that the Relevant Minister had not complied with this minimal content and the respondents did not otherwise suggest that the Relevant Minister had so complied.

22 The appellants emphasised six features of the power conferred by s 23 of the *Housing Act*. First, the power is not expressly qualified or conditioned. In that respect, in *Disorganized Developments*, the majority observed that it was now commonplace for the requirements of procedural fairness to condition the exercise of unfettered statutory powers.[15] Second, the power operates upon a person by reference to their home. Third, the power can be exercised in respect of a single dwelling or class of dwelling. Fourth, the Relevant Minister can ameliorate the blunt effect of a determination by adding protective conditions. Fifth, it is for that Minister to determine the nature of any "class of dwelling" that is the subject of the adjusted rent. And sixth, the power may be delegated and the Minister had control over the CEOH as the affected tenants' landlord,[16] permitting the power to be exercised flexibly and allowing the Minister access to details about each tenancy agreement.

23 Given the relationship between the *Housing Act* and the *RT Act*,[17] the appellants also emphasised that the purpose of securing "fair rent" necessarily informed both the exercise of power in determining rent under s 23 of the *Housing Act*, and in determining any rebate under reg 5 of the *Housing Regulations*. They argued that whilst the Determinations apply a model which was – at least in part – intended to be applied without differentiation to the particular circumstances of a given tenant, there were some aspects of the model about which tenants might have made meaningful submissions to the Government. The first was the dollar amount

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15 (2023) 280 CLR 515 at 539 [41]. See also *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44.

16 *Housing Act*, ss 14, 17.

17 *Housing Act*, s 34.

of rent specified for each class of dwelling. Tenants might have been able to demonstrate that the amounts were too high, given general market conditions, or given their specific needs. The second was the timing of the interim period. Tenants again might have been able to make useful submissions about the length of the period. The third concerned the list of affected communities. Whilst there was, at one point in time at least, an intention that the Determinations apply to all relevant remote communities, the First Determination failed to do so (by error), and the Fourth Determination excluded 17 communities. Again, submissions might have been made concerning whether a given community or communities should or should not have been excluded.

24 The appellants also submitted that the Determinations affected their legal rights. It was argued that each Determination denied to each tenant the protections afforded by ss 41 and 42 of the *RT Act*.

The respondents' case

25 In contrast, the respondents submitted that the minimum content of the obligation to provide procedural fairness did not include any need to give prior notice to the tenants or to give them an opportunity to make submissions. That is because, it was contended, the Determinations were an expression of a policy decision (approved by Cabinet) that did not turn – to any extent – upon the individual circumstances of any given tenant. Rather, the policy decision was to adopt a methodology for determining rent that rendered those individual circumstances irrelevant. That calculation, it was said, turned upon a simple formula based on the number of bedrooms per dwelling in a listed community and nothing else. It was not suggested that s 23 of the *Housing Act* did not authorise a policy decision of this kind.

26 That a decision maker may validly adopt a policy which necessarily excludes any obligation to consult with affected parties was said to be supported by certain passages in the judgment of Brennan J in *Kioa v West*.[18] These were said to affirm the conclusion that the content of the duty to afford procedural fairness may be reduced to "nothingness" in particular circumstances. In one of the passages, Brennan J observed:[19]

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18 (1985) 159 CLR 550.

19 *Kioa* (1985) 159 CLR 550 at 615-616. See also *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 652-653.

> "... the intention to be implied when the statute is silent is that observance of the principles of natural justice conditions the exercise of the power although in some circumstances the content of those principles may be diminished (even to nothingness) to avoid frustrating the purpose for which the power was conferred. Accepting that the content of the principles of natural justice can be reduced to nothingness by the circumstances in which a power is exercised, a presumption that observance of those principles conditions the exercise of the power is not necessarily excluded at least where, in the generality of cases in which the power is to be exercised, those principles would have a substantial content."

27 In another passage of *Kioa*, relied upon by the respondents, Brennan J reasoned that an ascertainment of what a "fair procedure" may demand will depend upon what a decision maker is bound to take into account and "the matters he proposes to take into account".[20] Brennan J wrote:[21]

> "A person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters adverse to his interests which the repository of the power *proposes to take into account in deciding upon its exercise*."

28 The proposition that the content of a broad power may be permissibly exercised in such a way so as to deny the need for any prior consultation with those individuals impacted by it was also said to be supported by the following passage from the reasoning of Brennan J in *Kioa*:[22]

> "It does not follow that the principles of natural justice require the repository of a power to give a hearing to an individual whose interests are likely to be affected by the contemplated exercise of the power in cases where the repository is not bound and does not propose to have regard to those interests in exercising the power. If the repository of the power were authorized to exercise the power in his absolute discretion without taking account of individual interests and he proposed so to exercise the power,

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20 (1985) 159 CLR 550 at 628.

21 *Kioa* (1985) 159 CLR 550 at 628 (emphasis added and citations omitted).

22 (1985) 159 CLR 550 at 620-621 (citation omitted). See also Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 7th ed (2022) at 430-435 [8.120], 438-439 [8.130].

> the repository might exercise it without hearing the individuals whose interests are likely to be affected."

29 The foregoing was said to be consistent with the reasoning of Brennan J in *South Australia v O'Shea*, where his Honour said:[23]

> "... the Minister is not bound to hear an individual before formulating or applying a general policy or exercising a discretion in the particular case by reference to the interests of the general public, even when the decision affects the individual's interests. When we reach the area of ministerial policy giving effect to the general public interest, we enter the political field. In that field a Minister or a Cabinet may determine general policy or the interests of the general public free of procedural constraints; he is or they are confined only by the limits otherwise expressed or implied by statute."

30 The making of the Determinations, the respondents submitted, reflected a decision by Cabinet to adopt a pricing model based upon flat rates per bedroom. That decision was squarely within "the political field" and, it was argued, one which intentionally excluded the particular circumstances of any given tenant and reflected an outcome in which it was not proposed to consider any such specific circumstances. Adoption of a reasonable procedure thus was submitted not to include prior consultation.

31 In that respect, the respondents also relied upon a distinction, sometimes drawn, between an exercise of power which affects an individual or individuals as against one which affects the community or a section of the community at large.[24] In the latter case, no duty of procedural fairness may be owed, or the content of that duty may be minimal. Thus, in *Comptroller-General of Customs v Kawasaki Motors Pty Ltd (No 1)*,[25] a challenge was made to a decision to revoke a certain commercial tariff concession order ("TCO"). Kawasaki, commercially impacted by this decision as an importer, contended that it should have been given prior notice. Hill and Heerey JJ rejected the contention that a duty of procedural fairness was owed when revoking the TCO. That was because a TCO was of general

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23 (1987) 163 CLR 378 at 411.

24 *Kioa* (1985) 159 CLR 550 at 619.

25 (1991) 32 FCR 219.

application to a class of goods, regardless of the identity of the importer.[26] Here, the respondents emphasised that the Determinations applied to over 5,000 dwellings across a great many remote communities and submitted that this supported a conclusion that prior consultation with the appellants and the other tenants was not required.

32 The respondents nonetheless also conceded that had the power conferred by s 23 of the *Housing Act* been exercised in relation to a single dwelling, or only a few dwellings, the content of procedural fairness would have been equivalent to that contended for by the appellants. But here, given that the power was exercised in relation to all dwellings in the listed communities, such consultation was impractical. It could not, however, be said with any precision how many impacted homes would be needed to reduce the content of procedural fairness to nothingness.

33 Finally, the respondents submitted that any failure to afford procedural fairness was immaterial. The appellants, the respondents said, had not discharged their onus of showing that prior consultation could "realistically"[27] have led to a different outcome. Directed at very high-level and indifferent rules to fix the rent payable, the Determinations would have remained the same following any suggested prior consultation.

The content of the obligation to provide procedural fairness

34 In *Minister for Immigration and Border Protection v SZSSJ*, this Court unanimously observed that "compliance with an implied condition of procedural fairness requires the repository of a statutory power to adopt a procedure that is reasonable in the circumstances to afford an opportunity to be heard to a person who has an interest apt to be affected by exercise of that power".[28] What is fair and reasonable depends upon the nature of the power being exercised, along with "the statutory requirements, the interests of the individual and the interests and

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26 *Comptroller-General of Customs v Kawasaki Motors Pty Ltd (No 1)* (1991) 32 FCR 219 at 240-241. See also *Botany Bay City Council v Minister of State for Transport and Regional Development* (1996) 66 FCR 537 at 551-556; *Castle v Director General State Emergency Service* [2008] NSWCA 231.

27 *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321 at 327 [7], 328-329 [14].

28 (2016) 259 CLR 180 at 206 [82].

purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations".[29] What procedural fairness requires is variable and can extend, at one end of the spectrum, from a need for a full hearing, and at the other end of the spectrum, in some cases, to "nothingness";[30] although the latter might be better described as an exclusion of the rules of procedural fairness and, in any event, as Brennan J observed in *Kioa*, cases of this kind will be "exceptional".[31]

35 In these circumstances the following passage from the reasons of Brennan J in *Kioa* is dispositive:[32]

> "If a power is apt to affect the interests of an individual in a way that is substantially different from the way in which it is apt to affect the interests of the public at large, the repository of the power will ordinarily be bound or entitled to have regard to the interests of the individual before he exercises the power. No doubt the matters to which the repository is bound or is entitled to have regard depend on the terms of the particular statute and, if there be no positive indications in its text, the subject-matter, scope and purpose of the statute must be looked at to determine whether the repository is bound or is entitled to have regard to individual interests. 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."

36 Importantly, this passage makes clear: (i) that a power apt to affect the interests of an individual in a way that is substantially different to the interests of the public at large will ordinarily require or entitle the repository of the power to have regard to the interests of that individual; and (ii) that principles of natural justice apply not only when the decision maker is *bound* to consider the interests

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29 *Kioa* (1985) 159 CLR 550 at 585.

30 *Kioa* (1985) 159 CLR 550 at 615-616.

31 (1985) 159 CLR 550 at 620-621.

32 (1985) 159 CLR 550 at 619 (citation omitted).

of an affected individual; they apply equally when the decision maker is *entitled* to take those interests into account.

37 At issue in this appeal are the individual rights and interests of each appellant, in respect of the particular dwelling where each appellant lived and the rent payable for that dwelling. The rights and interests were, in that sense, personal, and contractual, having regard to the appellants' individual tenancy agreements with the CEOH. And that is so even though they were affected by determinations that apply criteria of an undifferentiated, if not absolute, nature. That is because, in each case, discrete contractual obligations to pay rent, which differed between tenancy agreements, and which were owed independently by each tenant, were entirely replaced.

38 Here, not only did the Determinations substantially affect the tenants in a way that was different from the public at large; they also affected each tenant differently from each other, given they impacted individual contractual rights and given the future application of the Safety Net policy. In that respect, the power conferred by s 23 of the *Housing Act* authorised the Minister to have regard to the positions of individual tenants. The circumstances of this case thus engaged the foregoing dispositive passage from the reasons of Brennan J in *Kioa*; the Minister was bound to afford procedural fairness to the appellants. This was not an exceptional case where the obligation to afford procedural fairness had no content. This case involved the application of settled legal principles to a standard statutory power. In that respect, it is sufficient to accept the expression of the minimum requirements for affording procedural fairness contended for by the appellants.

39 The respondents contended, correctly, that the appellants' reliance upon ss 41 and 42 of the *RT Act* was misconceived. As to s 41, none of the tenancy agreements before this Court contained a clause specifying a right to increase rent. Moreover, nothing in s 41 could limit the power conferred on the Relevant Minister under s 23 of the *Housing Act*. All of the leases remained subject to the possible exercise of that power; the appellants accepted that. As to s 42, it did not apply because s 41 was not engaged and it only applied to rent "payable under a tenancy agreement" and not rent payable under a determination made pursuant to s 23. However, as seen above, the Determinations remained apt to adversely affect the rights and interests of the appellants in respect of their dwellings and the rent payable for those dwellings.

40 The respondents advanced a proposition to the effect that a decision maker, in whom is reposed a very general statutory power or discretion, can reduce the standard of procedural fairness to "nothingness" simply by deciding that the interests of those affected are irrelevant. That proposition cannot be accepted.

Determinedly held indifference does not eliminate the need for meaningful consultation where, as here, the exercise of power may adversely affect the rights or interests of an individual or individuals. Affording procedural fairness in such circumstances may be more important in ensuring an opportunity of raising for consideration matters which are not already obvious.[33]

41 The passages relied upon by the respondents in the reasons of Brennan J in *Kioa* do not stand for the proposition asserted. They were directed at powers which Brennan J considered to be, to use the language of that day, "legislative"[34] in nature, in the sense that the power might affect the community as a whole (or large sections of it), or concerned only with issues of "general policy".[35] For the reasons given above, that is not this case.

42 It may be accepted that s 23 of the *Housing Act* permits the Relevant Minister to consider matters of policy, including what is in the public interest. In that respect, however, a distinction should be drawn between the formulation of a general policy on one hand, and the application of that policy on the other. In the former case, there may be no duty to afford procedural fairness, or the content of any such duty may be minimal. The distinction was reaffirmed by the majority in *Disorganized Developments*, a case concerning the application of a general policy designed to deter criminal activity, but which, when applied, affected individual portions of land, designated in connection with the *Criminal Law Consolidation Act 1935* (SA) as being, in each case, a "prescribed place". The majority said:[36]

> "Undoubtedly, the focus of the scheme which includes the declaration power is the disruption of criminal activity. In that context, considerations personal to the owners and occupiers of land ordinarily can be expected to be secondary to broader policy considerations. However, the proper exercise of the declaration power requires the identification of facts

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33 See *Kioa* (1985) 159 CLR 550 at 633; *Nathanson v Minister for Home Affairs* (2022) 276 CLR 80 at 109 [51].

34 *Kioa* (1985) 159 CLR 550 at 620.

35 *Disorganized Developments* (2023) 280 CLR 515 at 540 [43]. See also *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 398.

36 (2023) 280 CLR 515 at 540 [43] (footnotes omitted). See also *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 398; *South Australia v O'Shea* (1987) 163 CLR 378 at 389, 411, 418-419.

to connect the proposed prescribed place with the purpose of disruption. In this way, the exercise of the declaration power is an application of the policy to disrupt criminal activity, rather than the formulation of policy."

43 Here, the Government and SAG formulated, and Cabinet approved, the policy to determine rent payable by reference to the number of bedrooms in a dwelling. The Determinations applied that policy. For the reasons given above, the application of each Determination directly affected the individual rights and interests of each tenant. As such, for the reasons given above, an obligation to give reasonable prior notice of each Determination and to give each tenant a reasonable opportunity to be heard arose. It could not be removed by proclaiming that each Determination did not need to take into account the particular circumstances of any given tenant. That is because the Determinations affected tenants differentially. Such a conclusion coheres with the proposition that exercises of power should respect the integrity and the dignity of those individuals who are subject to that power.[37] It also coheres with the overriding statutory purpose that the rent payable must be "fair rent" or be "affordable".

44 The decision of this Court in *South Australia v O'Shea* also does not support the respondents' position. In that case, the Governor in Council had a power to release an offender on licence under the *Criminal Law Consolidation Act 1935* (SA), but could only do so on the recommendation of a parole board. Relevantly, the offender and his counsel were present at a meeting of the parole board which recommended his release. The Governor in Council, without hearing from the offender, declined to act on that recommendation. The offender contended that the Governor in Council had not afforded him procedural fairness. A majority of this Court rejected that submission. That was because, in the circumstances, a "hearing before the recommending body provides a sufficient opportunity for a party to present his case so that the decision-making process, viewed in its entirety, entails procedural fairness".[38] No equivalent two-stage process applied here. The respondents did not suggest that the SAG consultative process that predated Cabinet's decision was, in and of itself, a discharge of the conceded duty to provide procedural fairness.

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37 See *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at 543 [100].

38 *South Australia v O'Shea* (1987) 163 CLR 378 at 389.

Materiality

45 Nor are the respondents correct in contending that the failure to afford procedural fairness was immaterial. Although the appellants bore an onus to establish materiality, the question is whether the decision that was in fact made *could* realistically have been different, and meeting that threshold is not demanding or onerous. The threshold can be met by "inferences drawn from the evidence" that an asserted step that was not taken could realistically have affected the reasoning of the decision maker.[39] In *Disorganized Developments*, the appellant's land was declared to be a "prescribed place". The majority observed:[40]

> "There is no reason to doubt that an owner or occupier may have something to say of relevance about the characteristics of the land or its uses, or about possible adverse impacts of declaring a place as a prescribed place, which might affect an assessment of whether to make such a declaration."

46 The appellants here could have had something to say about the per bedroom rent fixed in each Determination, the timing of the introduction of the new model, whether their communities should or should not have been included, and the future application of the Safety Net. Submissions received in relation to these topics could realistically have affected the reasoning of the decision maker and thus influenced the content of each Determination, and the timing of each Determination's application.[41] It follows that the failure to afford procedural fairness here satisfies any requirement of materiality.

47 For these reasons the appellants were denied procedural fairness, and that denial was material. The making of each Determination was thus infected with jurisdictional error.

Disposition

48 Orders should be made as follows:

a. Appeal allowed.

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39 *LPDT* (2024) 280 CLR 321 at 328-329 [13]-[14].

40 (2023) 280 CLR 515 at 540 [44].

41 *LPDT* (2024) 280 CLR 321 at 327 [7], 328-329 [14].

b. Order 1 of the Court of Appeal on 24 January 2025 be set aside and in lieu thereof it be ordered that:

   i. the appeal in proceeding AP 13/22 (2237775) is allowed;

   ii. the First Determination, Second Determination and Third Determination be quashed.

c. The respondents pay the appellants' costs in this Court, and below in the Court of Appeal and at first instance in the Supreme Court of the Northern Territory.