CITATION:	*Badari & Ors v Minister for Territory Families and Urban Housing & Anor; Badari & Ors v Minister for Housing and Homelands & Anor; Nadjamerrek & Ors v Chief Executive Officer (Housing)* [2025] NTCA 1
	AP 13/22 (2237775)
PARTIES:	BADARI, Asher and GALAMINDA, Ricane and NADJAMERREK, Lofty and TILMOUTH, Carmelena v MINISTER FOR TERRITORY FAMILIES AND URBAN HOUSING and MINISTER FOR HOUSING AND HOMELANDS
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	AP 13/22 (2237775)

	2023-01110-SC
PARTIES:	BADARI, Asher and GALAMINDA, Ricane and NADJAMERREK, Lofty and TILMOUTH, Carmelena v MINISTER FOR HOUSING AND HOMELANDS and CHIEF EXECUTIVE OFFICER (HOUSING)
TITLE OF COURT:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	ON REFERENCE from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	2023-01110-SC

	2023-01346-SC
PARTIES:	NADJAMERREK, Lofty and BADARI, Asher and GALAMINDA, Ricane

	and
	TILMOUTH, Carmelena
	v
	CHIEF EXECUTIVE OFFICER (HOUSING)
TITLE OF COURT:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	ON REFERENCE from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	2023-01346-SC
DELIVERED:	24 January 2025
HEARING DATES:	15 & 16 November 2023
JUDGMENT OF:	Grant CJ, Barr & Huntingford JJ

CATCHWORDS:

LEASES AND TENANCIES – Determination of rent unlawful

Whether four determinations of rent payable for dwellings made pursuant to s 23 of the *Housing Act* beyond or outside the power conferred by the statute – Whether limitation on landlord's power to increase rent imposed by s 41 of the *Residential Tenancies Act* had application – Whether responsible Minister *de jure* or *de facto* 'landlord' for purposes of s 41 of the *Residential Tenancies Act* – Whether rent unlawfully increased by application of uncodified policy – Whether exercise of power under s 23 of the *Housing Act* requires opportunity for hearing – Whether tenants denied procedural fairness – Whether determinations of rent payable legally unreasonable –Appeal and related application for judicial review dismissed.

LEASES AND TENANCIES – Declaration that rent excessive

Whether Northern Territory Civil and Administrative Tribunal has jurisdiction under s 42 of the *Residential Tenancies Act* to declare excessive rent fixed by the Minister under s 23 of the Housing Act – Tribunal has no jurisdiction – Application for leave to appeal granted – Appeal dismissed.

Housing Act 1982 (NT) ss 5, 6, 15, 16, 17, 21, 22, 23, 28W, 34, 37
Residential Tenancies Act 1999 (NT) ss 3, 4, 6, 7, 19, 31, 32, 35, 37, 39, 41, 42, 46, 48, 49, 112, 122

Aboriginal Areas Protection Authority v Director of National Parks [2022] NTSCFC 1, *Attorney-General (NT) v Minister for Aboriginal Affairs* (1989) 25 FCR 345, *Bates v Lord Hailsham of St Marylebone* [1972] 1 WLR 1373, *Beckingham v Browne* [2021] VSCA 362, *BMV16 v Minister for Home Affairs* [2018] FCAFC 90, *Bread Manufacturers of New South Wales v Evans* (1981) 180 CLR 404, *Brisbane City Council v Leahy* [2023] QCA 133, *Capital Duplicators v Australian Capital Territory* (1992) 177 CLR 248, *Castle v Director-General State Emergency Service* [2008] NSWCA 231, *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242, *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76, *Comcare v Post Logistics Australasia Pty Ltd* (2012) 207 FCR 178, *Commissioner of Stamp Duties v Trustee Co Ltd* (1987) 9 NSWLR 719, *Comptroller-General of Customs v Kawasaki Motors Pty Ltd (No 1)* (1991) 32 FCR 219, *Day v Harness Racing New South Wales* (2014) 88 NSWLR 594, *Deputy Commissioner of Taxation (NSW) v Mutton* (1988) 12 NSWLR 104, *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 289 FCR 2, *Gardner v Dairy Industry Authority of New South Wales* [1977] 1 NSWLR 505, *Greyhound Racing NSW v Cessnock and District Agricultural Association* [2006] NSWCA 333, *Grocon Constructors (Victoria) Pty Ltd v APN DF2 Project 2 Pty Ltd* [2015] VSCA 190, *Hemmes Trading Pty Ltd v State of New South Wales* [2009] NSWSC 1303, *HN v NTCAT & Ors* [2020] NTSC 48, *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, *Jack v Chief Executive Officer* (Housing) (No 2) [2021] NTSC 81, *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44, *Jennings Constructions v Burgundy Royale Investments* (1987) 162 CLR 153, *Kennedy v Anti-Discrimination Commission of the Northern Territory* (2006) 226 FLR 34, *Kioa v West* (1985) 159 CLR 550, *Medway v Minister for Planning* (1993) 30 NSWLR 646, *Minister for Home Affairs v DUA16* (2020) 271 CLR 550, *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12, *Minister for Immigration v SZVFW* (2018) 264 CLR 541, *Nathanson v Minister for Home Affairs* (2022) 96 ALJR 737, *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, *Northern Territory v Skywest Airlines* (1987) 90 FLR 270, *NT Power Generation Pty Ltd v Power & Water Authority* (2002) 122 FCR 399, *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615, *R v Kearney; Ex parte Japanangka* (1984) 158 CLR 395, *R v Tkacz* (2001) 25 WAR 77, *R v Toohey; ex parte Northern Land Council*

(1981) 151 CLR 170, *Re Gosling* (1943) 43 SR (NSW) 312, *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322, *Re Minister for Immigration and Multicultural Affairs; Ex parte MIAH* (2001) 206 CLR 57, *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, *Salemi v MacKellar (No 2)* (1977) 137 CLR 396, *South Australia v O'Shea* (1987) 163 CLR 378, *State of South Australia v Slipper* (2004) 136 FCR 259, *Stran v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 233, *Svikart v Stewart* (1994) 181 CLR 548, *Traut v Rogers* (1984) 70 FLR 17, *Vanmeld Pty Ltd v Fairfield City Council* (1999) 46 NSWLR 78, *Wake and Gondarra v Northern Territory* (1996) 124 FLR 298, *Waqa v Technical and Further Education Commission* [2009] NSWCA 213, *Waters v Acting Administrator for the Northern Territory* (1993) 46 FCR 462, *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22, *Young & Conway v Chief Executive Officer (Housing)* (2020) 355 FLR 290, referred to.

REPRESENTATION:

Counsel

Appellants/Plaintiffs/Applicants:	M Albert with D Kelly
Respondents/Defendants/Respondent:	B Doyle KC with L Spargo-Peattie

Solicitors

Appellants/Plaintiffs/Applicants:	Australian Lawyers for Remote Aboriginal Rights
Respondents/Defendants/Respondent:	Solicitor for the Northern Territory

Judgment category classification:	B
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IN THE COURT OF APPEAL AND
THE FULL COURT OF THE
NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Badari & Ors v Minister for Territory Families and Urban Housing & Anor; Badari & Ors v Minister for Housing and Homelands & Anor; Nadjamerrek & Ors v Chief Executive Officer (Housing) [2025] NTCA 1

AP 13/22 (2237775)

BETWEEN:

ASHER BADARI
First Appellant

AND

RICANE GALAMINDA
Second Appellant

AND

LOFTY NADJAMERREK
Third Appellant

AND

CARMELENA TILMOUTH
Fourth Appellant

v

MINISTER FOR TERRITORY FAMILIES AND URBAN HOUSING
First Respondent

AND

MINISTER FOR HOUSING AND HOMELANDS
Second Respondent

2023-01110-SC

BETWEEN:

ASHER BADARI
First Plaintiff

AND

RICANE GALAMINDA
Second Plaintiff

AND

LOFTY NADJAMERREK
Third Plaintiff

AND

CARMELENA TILMOUTH
Fourth Plaintiff

v

MINISTER FOR HOUSING AND HOMELANDS
First Defendant

AND

CHIEF EXECUTIVE OFFICER (HOUSING)
Second Defendant

2023-01346-SC

LOFTY NADJAMERREK
First Applicant

and

ASHER BADARI
Second Applicant

and

RICANE GALAMINDA
Third Applicant

and

CARMELENA TILMOUTH
Fourth Applicant

v

CHIEF EXECUTIVE OFFICER (HOUSING)
Respondent

CORAM: GRANT CJ, BARR & HUNTINGFORD JJ

REASONS FOR JUDGMENT
(Delivered 24 January 2025)

[1] These are three separate proceedings variously before the Court of Appeal and the Full Court which have been heard together because they involve facts, issues and questions in common.

[2] The principal matter (AP 13/22 (2237775)) is an appeal from a decision of the Supreme Court delivered on 10 November 2022.[1] That decision, and the grounds of appeal, involve the application of s 41(1) of the *Residential Tenancies Act 1999* (NT) (**RTA**) to the appellants' tenancy agreements; and the operation of s 23 of the *Housing Act 1982* (NT) (***Housing Act***) and ss 41, 48 and 49 of the RTA concerning rent

1 *Badari & Ors v Minister for Territory Families and Urban Housing & Anor* [2022] NTSC 83.

increases for those tenancies. The principal question is whether three Determinations of Rent Payable for Dwellings made in purported pursuance of s 23 of the *Housing Act* on 23 December 2021, 29 April 2022 and 2 September 2022 were made beyond or outside the power conferred by the statute.

[3] The second matter (2023-01110-SC) is an adjunct to the appeal in the first matter. In its original form, it is an application for judicial review seeking, amongst other relief, a declaration that a fourth Determination of Rent Payable for Dwellings dated 1 February 2023 made in purported pursuance of s 23 of the *Housing Act* was *ultra vires* by operation of s 41 of the RTA and cl 2(2) of Sch 2 of the *Residential Tenancies Regulations 2000* (NT) (**RT Regulations**). In essence, this is a challenge to the validity of a fourth Determination made after the delivery of the decision of the Supreme Court which is presently the subject of appeal in the principal matter. The clear purpose of the challenge is to ensure that any decision on appeal is not rendered nugatory by the continuing operation of the Determination subsequently made. By consent, that particular claim for relief was referred for determination to the Full Court, to be heard together with the other matters.

[4] The third matter (2023-01346-SC) is in its original form an application for leave to appeal from a decision of the Northern Territory Civil and Administrative Tribunal (**NTCAT**) made on 29 March 2023. The

substance of the decision is that NTCAT lacks jurisdiction to determine applications made by the applicants (as tenants) for declarations under s 42 of the RTA. By consent, that question was referred for determination to the Full Court, to be heard together with the other matters.

Factual and statutory background

[5] The four appellants/plaintiffs/applicants (referred to in these Reasons as **the appellants**) are tenants in public housing in remote communities in the Northern Territory. Due to changes in the Administrative Arrangements Order over the relevant period, the four Determinations in question in these proceedings were made variously by the Minister for Territory Families and Urban Housing and the Minister for Housing and Homelands (referred to in these Reasons as **the responsible Minister**).

[6] On 23 December 2021, the responsible Minister made a Determination under s 23 of the *Housing Act* that affected the mechanism by which rent payable by the appellants was to be assessed, and, ultimately, the amount of base rent payable by the appellants with respect to their various leased premises (**the First Determination**).

[7] The responsible Minister then made a Determination in similar terms on 27 April 2022 which revoked part of the First Determination (**the Second Determination**).

[8] On 2 September 2022, the responsible Minister made a further Determination in similar terms to that made on 27 April 2022, but revoking part of the Second Determination (**the Third Determination**).

[9] In essence, the Second and Third Determinations postponed the commencement date for the new rent from that set in each of the earlier Determinations. (The First, Second and Third Determinations are referred to collectively in these Reasons as **the Determinations**.)

[10] The appellants brought an application for judicial review seeking the following relief:

1. A declaration of right pursuant to section 18(1) of the *Supreme Court Act 1979* (NT) that
   (a) the three Determinations do not give rise to an increase in the plaintiffs' rent having regard to section 41 of the *Residential Tenancies Act 1999* (NT) (the RTA) (the first declaration); and
   (b) any rent increase by way of an increase in the percentage of the plaintiff's income is unlawful having regard to section 41 of the RTA (the second declaration).
2. A declaration of right pursuant to section 18(1) of the *Supreme Court Act 1979* (NT) that the plaintiffs as tenants of "public housing premises" as defined in section 5 of the *Housing Act 1982* (NT) (the Housing Act) can seek a declaration that the rent payable under their tenancy agreement is excessive under section 42 of the RTA because such agreements are not a "tenancy under the Housing Act" as defined in section 4 of the RTA.
3. An order quashing those parts of the three Determinations which give rise to rent increases because of a failure to afford procedural fairness and for legal unreasonableness.

[11] The general factual background to the matter is not in dispute. That background is conveniently set out in the judgment of the Supreme

Court in the following terms (subject to a number of assertions of factual error which are dealt with in the course of these Reasons):

> It is accepted that each of the plaintiffs occupy residential dwellings in a remote community pursuant to a lease which names the Chief Executive Officer (Housing) (the CEOH) as the landlord. The first and second plaintiffs jointly lease residential premises in Gunbalanya (also known as Oenpelli). The third plaintiff leases different residential premises in Gunbalayna. The fourth plaintiff leases residential premises in Laramba.
>
> The written lease signed by the first and second plaintiffs does not specify within the document the rent that is payable. A clause in the *Remote Public Housing Tenancy Rules* [clause 5.1], which purported to be part of the terms of the lease, gave the CEOH, as landlord, the right "to vary the Rent from time to time in accordance with any determination made pursuant to section 23 of the *Housing Act*". As the copy of the lease before the Court has not been executed by or on behalf of the CEOH, the first and second plaintiffs submitted that the terms of the lease are the default terms set out in Schedule 2 of the *Residential Tenancies Regulations 2000* (NT) [*Residential Tenancies Act* (RTA),[s 19(4)]). The default terms do not contain a clause equivalent to clause 5.1. Nothing turns upon this point. The only relevance of clause 5.1 is as demonstrating that the first and second plaintiffs were on notice that determinations made by the Minister under s 23 of the *Housing Act* may result in an increase in base rent for the premises they were occupying.
>
> A similar situation existed with regard to the lease signed by the third plaintiff.
>
> The lease signed by the fourth plaintiff specified the rent payable as $140.00 per week, but included a note to the effect that "the rent is subject to adjustment in accordance with section 23 of the *Housing Act* 1982 (NT)." The terms of the fourth plaintiff's lease are … identical to the default terms.
>
> The provisions of the *Housing Act* govern aspects of the provision of public housing in the Northern Territory. The *Housing Act* establishes an entity by the name of the CEOH. This entity is a body corporate sole and is capable, in its corporate name, of acquiring, holding and disposing of real, leasehold and personal property [the *Housing Act*, s 6]. The CEOH has power to do all things that are necessary or convenient to be done for or in connection with or incidental to the performance of its functions in the exercise of its powers [the *Housing Act*, s 16(1)]. The

CEOH is, however, subject to Ministerial direction [the *Housing Act*, s 17].

One of the functions of the CEOH is to provide, and to assist in the provision of, residential accommodation [the *Housing Act*, s 15(a)]. To that end, and without limiting the generality of s 16(1), in carrying out its functions the CEOH may let premises and may acquire, hold and dispose of real property, or any interest therein.

A dwelling for the purposes of the *Housing Act* means a house acquired and retained by the CEOH. Section 23 of the *Housing Act* addresses the rent payable for dwellings to which the *Housing Act* applies. The section provides:

> **Rent payable for dwellings**
>
> (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).

It is apparent from the provisions of s 23 that the base rent payable for occupation of remote dwellings falling within a class of dwellings to which a determination under that section applies is not set by agreement between the parties as recorded in the lease agreement. It is set by statute as the amount determined from time to time by the Minister … [base rent]. The base rent is not necessarily the rent paid by a tenant, as there exists a rebate system which permits a rebated rent to be charged based on household income. The claim now made by the plaintiffs is that any rent increase, either in base rent or rebated rent, is only permissible if the provisions of the RTA are satisfied, and in particular, that the provisions of s 41 of the RTA are satisfied. I will return to that claim presently. Before doing so, it is appropriate to set out the basis on which the CEOH held an

interest in each of the dwellings so as to be able to lease the dwellings to the plaintiff.

In an affidavit made on 22 August 2022, Brent Aaron Warren, the Deputy Chief Executive of Housing Operations in the Department of Territory Families, Housing and Communities stated:

- the townsite of Gunbalanya lies within Northern Territory Portion 1646 (NT 1646), as identified in Survey Plan CP 004181;
- Lots 553 and 699, Town of Gunbalanya, where the first, second, and third plaintiffs reside, are contained within NT 1646;
- NT 1646 is Aboriginal land within the meaning of section 3(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA). The Arnhem Land Aboriginal Trust holds an estate in fee simple over NT Portion 1646;
- on 26 August 2009, the Arnhem Land Aboriginal Trust, Northern Land Council, CEOH and the Commonwealth of Australia entered into an agreement through which the Arnhem Land Aboriginal Trust granted to the CEOH a lease under section 19 of the ALRA (the Gunbalaya lease); and
- the Gunbalaya lease remains in force.

… [T]he parties agree that the residential dwelling occupied by the first and second plaintiffs, and that occupied by the third plaintiff, are premises that were part of the land leased to the CEOH by the Gunbalaya lease.

In the same affidavit, Mr Warren stated:

- Laramba is an Aboriginal community living area which was excised from the Napperby pastoral lease in 1992 under Part 8 of the *Pastoral Land Act 1992* (NT). It comprises NT Portion 4069 over which the Laramba Community Incorporated (LCI) holds an estate in fee simple, subject to various statutory conditions and restrictions which cover the use and occupation of Aboriginal community living areas;
- Lot 51, Town of Laramba, where the fourth plaintiff resides, is situated within NT Portion 4069;
- on 18 July 2014, LCI, the Central Land Council and the Executive Director of Township Leasing (the EDTL) entered into a head lease concerning certain land in Laramba, including Lot 51, to facilitate the provision of public housing; and
- on 6 July 2018, the EDTL entered into a sublease with the CEOH to facilitate the CEOH providing public housing in Laramba. This sublease included the land comprising Lot 51.

Prior to December 2021, the Determination setting out base rent payable for remote dwellings included a Table which specified the base rent payable depending upon whether the dwelling was [a] 1, 2, 3 or 4 bedroom dwelling and whether the dwelling was classified as “new or rebuilt”, “refurbished” or an “existing house”. Acknowledging that tenants in public housing were often poor, a safety net system existed such that rent for public housing could be set at the lesser of the base rent determined in accordance with the Table or rent calculated based on a percentage of household income (rebated rent). This safety net was implemented as a matter of policy.

Over time, this system was considered to be inefficient, complex and difficult to administer. As household income frequently changed for tenants in remote public housing, due to factors such as changes in Centrelink entitlements and changes to the number of persons occupying a dwelling, the rent payable by the tenant required frequent reassessment and was subject to change. The Northern Territory Government determined to implement a simplified and consistent scheme that was easy to administer, easy to understand, and affordable for all parties. To that end, a new framework for determining rent for remote dwellings was developed throughout 2018. This process included the formation of the Stakeholder Advisory Group (the SAG), comprising representatives from:

(a) the North Australian Aboriginal Justice Agency;

(b) Aboriginal Housing Northern Territory;

(c) NT Shelter;

(d) the Northern Land Council;

(e) the Central Land Council;

(f) Yili Rreung Aboriginal Housing Corporation;

(g) Kalano Community Association;

(h) the Tangentyere Council;

(i) the Central Australian Affordable Housing Company;

(j) the Julalikari Council Aboriginal Corporation;

(k) Aboriginal Peak Organisations Northern Territory;

(l) North Australian Aboriginal Family Legal Service; and

(m) Aboriginal Medical Services Alliance Northern Territory.

The SAG considered a number of different methodologies for determining base rent for remote dwellings. A record of the meeting of the SAG on 9 November 2018 reveals that all members of the SAG agreed that the operational cost per bedroom model

was the best model. This model was approved by Cabinet in December 2021. The model approved by Cabinet provided for base rent for a remote public housing dwelling to be determined based on the number of the bedrooms the dwelling contains and to be set accordingly by the Minister pursuant to s 23 of the *Housing Act*. The model approved by Cabinet contained a safety net by way of a policy allowing the CEOH to only charge a portion of the full rent payable by a tenant on a temporary basis, if the tenant would encounter rental stress due to being required to pay the full rent payable pursuant to the Determination. The government policy is for the CEOH to require such tenants to pay an amount equivalent to 25% of the total household income of the relevant dwelling, initially for up to 6 months.[2]

[12] It was against that background that the responsible Minister made the three Determinations which were the subject of the original application for judicial review. Section 23 of the *Housing Act*, pursuant to which the three Determinations were purportedly made, is extracted in that part of the judgment of the Supreme Court set out immediately above. Section 41 of the RTA, the operation of which the appellants say precluded the rent increases effected by the three Determinations, provides:

> **Increases in rent**
>
> (1) A landlord may increase the rent payable under a tenancy agreement only if:
>
> (a) the right to increase the rent; and
>
> (b) the amount of the increase in rent or the method of calculation of the increase in rent,
>
> is specified in the agreement.
>
> (2) A proposal to increase the rent payable under a tenancy agreement is of no effect unless at least 30 days written notice is given to the tenant of:
>
> (a) the amount of the increase; and

2 *Badari & Ors v Minister for Territory Families and Urban Housing & Anor* [2022] NTSC 83 at [4]-[17].

(b) the date from which the increase is to take effect.

(3) The date fixed for an increase in rent in relation to a tenancy must not be earlier than 6 months after:

(a) the day on which the tenancy agreement commences; or

(b) if there has been a previous increase of rent under this section in relation to one or more of the same tenants and the same premises – the last increase.

(4) If the rent payable under a tenancy agreement is increased under this section, the terms of the agreement are varied accordingly.

(5) Subsections (2), (3) and (4) do not apply in relation to:

(a) a provision of a tenancy agreement in relation to a tenancy under which the rent payable changes automatically at stated intervals on a basis set out in the agreement or by a determination under the *Housing Act 1982* by the minister administering that Act; or

(b) an increase in the amount of rent payable by a tenant because of the cancellation or adjustment of a rent rebate.

[13] Section 19 of the RTA, which the appellants say governed the form of the tenancy agreements, relevantly provides:

Tenancy agreements to be written

(1) If a landlord enters into a written tenancy agreement the agreement is to:

(a) contain the name of the tenants and the name and address for service of the landlord's agent, if any;

(b) contain the full name and address for service of the landlord;

(c) clearly identify the premises to which the agreement relates;

(d) contain each term, or a term to the same effect as each term, that is specified by or under this Act to be a term of a tenancy agreement;

(e) include terms as to the amount of rent payable and how the rent is to be payable; and

(f) if the agreement is for a fixed term tenancy – specify the duration of the agreement.

…

(4) If a tenancy agreement is not in accordance with subsection (1) or is not signed by all parties to the agreement, a tenancy agreement, if any, prescribed for the purposes of this section is to be taken to be the agreement between the parties for the purposes of this Act.

[14] Regulation 10 of the RT Regulations provides that for the purposes of s 19(4) of the RTA, 'the tenancy agreement set out in Schedule 2 is prescribed'. Clause 2(2) of the default tenancy agreement prescribed by Sch 2 of the RT Regulations provides:

> The tenant must pay, before each rental payment period in respect of the premises to which this agreement relates, the amount of rent, if any, agreed at the beginning of the tenancy between the landlord and the tenant to be payable in respect of the rental payment period.

[15] The third declaration sought by the appellants in the original application for judicial review was that as tenants of 'public housing premises' as defined in s 5 of the *Housing Act* they can seek a declaration that the rent payable under their tenancy agreements is excessive under s 42 of the RTA because such agreements are not a 'tenancy under the *Housing Act*' as defined in s 4 of the RTA.

[16] The term 'public housing premises' is defined in s 5 of the *Housing Act* to mean (so far as is relevant for these purposes):

(a) premises that are owned or leased by the Chief Executive Officer (Housing) or the Territory for the purpose of being let to eligible persons by the Chief Executive Officer (Housing) or the Territory under a prescribed housing scheme, whether or not the premises have been let;

[17] The term 'tenancy under the *Housing Act 1982*' is defined in s 4 of the RTA to mean:

> (a) a social housing tenancy; or
>
> (b) any other tenancy granted under the *Housing Act 1982*:
>
> (i) in relation to premises that are owned or leased by the CEO (Housing) or the Territory; or
>
> (ii) under which the CEO (Housing) or the Territory is the landlord.

[18] Section 42 of the RTA provides:

> **Tribunal may declare rent excessive**
>
> (1) The Tribunal may, on the application of the tenant, declare that the rent payable under a tenancy agreement is excessive.
>
> (2) The Tribunal must not make a declaration under subsection (1) unless it:
>
> (a) has given 14 days notice to the landlord of the application; and
>
> (b) has invited the landlord to make submissions to the Tribunal in relation to the application before the date specified in the notice; and
>
> (c) has considered any submissions made by the landlord.
>
> (3) The Tribunal may only make a declaration under subsection (1) if the rent paid in respect of the tenancy agreement is, in the opinion of the Tribunal, excessive:
>
> (a) having regard to the general level of rents for comparable premises in the same or similar localities and the cost of any services provided in connection with the tenancy agreement by the landlord or the tenant; or
>
> (b) because the level of services provided under the agreement has, in the opinion of the Tribunal, been reduced to a significant extent, having regard to the cost of any services provided in connection with the tenancy agreement by the landlord or the tenant.
>
> (4) If the Tribunal makes a declaration under subsection (1), it may by order:
>
> (a) specify the rent payable for the premises and vary the agreement by reducing the rent payable under the agreement accordingly; and

(b) specify a date (which is not to be before the date of the application) from which the variation takes effect; and

(c) specify the period of not more than 12 months that the order is to remain in force.

(5) The Tribunal may, on the application of the landlord, vary or revoke an order under this section as the Tribunal thinks fit.

The decision of the Supreme Court

[19] Against that factual and statutory background, the trial judge dismissed the appellants' application for the declarations sought.

[20] In relation to the argument that s 41 of the RTA precluded the rent increases effected by the three Determinations, the trial judge proceeded on the assumption that none of the leases contained clauses that satisfied the requirements of s 41(1) of the RTA. Even accepting that contention for the purpose of the argument, the trial judge found that the Chief Executive Officer (Housing) was the 'landlord' for that purpose, and that the landlord had not purported to increase the rent. The term 'landlord' was relevantly defined in s 4 of the RTA to mean 'the person who grants the right of occupancy under a tenancy agreement'. As neither the responsible Minister nor the Northern Territory of Australia granted any of the appellants a right of occupancy under a tenancy agreement, neither was restricted by s 41 of the RTA in relation to any increase in rent or the method of calculation of an increase in rent.[3]

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3 *Badari & Ors v Minister for Territory Families and Urban Housing & Anor* [2022] NTSC 83 at [19]-[21].

[21] To the extent that there was any apparent conflict between the responsible Minister's power to determine rents under s 23 of the *Housing Act* and the facility to fix rents at a different level under s 41 of the RTA, the trial judge determined that the RTA had been later enacted and the legislature had made a clear choice to allow the Chief Executive Officer (Housing) to grant a right of occupancy for tenancies under the *Housing Act* while leaving the Minister responsible for determining rents. That intention was consistent with the obvious purpose of s 41 of the RTA to redress inequality of bargaining power in a market-based residential lease system, and the inapplicability of that mechanism to a social housing system which involves quite different obligations and considerations. So much was also apparent from the fact that s 42 of the RTA, to the extent that it permits a declaration that rent is excessive, is entirely unconcerned with the financial position of the lessee, and the fact that rent determinations under the public housing system permitted the grant of rebates to the base rent on the basis of financial circumstance and need.[4]

[22] The confinement of s 41 of the RTA to a rent increase imposed by a 'landlord' also reflected the infeasibility of setting an individualised market rent for each of the 5000 dwellings in remote communities which were subject to the Determinations under the *Housing Act*, and the express grant of power in s 23 of the *Housing Act* to make

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4 *Badari & Ors v Minister for Territory Families and Urban Housing & Anor* [2022] NTSC 83 at [23]-[25].

determinations for ‘a class of dwelling’. In the opinion of the trial judge, the absence of a reference in s 7(5) of the RTA to s 41 of the RTA as one of the provisions specified not to apply to a tenancy under the *Housing Act* did not indicate a legislative intention that s 41 was to apply. The inclusion of an express exemption was determined by the trial judge to be unnecessary in a scheme under which the rent payable for public housing tenancies is fixed by determination under s 23 of the *Housing Act*.[5]

[23] In relation to the argument that the appellants could seek a declaration from NTCAT that the rent payable under their tenancy agreements was excessive under s 42 of the RTA, the trial judge declined to determine that issue in circumstances where the appellants had not at that stage sought to invoke the jurisdiction of NTCAT in that respect. As described at the commencement of these Reasons, the appellants subsequently brought an application for that purpose before NTCAT, which determined as a preliminary issue that it lacked jurisdiction to make declarations under s 42 of the RTA in relation to public housing tenancies. The application for leave to appeal against that determination forms the third matter under consideration (2023-01346-SC) in the subject proceedings.[6]

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5 *Badari & Ors v Minister for Territory Families and Urban Housing & Anor* [2022] NTSC 83 at [26]-[27], [29].

6 *Badari & Ors v Minister for Territory Families and Urban Housing & Anor* [2022] NTSC 83 at [32].

[24] In relation to the argument that the appellants were denied procedural fairness, the trial judge adopted the respondents' distinction between the exercise of a power to make a decision which directly affects a person individually and that which simply affects an individual as member of the public or of a class of the public.[7] That latter category of decision includes the exercise of statutory powers to regulate prices in the public interest, which does not attract an entitlement to a prior hearing before the exercise of the power.[8] The trial judge ultimately determined that the responsible Minister was not obliged to provide procedural fairness to the appellants as part of a class of tenants to whom the Determinations applied, but that even if there was such an entitlement it was satisfied by the consultation process undertaken through the SAG.[9]

[25] Finally, the trial judge rejected the argument that the Determinations were legally unreasonable because they applied to all public housing premises in town camps and remote communities regardless of condition or location. That determination was made largely on the basis that s 23 of the *Housing Act* permitted the responsible Minister to make a Determination in relation to a class of dwelling in the context of a

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7 *Comptroller-General of Customs v Kawasaki Motors Pty Ltd (No 1)* (1991) 32 FCR 219 at [239]; *Kioa v West* (1985) 159 CLR 550 at [584]; *Castle v Director-General, State Emergency Services* [2008] NSWCA 231 at [6]-[9].

8 *Bread Manufacturers of New South Wales v Evans* (1981) 180 CLR 404; *Re Gosling* (1943) 43 SR (NSW) 312; *Bates v Lord Hailsham of St Marylebone* [1972] 1 WLR 1373; *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615 at 637.

9 *Badari & Ors v Minister for Territory Families and Urban Housing & Anor* [2022] NTSC 83 at [39]-[49].

public housing scheme, and the scope and content of the Determinations were readily explicable by the policy considerations relevant to the assessment of base rents in a broad geographical range of communities for a public housing system in which rental rebates were available.[10]

The grounds of appeal in AP 13/22 (2237775)

[26] The appellants' grounds of appeal may be summarised as follows.[11]

1. The trial judge erred in concluding that s 41(1) of the RTA did not apply to the appellants' tenancy agreements by concluding that:
   (a) the legislature did not intend for it to apply,
      (i) especially having regard to ss 7 and 41 of the RTA and ss 23 and 34 of the *Housing Act*, and
      (ii) having regard to the trial judge's incorrect understanding that a determination of rent with application to the appellants had been made prior to the Determination dated 23 December 2021, and that there was a legal concept of 'base rent', when the only relevant concept under both the RTA and s 23 of the *Housing Act* was 'rent';

10 *Badari & Ors v Minister for Territory Families and Urban Housing & Anor* [2022] NTSC 83 at [51]-[62].

11 Notice of Appeal, 7 December 2022.

(b) the responsible Minister was not the 'landlord' for the purposes of s 41 of the RTA in circumstances where each was either,

(i) acting as an agent of the Commonwealth pursuant to s 16(2)(h) of the *Housing Act* and thus within the definition of 'landlord', and/or

(ii) an emanation of the same Crown as the Chief Executive Officer (Housing) and/or the Commonwealth and thus within the definition of 'landlord';

(c) the responsible Minister was not the *de facto* 'landlord' for the purposes of s 41 of the RTA, especially having regard to ss 16(2)(h), 17, 21 and 22 of the *Housing Act*.

2. The trial judge erred when concluding that an uncodified policy could lawfully increase the rent payable by the appellants despite s 41 of the RTA and/or s 23 of the *Housing Act*.

3. The trial judge erred by failing to conclude that those parts of the First, Second and Third Determinations which gave rise to rent increases, and/or applied to classes of two, three and/or four bedroom dwellings, were infected by jurisdictional error on the basis of a denial of procedural fairness to those persons whose rights or interests were affected, including the appellants.

4. The trial judge erred in concluding that procedural fairness was afforded to the appellants in respect of the First, Second and Third

Determinations made in 2021 and 2022 on the basis of the SAG consultation in 2018 in circumstances where:

(a) the rent rates which were the subject of the consultation were not replicated in the First, Second or Third Determination;

(b) there was no evidence that any person attending the consultation was a person who would be affected by any future determination made under s 23 of the *Housing Act*; and/or

(c) the consultation did not include when each of the Determinations was to be made or postponed nor the effect of each of those decisions.

5. The trial judge erred by failing to conclude that those parts of the First, Second and Third Determinations which gave rise to rent increases, and/or applied to classes of two, three and/or four bedroom dwellings, were legally unreasonable in that each took no account of:

(a) the extent of non-compliance by the landlord with the requirements of the RTA in respect of each affected premises, and especially those requirements set out in ss 48 and 49 of the RTA;

(b) the proximity of each affected premises to government, health and education services, especially when compared with

determinations made under s 23 of the *Housing Act* in relation to urban premises; and/or

(c) the departure of each of the First, Second and Third Determinations from the model endorsed by the SAG consultation.

[27] The issue of principle which the appellants say underlies the challenge to the trial judge's determination is that the relevant legislation should not be construed on the assumption that different considerations apply to private tenants, on the one hand, and social housing tenants of limited means, on the other hand. The appellants say the only relevant point of distinction for these purposes is that members of the latter category of tenant are entitled to the benefits which a public housing scheme affords because they are at relative disadvantage in terms of economic resource and power. Otherwise, they should enjoy the protections of general tenancy law equally with other categories of tenant without any assumption of differential treatment informing the process of statutory construction.[12]

The applicability of s 41(1) of the RTA

[28] The appellants' first ground of appeal is that the trial judge erred in concluding that s 41(1) of the RTA did not apply to the appellants' tenancy agreements. As already described, s 41(1) of the RTA provides that a landlord may increase the rent payable under a tenancy

12 Appellants' Outline of Submissions, 9 October 2023, [73].

agreement only if the right to increase the rent and the amount of the increase in rent or the method of calculation of the increase in rent is specified in the agreement. The trial judge concluded that the increases effected by the Determinations were not made by the Chief Executive Officer (Housing) as 'landlord'. Rather, the increases were effected by the Determinations made by the responsible Minister, who was an entity quite separate from the 'landlord' as relevantly defined in s 4 of the RTA to mean relevantly 'the person who grants the right of occupancy under a tenancy agreement'.

[29] The appellants' challenge to the trial judge's conclusion in that respect is put on a number of bases. The first is that it was erroneous to conclude that the legislature did not intend s 41(1) of the RTA to apply to the appellants' tenancy agreements, particularly having regard to the operation of ss 7 and 41 of the RTA and ss 23 and 34 of the *Housing Act*. As an adjunct to that argument, the appellants say that the trial judge also incorrectly understood that a determination of rent with application to the appellants had been made prior to the First Determination, and that there was a legal concept of 'base rent', when no prior statutory determination had been made and the only relevant concept under both the RTA and s 23 of the *Housing Act* was 'rent'. The second basis for the challenge to the trial judge's conclusion is that it was erroneous to conclude that the responsible Minister was not the 'landlord' for the purposes of s 41 of the RTA in circumstances

where the responsible Minister was either acting as an agent of the Commonwealth pursuant to s 16(2)(h) of the *Housing Act*, and/or an emanation of the same Crown as the Chief Executive Officer (Housing) and/or the Commonwealth. The third basis for the challenge to the trial judge's conclusion is that the responsible Minister was the *de facto* 'landlord' for the purposes of s 41 of the RTA having regard to ss 16(2)(h), 17, 21 and 22 of the *Housing Act*.

Operation of ss 7 and 41 RTA and ss 23 and 34 *Housing Act*

[30] The appellants' principal contention under this ground of appeal is that there is no conflict between the limitation in s 41 of the RTA on a landlord's right to increase the rent payable under a tenancy agreement and the power of the Minister under s 23 of the *Housing Act* to determine the rent to be paid.[13] Any apparent or potential conflict is said to be resolved in favour of the RTA by operation of s 34 of the *Housing Act*, which provides:

> The *Residential Tenancies Act 1999* applies to and in relation to premises let under this Act.

[31] The appellants submit that the phrase 'to and in relation to' is of wide and general import, such that the RTA is afforded primacy over the relevant provisions of the *Housing Act* unless the latter expressly indicates otherwise.[14] The appellants point in that respect to provisions

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13 Appellants Outline of Submissions in Chief dated 9 October 2023, [8]-[14].

14 The appellants say that construction receives support from the legislative history, in that immediately prior to the introduction of the RTA, s 34 of the *Housing Act* provided that 'Part VII of the *Tenancy Act* shall apply to and in relation to the repossession by the

such as s 28W(2) of the *Housing Act*, which provides an express indication with the formulation 'despite the application of the [RTA]'. Similarly, s 7(5) of the RTA provides expressly that ss 31, 32, 37, 39(1) and (2), 42 and 112(5)(b) or (c) and Part 10 of the RTA do not apply in relation to a tenancy or proposed tenancy under the *Housing Act*. These provisions are said both to acknowledge the default position that the RTA prevails over the *Housing Act* and to carve out in express terms the limitations from the RTA which would otherwise apply to the *Housing Act*.

[32] That construction is said to be supported by the fact that s 41(5)(a) of the RTA itself expressly excludes the application of subs (2), (3) and (4) to 'a tenancy under which the rent payable changes … by a determination under the *Housing Act 1982* by the Minister administering that Act', with no exclusion of the application of subs 41(1) to a tenancy of that type. To the extent it may be required, s 7 of the RTA contains a mechanism which empowers the Minister to exempt specified classes of tenancy agreement from all or any of the provisions of the RTA, subject to a notice and consultation process.

[33] The trial judge found that the omission from s 7(5) of the RTA of s 41 as a specified provision which does not apply to a tenancy under the *Housing Act* was not indicative of a legislative intention that s 41 was

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Commission of premises let under this Act'. That limitation on application is said to evince a legislative intention that the provision as subsequently amended gave the RTA primacy without limitation unless expressed elsewhere in the *Housing Act*. See Appellants Outline of Submissions in Chief dated 9 October 2023, [10].

to have such application. That is because the mechanism permitting the rent payable by a tenant in public housing to be fixed by determination under s 23 of the *Housing Act* rendered express exemption unnecessary.[15] The appellants submit that the effect of that interpretation would be to allow those procedural fairness protections in s 7 to be circumvented by the 'stroke of a Ministerial pen' and to subvert the way in which the *Housing Act* is intended to be read with the RTA.

[34] The appellants' further or alternative submission is that the two provisions are capable of harmonious operation if the power in s 23 of the *Housing Act* is taken to permit only the reduction of rent, with an increase in rent available only if the requirements of s 41(1) of the RTA are satisfied. The appellants say that construction would not operate to make a determination under s 23 of the *Housing Act* inoperative, but only to subject it to the limitations imposed by the RTA in the manner contemplated by s 34 of the *Housing Act*. That is said to be consistent with a scheme under which rent increases are permitted only if the criteria stipulated in s 41(1) are satisfied, but the manner in which rent may be reduced is not limited under the terms of the legislation to the means permissively specified in s 46 of the RTA. That difference in approach is said to be explicable from a policy perspective to ensure that tenants are afforded transparency, clarity and

15 *Badari & Ors v Minister for Territory Families and Urban Housing & Anor* [2022] NTSC 83 at [29].

predictability in how their financial obligations under the tenancy agreement may increase in the future.

[35] The appellants say that the consequence of that constructional approach is that s 23(4) of the *Housing Act*, which provides that the rent to be paid is the rent determined by the Minister under subs (1) despite anything to the contrary contained in any other arrangement or agreement, operates only to the extent it gives rise to a rent reduction or, alternatively, a rent rise authorised by the specific terms of the tenancy agreement. That is because s 23(4) of the *Housing Act* would otherwise have the effect of overriding the legislature's clear expression of intent in s 41(1) of the RTA that any rent increase is authorised 'only if' and to the extent contemplated by the terms of the tenancy agreement.

[36] In answering these questions it is necessary so far as is possible to construe the RTA consistently with the relevant provisions of the *Housing Act*. That is because the two pieces of legislation are clearly interrelated (not least because they make express reference to each other), and are clearly intended to operate as part of a broader scheme for the regulation of tenancies and the provision of housing in the Northern Territory. As was stated in *Commissioner of Stamp Duties v Permanent Trustee Co Ltd*:

> Upon the hypothesis … that there is a rational integration of the legislation of the one Parliament, it is proper for courts to endeavour to so construe interrelated statutes as to produce a

> sensible, efficient and just operation of them in preference to an inefficient, conflicting or unjust operation.[16]

[37] The submissions made by the appellants in relation to the operation of ss 7 and 41 of the RTA and ss 23 and 34 of the *Housing Act* do not directly engage with the fact that s 41(1) of the RTA, in its terms, restricts the capacity of a 'landlord' to increase the rent for a tenancy. The challenge to the trial judge's characterisation of the Chief Executive Officer (Housing), rather than the responsible Minister, as the 'landlord' within the meaning of s 41(1) of the RTA forms the basis of the second and third grounds of challenge and is discussed further below, including whether there is some contrary intention which would warrant the displacement of the statutory definition of 'landlord' appearing in s 4 of the RTA.

[38] The appellants' first ground of challenge is, in effect, that it was erroneous on the part of the trial judge to conclude that the legislature did not intend s 41(1) of the RTA to apply to the appellants' tenancy agreements given that its application to public housing tenancies was not expressly excluded.[17] That resolves to the contention that, on proper construction, the scheme created under the RTA and the *Housing Act* precludes any increase to the rent payable in respect of the lease of a dwelling under the *Housing Act* other than in compliance

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16 *Commissioner of Stamp Duties v Trustee Co Ltd* (1987) 9 NSWLR 719 at 722 per Kirby P.

17 As is discussed later in these Reasons, the respondents dispute that characterisation of the relevant finding by the trial judge.

with the limitations imposed by s 41(1) of the RTA, regardless of how or by whom that rental increase is effected.

[39] In addressing that contention, the respondents submit that the RTA creates a general framework regulating the relationship of landlords and tenants under residential tenancy agreements. Under that framework, s 19(1) of the RTA contemplates that a landlord and tenant may enter into a tenancy agreement provided it contains certain terms and is signed by both parties. If a tenancy agreement does not contain those conditions, or is not signed by all parties, the tenancy agreement prescribed in Sch 2 to the RT Regulations is taken to be the agreement between the parties.[18] The relevant tenancy agreements in this case were either taken to be those in Schedule 2 to the RT Regulations or mirrored the language of cl 2(2) of Schedule 2.

[40] Clause 2(2) of the RT Regulations relevantly provides that a tenant must pay the amount of rent, if any, agreed at the beginning of the tenancy between the landlord and the tenant to be payable in respect of the rental payment period. Section 35 of the RTA provides that it is a term of a tenancy agreement that the tenant must pay the rent specified in or under the agreement in the manner and at the place specified in the agreement or otherwise agreed in writing. It is as part of that scheme that s 41(1) of the RTA provides that a landlord may increase the rent payable under a tenancy agreement only if (a) the right to

18 RTA, s 19(4); and RT Regulations, r 10

increase the rent, and (b) the amount of the increase in rent or the method of calculation of the increase in rent is specified in the agreement. The respondent submits that those incidents demonstrate that the RTA creates a scheme for the regulation of tenancies between landlords and tenants which limits the manner in which landlords may alter rent payable under tenancy agreements.

[41] The respondents submit that, conversely, the *Housing Act* creates a different and more particular framework for the provision of public housing. That Act and the housing schemes operated under it are administered in large part by the Chief Executive Officer (Housing) as landlord. The power of the responsible Minister under s 23(1) of the *Housing Act* is relevantly to determine the rent to be paid for a dwelling or a class of dwelling. A 'dwelling' is defined in s 5 of the *Housing Act* as a house built or otherwise acquired, and retained, by the Chief Executive Officer (Housing), or a house in the control of the Chief Executive Officer (Housing) as agent for the Territory or the Commonwealth. The respondents say that under those arrangements, and quite consistently with the operation of a public housing scheme, s 23(4) of the *Housing Act* expressly and unambiguously requires that the rent to be paid for a 'dwelling' is the rent determined by the Minister from time to time, '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)'.

[42] The respondents say that this arrangement affords the RTA and the *Housing Act* harmonious operation, and that the appellants have mischaracterised the trial judge's reasoning and finding in this respect as predicated upon the existence of a conflict between the two provisions. Rather, the assertion of conflict was one prosecuted by the appellants and which the trial judge addressed in the following terms:

> When it is accepted that the legislature in the RTA, a later enactment to the *Housing Act*, chose to provide that the CEOH could be the entity granting the right of occupancy (effectively the landlord) while retaining the Minister as the person responsible for setting rents, the apparent conflict between the provisions falls away.[19]

[43] The respondents also say that the trial judge did not find that s 41(1) of the RTA 'did not apply' to the appellants' tenancy agreements.[20] Rather, the trial judge found that s 41(1) of the RTA effected no constraint upon the exercise of the Minister's power under s 23 of the *Housing Act* because of a deliberate decision on the part of the legislature to establish the Chief Executive Officer (Housing) as the legal person which granted the right of occupancy under public housing tenancy agreements.[21] It was for that reason unnecessary for s 7(5) of

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19 The appellants' submission to that effect is said to read the second sentence of paragraph [29] of the reasons of the trial judge out of context.

20 *Badari & Ors v Minister for Territory Families and Urban Housing & Anor* [2022] NTSC 83 at [21]-[22].

21 *Badari & Ors v Minister for Territory Families and Urban Housing & Anor* [2022] NTSC 83 at [21]-[22].

the RTA to exclude the operation of s 41(1) to public housing tenancies only '[t]o the extent that' rent is fixed by the Minister.[22] Section 41(1) of the RTA otherwise has application to those tenancies and would prevent the Chief Executive Officer (Housing), as landlord, from increasing the rent unless there was an express term to that effect.

[44] The respondents' submissions in this respect should be accepted. That the RTA has application to premises under the *Housing Act* is not in dispute. The relevant question is whether the limitation imposed by s 41(1) of the RTA upon what a landlord may do controls and limits the Minister's power under s 23 of the *Housing Act* to determine rents. The provisions of s 23(4) of the *Housing Act* are entirely inconsistent with the appellants' contention that the Minister is somehow constrained by the operation of s 41 of the RTA. It may be noticed in this respect that s 41 of the RTA imposes obligations with exclusive reference to tenancy agreements, and that s 23(4) of the *Housing Act* in its form at the material time was enacted after the promulgation of s 41 of the RTA.

[45] It cannot be said that this stipulation operates only to the extent it gives rise to a rent reduction or, alternatively, a rent rise authorised by the specific terms of the tenancy agreement. Rather, it is this stipulation requiring the rent determined by the Minister for a public

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22 *Badari & Ors v Minister for Territory Families and Urban Housing & Anor* [2022] NTSC 83 at [29].

housing dwelling to prevail over any other agreement or arrangement. That conclusion is not altered by the fact that the Minister had made no statutory determination in relation to the relevant premises prior to the First Determination.

[46] That specific stipulation in s 23(4) of the *Housing Act*, together with the fact that the Minister is not the 'landlord', obviates the need for any express exemption of the operation of the general provision in s 41(1) of the RTA in the *Housing Act*, and explains why it was unnecessary for s 41(5) of the RTA to disapply s 41(1) in express terms. Conversely, subss 41(2), (3) and (4) would, but for s 41(5), have application to a rent increase irrespective of the circumstance that it was not imposed by the landlord. We respectfully agree with the trial judge's observation that the relationship between s 41 of the RTA and s 23 of the *Housing Act* reflects a legislative intention that s 41(1) of the RTA has application to redress inequality of bargaining power in a market-based residential lease system, and s 23 of the *Housing Act* has application to a social housing system which involves quite different obligations and considerations.

Notice of Contention

[47] The respondents have filed a Notice of Contention pleading that the trial judge erroneously decided[23] that none of the appellants' leases

23 *Badari & Ors v Minister for Territory Families and Urban Housing & Anor* [2022] NTSC 83 at [21].

contained a provision which satisfied the requirements of s 41(1) of the RTA, in circumstances where the lease between the Chief Executive Officer (Housing) and the fourth appellant dated 20 October 2020[24] specified that the rent was subject to adjustment in accordance with s 23 of the *Housing Act* in a manner that satisfied the requirements of s 41(1) of the RTA.

[48] It is not necessary to determine this matter given the finding we have made in relation to the relationship between s 41 of the RTA and s 23 of the *Housing Act*. Moreover, the argument operates only in relation to the fourth appellant. However, the matter was the subject of considered submissions by the parties and it is appropriately determined.

[49] In order for a provision to satisfy the requirements of s 41(1) of the RTA it must specify both the right to increase the rent and either the amount of the increase in rent or the method of calculation of the increase in rent. The provision in this case forms part of the tenancy agreement by its incorporation in Schedule 1 headed 'Public Housing Tenancy Agreement – Periodic Tenancy' and signed by the fourth appellant. The provision states only that rent may be adjusted in accordance with s 23 of the *Housing Act*, which grants the Minister the power to determine rents. It may be accepted that the reference to the adjustment of rent is sufficient to constitute the specification of a right to increase rent, notwithstanding the level of generality in that

24 AB 255.

formulation. As the respondents submit, it is unnecessary for the clause to specify the Minister's future intentions, and the language used is sufficient to convey the necessary information in relation to the right to increase rent. The reference to adjustment comprehends the fact that a determination under that provision may entail the rent being adjusted to a higher or lower amount than the rent currently payable.

[50] Accepting that to be so, the clause manifestly does not specify the amount of the increase in rent. Accordingly, in order to satisfy the requirements of s 41(1) of the RTA it is necessary to characterise the provision that rent may be adjusted in accordance with s 23 of the *Housing Act* as the specification of the method of calculation of the increase in rent. The term 'specify' carries with it the requirement that the clause in question must identify the relevant matter 'definitely or explicitly', 'in detail' or with 'unambiguous clarity'. A formulation which identifies matters in general, indefinite and non-specific terms will not meet the requirement of specification.[25] The adjustment provision in this case in no way specifies the method of calculation of the increase in rent. A reference to a singular power on the part of the responsible Minister to increase rent outside the scheme of the RTA does not amount to a method of calculation in the relevant sense.

[51] The Notice of Contention is dismissed.

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25 *Beckingham v Browne* [2021] VSCA 362.

Whether responsible Minister *de jure* 'landlord'

[52] The second basis for appellants' challenge under this ground of appeal asserts that the responsible Minister was properly characterised as the 'landlord' for the purposes of s 41 of the RTA because the responsible Minister was acting as an agent of the Commonwealth pursuant to s 16(2)(h) of the *Housing Act*, and/or was an emanation of the same Crown as the Chief Executive Officer (Housing) and/or the Commonwealth. The following findings of fact made by the trial judge in relation to the tenancy arrangements are not subject to any challenge on appeal.

[53] The township of Gunbalanya, where the first, second, and third appellants resided at the material times, is Aboriginal land within the meaning of s 3(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**ALRA**). The Arnhem Land Aboriginal Trust (**ALAT**) holds an estate in fee simple over NT Portion 1646, which includes the township of Gunbalanya. On 26 August 2009, the ALAT, the Northern Land Council, the Chief Executive Officer (Housing) and the Commonwealth of Australia entered into an agreement through which the ALAT granted the Chief Executive Officer (Housing) a lease over the township of Gunbalanya under s 19 of the ALRA. The residential dwellings occupied by the first, second and third appellants form part of the land leased to the Chief Executive Officer (Housing), and the tenancy agreements pursuant to which the first, second and third

appellants occupy the residential dwellings in question name the Chief Executive Officer (Housing) as the landlord.

[54] Laramba is an Aboriginal community living area which was excised from the Napperby pastoral lease in 1992 under Part 8 of the *Pastoral Land Act 1992* (NT). It comprises NT Portion 4069 over which the Laramba Community Incorporated holds an estate in fee simple. The residential dwelling occupied by the fourth appellant at the material times is situated within NT Portion 4069. On 18 July 2014, Laramba Community Incorporated, the Central Land Council and the Executive Director of Township Leasing (**EDTL**), a Commonwealth employee, entered into a head lease concerning certain land in Laramba, including the dwelling occupied by the fourth appellant, to facilitate the provision of public housing. Then, contemporaneously with the grant of the head lease, the EDTL entered into a sublease of the housing stock on that land to the Chief Executive Officer (Housing) to facilitate the provision of public housing in Laramba by the Chief Executive Officer (Housing). The residential dwelling occupied by the fourth appellant formed part of the housing stock leased to the Chief Executive Officer (Housing), and the tenancy agreement pursuant to which the fourth appellant occupied the residential dwelling in question named the Chief Executive Officer (Housing) as the landlord.

[55] Against that factual background, the Chief Executive Officer (Housing) is a corporation sole established by s 6 of the *Housing Act* in the following terms:

> **Chief Executive Officer (Housing)**
>
> (1) There is established an entity by the name of the Chief Executive Officer (Housing).
>
> (2) The Chief Executive Officer (Housing):
>
> (a) is a body corporate sole with perpetual succession; and
>
> (b) has a common seal; and
>
> (c) is capable, in its corporate name, of acquiring, holding and disposing of real, leasehold and personal property and of suing and being sued.
>
> (3) All courts, judges and persons acting judicially must take judicial notice of the seal of the Chief Executive (Housing) affixed to a document and must presume that it was duly affixed.

[56] The relationship between the Commonwealth, the Northern Territory of Australia (**the Territory**) and the Chief Executive Officer (Housing) was considered in *Jack v Chief Executive Officer (Housing) (No 2)*.[26] The relevant issue in that matter was whether the Territory should be joined as a defendant to proceedings seeking payment of compensation pursuant to s 122 of the RTA for an alleged breach by the 'landlord' of the habitability obligation imposed by s 48(1) of the RTA. The plaintiff's application to join the Territory was made on the basis that it was either the party which granted him the right of occupancy, or that party's agent, under the terms of the definition of 'landlord' in s 4 of the RTA. The distinction between a body politic and a statutory

26 *Jack v Chief Executive Officer (Housing) (No 2)* [2021] NTSC 81 at [16]-[63].

body created by that body politic with separate legal personality was described in *Jack v Chief Executive Officer (Housing) (No 2)* in the following terms (footnotes omitted):

> I turn then to consider the legal personality of the Territory, and the particular legal personality and function of the CEO in relation to public housing. The Territory is the body politic established under the Crown by the name of the 'Northern Territory of Australia'. Leaving aside purely geographical connotations, the designation 'Northern Territory of Australia' is used variously to mean either the whole body politic or the executive branch. A government Department is not a body with separate juridical personality. A government Department is a unit of administration with responsibility for an area of government of and within the body politic, and has no legal personality of its own. A legislature, including the Legislative Assembly of the Northern Territory, may also incorporate or establish an entity with separate juridical personality to the body politic which has created it. Statutory bodies with separate legal personalities are established to carry out specific functions which may be more effectively performed outside a traditional departmental structure. A statutory body is generally created and used when there is a need: for some operational independence from government; to accommodate funding arrangements separate to the annual appropriations processes; and/or for specific expertise on a governing board.
>
> A legal entity created for that purpose may take the form of a corporation sole or a body corporate. Such bodies, when created by the legislature, are not the 'Territory' or the 'Crown', as they have separate juridical personality. In the ordinary course, they will hold property, enter into contracts and conduct litigation in their own names, even allowing for the fact that they may also be instrumentalities or agents of the Territory depending upon the specific provisions of the legislation, the functions of the statutory body in question and the degree of governmental control to which it is subject. However, that characterisation is only determinative of matters such as whether the body enjoys Crown immunities or whether it is subject to regulatory laws and legislation with specific application to the public sector. It does not deny or deprive the body of its separate legal personality.[27]

27 *Jack v Chief Executive Officer (Housing) (No 2)* [2021] NTSC 81 at [35]-[36].

[57] For the reasons given in that passage, and having regard to the terms of s 6 of the *Housing Act*, there is no doubt that the Territory has established the Chief Executive Officer (Housing) as a corporation sole with quite separate legal personality. As the Court in *Jack v Chief Executive Officer (Housing) (No 2)* went on to describe,[28] the Chief Executive Officer (Housing) is constituted by the Chief Executive Officer of the Agency responsible for the administration of the *Housing Act*.[29] The functions of the Chief Executive Officer (Housing) are to provide and to assist in the provision of residential, office, industrial or other accommodation for Territory or Commonwealth public purposes.[30] The Chief Executive Officer (Housing) is specifically empowered to do such things as acquire, hold and dispose of real or personal property; build on land; maintain, manage and control premises; let premises; sell dwellings; provide financial and other assistance for the acquisition of land or buildings for accommodation; and sell, lease or otherwise dispose of real or personal property that is surplus to its own, the Territory's or the Commonwealth's needs.[31] Most relevantly for present purposes, the Chief Executive Officer (Housing) is empowered to 'act as agent for the Territory or

28 *Jack v Chief Executive Officer (Housing) (No 2)* [2021] NTSC 81 at [38]-[39].

29 *Housing Act*, s 7.

30 *Housing Act*, s 15.

31 *Housing Act*, s 16(2).

Commonwealth in administering a Territory or Commonwealth housing scheme'.[32]

[58] In the exercise of those powers and the performance of those functions the Chief Executive Officer (Housing) is subject to the directions of the Minister,[33] but in the absence of any countervailing direction it exercises those powers and performs those functions autonomously. So much is apparent, by way of example, from the fact that it is the Chief Executive Officer (Housing) which determines the criteria that a person must meet in order to be eligible for a social housing lease.[34] The moneys for the performance of those functions are comprised by such moneys as are appropriated to the Chief Executive Officer (Housing) by the Legislative Assembly; the moneys received by the Chief Executive Officer (Housing) in the performance of its functions and the exercise of its powers; moneys lent to the Chief Executive Officer (Housing) by the Territory, a statutory corporation or financial institution; and advances made by the Treasurer.[35]

[59] The Court in *Jack v Chief Executive Officer (Housing) (No 2)* then went on to describe the practice under which Australian governments have created separate legal entities to conduct their public or social housing functions to better accommodate the conduct of operations of

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32 *Housing Act*, s 16(2)(h).

33 *Housing Act*, s 17.

34 *Housing Act*, s 20A.

35 *Housing Act*, s 21.

that nature.[36] The Court then described the legislative history and the administrative arrangements in the Northern Territory in the following terms:

> In conformance with those usual arrangements, the entity responsible for public or social housing in the Northern Territory prior to self-government was constituted in 1960 as the Housing Commission. That entity continued in existence under the same name following self-government, and following the commencement of the *Housing Act* in 1982. With the passage of the Housing Amendment Bill in 1998, the constitution of the Housing Commission was changed from that of a body corporate to a body corporate sole, and the name of the entity was changed to the 'Chief Executive Officer (Housing)'. It has remained the case throughout that period that public or social housing functions in the Northern Territory have been conducted by an entity with legal personality separate to that of the 'Territory', which is not subject to the requirements and strictures imposed by public sector financial legislation.
>
> Under the current Administrative Arrangements Order, the Minister for Territory Families and Urban Housing is given responsibility for the areas of government constituted by the 'Chief Executive Officer (Housing)' and 'NT Home Ownership'. However, the 'Chief Executive Officer (Housing)' is not nominated as an Agency for the purposes of either the *Financial Management Act 1995* (NT) or the *Public Sector Employment and Management Act 1993* (NT). Accordingly, the CEO is not subject to the requirements and strictures of that legislation, and particularly the financial legislation. Similarly, the NT Home Ownership scheme is also not nominated as an Agency for the purposes of the *Public Sector Employment and Management Act*; although it is nominated as an Agency for the purposes of the *Financial Management Act* and is subject to the strictures of that legislation. While the officer constituting the CEO also holds office as the Chief Executive Officer of the Department of Territory Families, Housing and Communities, the establishment and functions of the CEO under the *Housing Act* stand quite separately to the other activities of that Department and, as can be seen from the establishing legislation extracted above, the CEO is expressly created with separate juridical personality.[37]

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36 *Jack v Chief Executive Officer (Housing) (No 2)* [2021] NTSC 81 at [40]-[42].

37 *Jack v Chief Executive Officer (Housing) (No 2)* [2021] NTSC 81 at [43]-[44].

[60] Titles aside, that remains the case under the current Administrative Arrangements Order and legislative structure. The Minister for Housing, Local Government and Community Development is given responsibility for the areas of government constituted by the 'Chief Executive Officer (Housing)' and 'NT Home Ownership', and the 'Chief Executive Officer (Housing)' is not nominated as an Agency for the purposes of either the *Financial Management Act 1995* (NT) or the *Public Sector Employment and Management Act 1993* (NT).

[61] Against that historical and legislative background, the term 'landlord' is used with particularity in s 41 of the RTA. Unless there is plain reason not to, the term must be given the meaning ascribed to it in s 4 of the RTA. That section provides:

> ***landlord*** means:
>
> (a) the person who grants the right of occupancy under a tenancy agreement; or
>
> (b) a successor in title to the tenanted premises whose title is subject to the tenant's interest,
>
> and includes:
>
> (c) a prospective landlord or a former landlord; and
>
> (d) an agent of the landlord, prospective landlord or former landlord.

[62] The use of the expression 'means' to qualify that definition indicates that it is intended to be exhaustive in scope, rather than simply enlarging the ordinary meaning of the word. That usage also tells against the appellants' submission that the definition is broad and inclusive, rather than exhaustive. It may also be noted in this respect

that the definition of 'landlord' is not qualified by any formulations such as 'unless the contrary intention appears' or 'except where otherwise clearly intended'. Although it may be accepted that even in the absence of express words to that effect such a qualification is implied as a natural feature of the constructional process,[38] the definition in s 4 of the RTA must be read into the substantive enactment in s 41 of the RTA if there is nothing in the text or purpose of the legislation indicating that the definition is expressly or impliedly excluded.

[63] This is not a case in which the statutory definition of 'landlord' is either expressly or implicitly excluded from application to s 41 of the RTA by the text and terms of the legislation. It fits comfortably into the substantive enactment without logical or grammatical infelicity. The appellants suggest that some significance should be attached to the fact that s 41(1) of the RTA adopts the formulation 'a landlord' when dealing with an increase of rent, whereas s 46 of the RTA adopts the formulation 'the landlord' in relation to the reduction of rent. The appellants say this is a textual suggestion that there might be more than one legal entity capable of characterisation as landlord at any given time. A review of the usages throughout the RTA does not suggest any significance to the use of the definite and indefinite articles beyond the fact that the use of the indefinite article is used conventionally to

38 Section 18 of the *Interpretation Act 1978* (NT) also provides that definitions in an Act apply except so far as the context or subject-matter otherwise indicates or requires.

indicate membership of a class, which class is still circumscribed by the statutory definition. To take just one example, the requirement in s 37 of the RTA that 'a landlord' must provide a receipt for a cash payment of rent necessarily undermines the appellant's submission that the phrase 'the landlord' is properly taken to refer to the landlord named on the lease, whereas the phrase 'a landlord' has some different and more expansive meaning.

[64] That leaves the question whether the subject matter, purpose and context of the legislation evince an intention on the part of the legislature that the definition should not apply. The onus of showing a contrary intention is on the appellants. As observed in the frequently cited passage from *Deputy Commissioner of Taxation (NSW) v Mutton*,[39] there is no simple formula for determining whether the legislature has evinced a 'contrary intention'. The circumstances which might lead to such a conclusion include where the definition is plainly inconsistent with the substantive provision, where the context clearly indicates that the definition is not to apply, where the application of the definition would render the substantive provision unworkable and where the application of the statutory definition would lead to confusion. To those circumstances may be added the situation where the application of the definition would result in the operation of the substantive provision in a manner which the legislature clearly did not

39 *Deputy Commissioner of Taxation (NSW) v Mutton* (1988) 12 NSWLR 104 at 108.

intend.[40] None of those circumstances apply in the present case. Moreover, there is nothing in the context to suggest that the defined term is not intended to apply. The proposition that public housing tenants should have the same rights and protections as tenants under commercial arrangements is an appeal to sentiment, rather than the identification of a contextual factor demonstrating contrary intention.

[65] On the uncontested findings of fact made by the trial judge, it was the Chief Executive Officer (Housing) who granted the rights of occupancy to the appellants under the relevant tenancy agreements. Having regard to the legislative and administrative arrangements concerning the establishment and character of the Chief Executive Officer (Housing), neither the responsible Minister nor the Territory may be characterised as the 'landlord' on the basis that either was the legal person who granted the relevant rights of occupancy. That is a very different question to whether the Chief Executive Officer (Housing) might be characterised as the 'alter ego' or emanation of the Crown for the purpose of determining the application or disapplication of a regulatory regime.[41]

[66] It is also not possible to characterise the responsible Minister as the 'landlord' for the purposes of s 41 of the RTA on the basis that the

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40 *Kennedy v Anti-Discrimination Commission of the Northern Territory* (2006) 226 FLR 34 at [29].

41 See, for example, *NT Power Generation Pty Ltd v Power &Water Authority* (2002) 122 FCR 399 at [126]; *Aboriginal Areas Protection Authority v Director of National Parks* [2022] NTSCFC at [124].

responsible Minister was acting as an agent of the Commonwealth pursuant to s 16(2)(h) of the *Housing Act*. That provision allows that the Chief Executive Officer (Housing) may 'act as agent for the Territory or Commonwealth in administering a Territory or Commonwealth housing scheme'. That provision has nothing to say about any agency arrangement between the responsible Minister and the Commonwealth, and no bearing on the separation of legal personality between the Territory and the Chief Executive Officer (Housing).

[67] Similarly, and for the reasons already described, the fact that the responsible Minister might be described as an emanation or officer of the same Crown as the Chief Executive Officer (Housing) in no way sustains a legal conclusion that the responsible Minister was the person who granted the rights of occupancy under the relevant tenancy agreements. The Legislative Assembly has expressly constituted the Chief Executive Officer (Housing) as a separate legal personality with the function of providing residential accommodation for public purposes, and to act as agent for the Territory or the Commonwealth in administering a housing scheme. The Legislative Assembly has made that provision in circumstances where the Territory has executive authority to administer public and social housing schemes on its own account should it determine to do so; but it has not. To find in that statutory and functional context that the responsible Minister is

indistinguishable from the Chief Executive Officer (Housing) for the purposes of administering tenancy arrangements for public or social housing would be to ignore the legislative arrangement, and to proceed on the basis that the legislature does not mean what it says.[42]

[68] The appellants' alternative proposition that the responsible Minister is an emanation or officer of the Commonwealth Crown also provides no basis on which to conclude that the responsible Minister was therefore the 'landlord' for the purpose of s 41 of the RTA. Leaving aside esoteric arguments about the divisibility of the Crown, and whether a Northern Territory Minister might be characterised as an 'officer of the Commonwealth' for the purpose of s 75(v) of the *Constitution*, the *Northern Territory (Self-Government) Act 1978* (Cth) (the *Self-Government Act*) established the Northern Territory of Australia as a separate body politic under the Crown (s 5), the Legislative Assembly (s 13), the office of the Administrator (s 32) and the Executive Council of the Northern Territory comprising the persons for the time being holding Ministerial office (s 33); and conferred duties, powers, functions and authorities upon the Legislative Assembly and these other institutions.[43]

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42 See, for example, *R v Kearney; Ex parte Japanangka* (1984) 158 CLR 395, 405, 411.

43 The status of self-governing territories as separate bodies politic has been confirmed: see, for example, *R v Toohey; ex parte Northern Land Council* (1981) 151 CLR 170; *Jennings Constructions v Burgundy Royale Investments* (1987) 162 CLR 153; *Svikart v Stewart* (1994) 181 CLR 548; *Traut v Rogers* (1984) 70 FLR 17, 19-20; *Northern Territory v Skywest Airlines* (1987) 90 FLR 270; *Attorney-General (NT) v Minister for Aboriginal Affairs* (1989) 25 FCR 345; *Waters v Acting Administrator for the Northern Territory* (1993) 46 FCR 462; *Wake and Gondarra v Northern Territory* (1996) 124 FLR 298.

[69] As part of the establishment of the self-governing body politic, s 6 of the *Self-Government Act* confers on the Legislative Assembly the power 'to make laws for the peace, order and good government of the Territory'. The exercise of legislative power by the Legislative Assembly is not an exercise of the Commonwealth Parliament's legislative power.[44] Section 35 of the *Self-Government Act* confers executive authority on the Ministers of the Territory with reference to specific heads of executive authority prescribed in reg 4 of the *Northern Territory (Self-Government) Regulations 1978* (Cth). Those heads of executive authority include 'Housing'. Under those constitutional arrangements, the exercise of those heads of executive authority by Ministers of the Territory is not an exercise of Commonwealth executive authority.

[70] Even if it were to be accepted for the sake of argument that the responsible Minister was an emanation of the Commonwealth Crown, that would not sustain any conclusion that the Commonwealth was the legal person which granted the rights of occupancy under the relevant tenancy agreement, or any conclusion that the Chief Executive Officer (Housing) does not have a legal personality distinct and separate from that of both the Territory and the Commonwealth. As the respondents submit, that proposition proceeds from the logical fallacy that 'the

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44 *Svikart v Stewart* (1994) 181 CLR 548, 562, 574; *Capital Duplicators v Australian Capital Territory* (1992) 177 CLR 248, 265-266, 282, 284; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322, 352-353; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, [171], [179].

Crown' is a form of juridical entity so that all entities which are associated with it may be treated as a single person or that each emanation may be treated identically. Neither is the executive government of the Northern Territory a single juristic entity. It is a politically organised group of entities comprising the body politic of the Territory (as a legal person), its unincorporated agencies and instrumentalities, and its agencies and instrumentalities which have their own legal personalities (such as the Chief Executive Officer (Housing)). It is wrong to treat those distinct entities as the same legal person merely because they may each be classified for some purposes as emanations of the Crown.

Whether responsible Minister *de facto* 'landlord'

[71] Finally under this ground of appeal, the appellants assert that the responsible Minister was the *de facto* 'landlord' for the purposes of s 41 of the RTA. The basis for that assertion would appear to be that in increasing the rent to be paid to the Chief Executive Officer (Housing) by determination under s 23 of the *Housing Act*, the responsible Minister was necessarily acting as 'landlord' in the relevant sense. Alternatively, the appellants say that s 41 of the RTA is concerned with the source of the obligation to pay, not the source of the amount to be paid. Accordingly, the Chief Executive Officer (Housing) is properly taken to have increased the rent payable under the tenancy agreement within the meaning of s 41 of the RTA by requesting and collecting

increased rent, notwithstanding that the increase was consequent upon a determination made under s 23 of the *Housing Act*.

[72] That alternative proposition may be dealt with in short order. A landlord does not increase the rent payable under a tenancy agreement by collecting rent in a particular amount. Moreover, s 23(4) of the *Housing Act* makes it plain in its terms that s 23 is the source of both '[t]he rent to be paid for a dwelling' and the obligation to pay 'despite anything to the contrary contained in [a] tenancy agreement'.

[73] So far as the appellants' primary proposition is concerned, the meaning of 'landlord' is a matter of statutory construction. As already described, the term 'landlord' is given a specific and technical meaning for the purposes of the RTA. The question of who is properly characterised as the 'landlord' for the purpose of the RTA is a question of law. The question whether the facts as found satisfy a relevant definition contained in a statutory enactment properly construed is also a question of law. The appellants' proposition that the responsible Minister was the *de facto* 'landlord' for the purposes of s 41 of the RTA does not engage with the statutory definition and the process of construction involved in determining whether the responsible Minister fell within the definition of 'landlord' in the RTA.

[74] The appellants say that this *de facto* characterisation also follows from the provisions of ss 16(2)(h), 17, 21 and 22 of the *Housing Act.* As already described, s 16(2)(h) of the *Housing Act* allows that the Chief

Executive Officer (Housing) may 'act as agent for the Territory or Commonwealth in administering a Territory or Commonwealth housing scheme'. There is nothing in the factual findings to sustain the further finding that the Chief Executive Officer (Housing) was acting as the 'agent' of the Territory in the administration of the relevant tenancy arrangements. The term 'agent' is imprecise and protean in scope, and the meaning to be ascribed to the term as it appears in a statute will depend upon the language, context and purpose of the statute. As used in s 16(2)(h) of the *Housing Act,* the term means that the Chief Executive Officer (Housing) may act on behalf of the Territory or Commonwealth for the purpose of administering a housing scheme, including in the technical legal sense of having authority to create legal relations between the Territory or Commonwealth and a tenant under such a scheme. However, even if it is accepted that the Chief Executive Officer (Housing) was acting as an agent of either the Territory or the Commonwealth in the provision of social housing in the townships of Gunbalanya and Laramba in the general sense contemplated by s 16(2)(h) of the *Housing Act,* that in no way sustains a conclusion of either fact or law, or mixed fact and law, that it was the responsible Minister, or even the Territory, which granted the rights of occupancy under the relevant tenancy agreements.

[75] Section 17 of the *Housing Act* provides that the Chief Executive Officer (Housing) is subject to the directions of the responsible

Minister. There is no evidence to sustain the conclusion that the Minister provided any direction to the Chief Executive Officer (Housing) in relation to the administration of the scheme generally, or in relation to the relevant tenancy arrangements specifically. In any event, while it is no doubt the case that directions may be given in relation to broad strategic and financial matters, the deployment of the power of direction by the responsible Minister would not as a matter of legal characterisation supplant the Chief Executive Officer (Housing) as the legal entity which granted the rights of occupancy under the relevant tenancy agreements. For reasons which have already been described, the fact that a power of Ministerial direction is an indicium which may assist in the determination of whether a particular body might be characterised as the 'alter ego' or emanation of the Crown for the purpose of determining the application or disapplication of a regulatory regime, whether a corporation conducts its operations by legal personality distinct from the Crown is a quite different issue.

[76] That result is not altered by the fact that the moneys of the Chief Executive Officer (Housing) may be derived by appropriation or loan from the Territory in accordance with s 21 of the *Housing Act*, and that under s 22 of the *Housing Act* the Chief Executive Officer (Housing) may only administer prescribed housing schemes or those approved by the responsible Minister.

[77] The appellants say the facts that s 16 of the *Housing Act* shows the Chief Executive Officer (Housing) to be a creature of statute, that s 17 makes the Chief Executive Officer (Housing) subject to ministerial direction, that s 21 establishes a financial relationship with the Crown, and that s 22 demonstrates further subjection to Ministerial control, demonstrate the 'unitary' nature of these emanations of the Crown notwithstanding their different legal personalities. Whatever the rhetorical force of that submission might be, it does not alter the separate juridical personality of the Chief Executive Officer (Housing) and the definition of 'landlord' in the RTA.

[78] To the extent that the appellants' assertion in this respect extends to the proposition that the responsible Minister was the 'landlord' for the purpose of s 41 of the RTA as 'an agent of the landlord' within placitum (d) of the definition in the RTA, that proposition must be rejected for the reasons given in *Jack v Chief Executive Officer (Housing) (No 2)*.[45] The term 'agent' as it appears in the definition of 'landlord' denotes a person or other entity having the landlord's authority in relevant respects concerning the control and management of the tenancy. An 'agent' is one within whose authority and power it is to discharge the landlord's statutory obligations and exercise the landlord's statutory rights under the RTA and the relevant tenancy agreement. On that construction, neither the Territory nor the

45 *Jack v Chief Executive Officer (Housing) (No 2)* [2021] NTSC 81 at [49]-[59].

responsible Minister is capable of characterisation as the Chief Executive Officer (Housing)'s agent for the purposes of the management of these premises specifically, or the provision of public or social housing generally.

[79] For these reasons, this ground of appeal must fail.

The application of uncodified policy

[80] The appellants' second ground of appeal is that the trial judge erred in concluding that an uncodified policy could lawfully increase the rent payable by the appellants despite s 41 of the RTA and/or s 23 of the *Housing Act*. This is a reference to the trial judge's findings in the following terms:

> The SAG considered a number of different methodologies for determining base rent for remote dwellings. A record of the meeting of the SAG on 9 November 2018 reveals that all members of the SAG agreed that the operational cost per bedroom model was the best model. This model was approved by Cabinet in December 2021. The model approved by Cabinet provided for base rent for a remote public housing dwelling to be determined based on the number of the bedrooms the dwelling contains and to be set accordingly by the Minister pursuant to s 23 of the *Housing Act*. The model approved by Cabinet contained a safety net by way of a policy allowing the CEOH to only charge a portion of the full rent payable by a tenant on a temporary basis, if the tenant would encounter rental stress due to being required to pay the full rent payable pursuant to the Determination. The government policy is for the CEOH to require such tenants to pay an amount equivalent to 25% of the total household income of the relevant dwelling, initially for up to 6 months.
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> …
>
> The second way in which the interests of the lessee in public housing are protected is by the adoption by the government of a policy of granting exceptions to the base rent as determined by the Minister in cases where requiring the lessee to pay the determined

> rent would lead to rent stress. This is referred to as a rental rebate. The content of that policy and how it is administered are also matters upon which the government is answerable to the legislature and to the people of the Northern Territory.[46]

[81] This second ground of appeal is brought in relation to the second declaration sought in the original application for judicial review in terms that:

> [A]ny rent increase by way of an increase in the percentage of the plaintiff's income is unlawful having regard to section 41 of the RTA.

[82] The appellants' submission is that the 'safety net' policy was contrary to both s 41 of the RTA and s 23 of the *Housing Act*, and quite distinct from the Determinations in terms of their time of promulgation, manner of administration and legal source. In particular, the Determinations calculated rent by reference to the number of rooms of the dwelling, were promulgated by the responsible Minister and published in the *Gazette*. In contrast, the policy was calculated by reference to household income, subject to amendment by the unilateral act of a single public servant and published on a website.

[83] The appellants say that the application of the 'safety net' policy purported to increase the rent to be paid by tenants from either 18 percent of the pension entitlement or 23 percent of household income to 25 percent of the same income by which rents were previously calculated. The appellants say that in the case of the third appellant, by

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46 *Badari & Ors v Minister for Territory Families and Urban Housing & Anor* [2022] NTSC 83 at [17], [25].

way of example: (a) at the time of the hearing before the trial judge the relevant tenancy agreement contained no provision for a rental amount; (b) the third appellant's total household income was constituted by a $443 disability support pension; (c) in the application of the safety net policy the third appellant's rent under the Determinations ought to have been $79.74 per week, being 18% of his household income, but he was in fact being charged a rental amount of $99 per week; (d) by the application of the safety net policy the third appellant's rent was to be increased with effect from 6 February 2023 to 25 percent of the same household income, being $109.75 per week; (e) on 20 December 2022 the relevant government functionary wrote to the third appellant advising that for a period of six months his rent would be 25 percent of total household income, resolving to $114 per week; and (f) at the conclusion of that six-month period, the third appellant's rent would be fixed at $140 per week under the terms of the applicable Determination.

[84] The appellants say that series of circumstances and directives operated to increase rent in a way which did not comply with s 41(1) of RTA given that none of the relevant tenancy agreements provided for increases in rent or specified a mechanism by which departmental policy might lead to increases in rent. At the same time, the application of the policy set rents at a rate inconsistent with the Determinations

under s 23(1) of the *Housing Act* (assuming their validity and applicability) and contrary to the dictate in s 23(4) of the *Housing Act*.

[85] At the material time, and now, reg 4 of the *Housing Regulations 1983* (NT) relevantly provided that the Chief Executive Officer (Housing) may let a dwelling to an eligible person, and that a letting 'must be … subject to regulation 5, at the rent of the dwelling determined under section 23 of the [Housing] Act for that dwelling'. Regulation 5 provided that '[t]he 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'.

[86] The appellants say that provision provided no support for the purported application of the safety net policy. First, they say that reg 5 is inconsistent with the stipulation in s 23(4) of the *Housing Act*, and therefore invalid, to the extent that it purports to authorise rent other than as determined by the Minister. Second, only a person who meets the definition of 'eligible person' qualifies for a rebate under reg 5. At the material times that term was defined in reg 3 to mean a person who in the opinion of the Chief Executive Officer (Housing) was 'of limited means; and not adequately housed'. The appellants submit there is no evidence the Chief Executive Officer (Housing) ever held that opinion of any of the tenants. Third, the safety net policy was not a Ministerial direction under s 17 of the *Housing Act*, was not otherwise binding on

the Chief Executive Officer (Housing) in whom the rebate power is vested and could not constitute the exercise of the rebate power.

[87] On the appellants' characterisation, the purported application of a 'rebate' under the safety net policy is, at law, a rent reduction under s 46 of the RTA. Unlike s 41, that provision requires no specific term in a tenancy agreement, and the landlord can reduce rent at any time by any means with the tenant's agreement, temporarily or otherwise. Once reduced, it may only be increased in compliance with the limitations imposed by s 41(1) of the RTA. On this argument, it would follow that the rent payable by each of the appellants was the rent last agreed by them prior to any attempt to increase it contrary to s 41(1) of the RTA.

[88] As the respondents submit, the trial judge did not conclude that the safety net policy could increase the rent payable by law by the appellants. The trial judge's only relevant finding or order in this respect was that the plaintiff's application for relief, including in terms of the second declaration sought, was dismissed. That claim for relief in terms of the second declaration was premised on the basis that the move from the rebates applied to remote public housing under the previous framework to the rebates applied under the safety net effected an increase in rent.

[89] What the evidence disclosed in that respect, and what the trial judge found so far as was necessary for the purpose of the judicial review

application, was that prior to December 2021 rent was calculated for remote public housing properties so that it would not exceed a maximum limit fixed by reference to the number of bedrooms.[47] As part of that previous framework, tenants could apply for a rebate under reg 5 of the *Housing Regulations* so that they paid either the maximum limit or a specified percentage of their household income (ordinarily 23 percent), whichever was less. That framework was adopted in May 2010 as a policy of the Chief Executive Officer (Housing), rather than pursuant to a determination under s 23 of the *Housing Act*, but neither that distinction nor the trial judge's labelling of the maximum limit as 'base rent' is determinative of any of the issues on appeal.

[90] In March 2018, the Northern Territory Cabinet requested a review of the remote public housing rent framework with a view to establishing a simplified and consistent scheme in which any uncertainty in relation to rental obligations was ultimately addressed by making the Determinations under s 23(1) of the *Housing Act*.[48] In response to Cabinet's request for a review, the relevant agency convened the SAG constituted by representatives from 13 peak bodies in Northern Territory Aboriginal land, housing, justice and medical services which are listed in the trial judge's reasons for decision.[49] The model adopted

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47 Appeal Book (**AB**) 264-265; *Badari & Ors v Minister for Territory Families and Urban Housing & Anor* [2022] NTSC 83 at [15].

48 AB 420.

49 *Badari & Ors v Minister for Territory Families and Urban Housing & Anor* [2022] NTSC 83 at [16].

by SAG was a dwelling-based, operational cost recovery model in which rent was based on the number of bedrooms in a dwelling and set at a level intended to defray the cost of providing remote public housing. That model was subsequently endorsed by Cabinet and the Determinations were made.[50]

[91] Under the Determinations, between 2 May 2022 and 5 February 2023 the rent payable was the same as the maximum limit under the previous framework. From 6 February 2023 rent was calculated at a fixed rate of $70 per room. In addition to the Determinations, the Cabinet approved a policy by which a tenant in financial stress – the benchmark for that being when rent exceeded 25 percent of household income – could apply to the Chief Executive Officer (Housing) for rent relief. Under the policy, the Chief Executive Officer (Housing) could apply a safety net to reduce the rent payable to 25 percent of household income. In the application of that policy, the Chief Executive Officer (Housing) identified tenants in financial stress and applied the safety net to them.[51]

[92] Against that background, it is instructive to consider by way of example the assertions made by the appellants in relation to the application of the safety net policy to the third appellant's rent. It is asserted that the third appellant's rent was increased by the application

50 Appeal Book (**AB**) to 67-270, 422-432, 449-453, 735-739; *Badari & Ors v Minister for Territory Families and Urban Housing & Anor* [2022] NTSC 83 at [16]-[17].

51 AB 272.

of the safety net policy with effect from 6 February 2023 to 25 percent of household income. On the assumption that the Determinations were valid, the position obtaining prior to 6 February 2023 was that the third appellant's rent was fixed by determination at $175 per week. The application of the safety net policy in fact reduced that amount by reference to total household income. Similarly, the position obtaining from 6 February 2023 was that the third appellant's rent was fixed by determination at $140 per week. The application of the safety net policy also reduced that amount by reference to total household income. At the conclusion of the six-month period from 6 February 2023 for which the policy was expressed to apply, the third appellant's rent would be fixed at $140 per week under the terms of the applicable Determination. That did not constitute the increase of rent by the operation of the safety net policy. It simply meant that the safety net policy would no longer be applied to provide relief from the full measure of rent payable under the applicable Determination.

[93] If, as we have already found, the Minister was not precluded by the operation of s 41(1) of the RTA from effecting an increase in rent by way of the Determinations, on proper characterisation it was the Determinations which operated to increase the rent payable under the relevant tenancy agreements beyond the levels payable under the previous framework. The effect of the application of the safety net policy was only to reduce the rent otherwise payable under the

Determinations. That is so regardless of whether the safety net policy is characterised as an uncodified policy or a rebate under reg 5 of the *Housing Regulations*, and regardless of whether the policy or rebate so characterised is invalid for inconsistency with s 23(4) of the Housing Act or the strictures on the application of reg 5 of the *Housing Regulations*. The safety net policy operated only with respect to the Determinations, and without that application the rents payable by the appellant would be as set out in the Determinations.

[94] It may be noted in that respect that the relevant relief sought in the appellants' application for judicial review was a declaration that any rent increased by way of an increase in the percentage of the appellants' income was unlawful. There has been no such increase by way of the application of the safety net, and there was no application for a declaration that the application of the safety net was unlawful on some other ground.

[95] For these reasons, this ground of appeal must fail.

Denial of procedural fairness

[96] The appellants' third ground of appeal is that the trial judge erred by failing to conclude that those parts of the Determinations which gave rise to rent increases, and/or applied to classes of two, three and/or four-bedroom dwellings, were infected by jurisdictional error on the basis of a denial of procedural fairness to those persons whose rights or

interests were affected, including the appellants. After conducting an extensive review of the authorities, the trial judge made the following finding in that respect.

> … In making the Determinations under s 23, the defendant was required to balance the interests of both tenants, and prospective tenants, against the interests of the general public in the expenditure of public funds. Minds may legitimately differ on where the balance should be set, but the fact that the legislature has made the Minister the repository of the power to make a determination is indicative that the legislature understands that the exercise of the power is in the nature of a policy or political decision. The evidence establishes that in setting a base rent the defendant has adopted a model based on the operational cost of maintaining the dwelling, but with the understanding that it is almost inevitable that some public monies will need to be expended even if base rent is paid. This methodology for ascertaining base rent is overlaid by a policy of rental rebates intended to assist individual tenants avoid rent stress. It may be expected that many tenants of remote dwellings will, from time to time, be entitled to a rebate. This will lead to the need to expend further public funds.
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> The nature of the power being exercised (being a power of a policy or political nature), the number of people as a class potentially affected by the exercise of the power and the fact that the exercise of the power does not affect the plaintiffs other than as members of an affected class convince me that the legislature did not intend that the exercise by the defendant of the power to make the present Determinations under s 23 of the Housing Act with regard to a class of dwellings was conditioned on the Minister affording the plaintiffs a right to be heard before any Determination was made.
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> The fact that a Determination under s 23 may be made regarding an individual dwelling, as opposed to a class of dwellings, does not alter this position. The same considerations which influence me to find that the defendant was not required to provide the plaintiffs with a hearing before making the present Determinations will very probably not arise with regard to an exercise of the power granted by s 23 to make a Determination concerning a single dwelling, and procedural fairness may imply different obligations on the defendant in such a case [*Medway v Minister*

for Planning (1993) 30 NSWLR 646]. It is, however, unnecessary to determine that issue in the present proceeding.[52]

[97] The appellants submit that the operative questions under this ground of appeal are whether the power conferred by s 23 of the *Housing Act* is conditioned by an obligation to afford procedural fairness, and, if so, what the content of that obligation was. They say those questions are answered by the unassailable propositions that s 23 of the *Housing Act* is qualified by an obligation to afford at least a degree of procedural fairness to tenants of dwellings and that none at all was given in respect of any of the Determinations the subject of this appeal.

[98] In putting the first proposition, the appellants say there is an unusually strong interpretative presumption that when a legislature confers powers that affect the rights and interests of persons, it does so on the condition that the repository of the power must afford those persons procedural fairness unless the requirement to afford procedural fairness is 'extremely, unambiguously or unmistakeably' removed by Parliament.[53] The appellants say that the trial judge fell into error by allowing the facts and circumstances of the power's application in this particular case, which were relevant only to the content of any obligation, to obscure the threshold question of whether the legislature

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52 *Badari & Ors v Minister for Territory Families and Urban Housing & Anor* [2022] NTSC 83 at [46]-[48].

53 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at [74]; *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at [75]; *State of South Australia v Slipper* (2004) 136 FCR 259 at [93]; *Nathanson v Minister for Home Affairs* (2022) 96 ALJR 737 at [51], [81], [88]; *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at [16].

intended the power to be conditioned by an obligation of procedural fairness. That is said to be illustrated by the trial judge's reasoning that the exercise of power concerning a class of dwellings tended against any requirement of procedural fairness, despite the fact that the power is capable in its terms of exercise in relation to a single tenant and dwelling. Similarly, the trial judge is said to have reasoned that the manner in which the power had previously been exercised in accordance with government policy and political considerations illustrated that it was not amenable to any constraints of procedural fairness.

[99] The appellants say that the statutory text and context clearly do not exclude the entitlement of those potentially affected by the exercise of power under s 23 of the *Housing Act* to be heard before its exercise. That is so notwithstanding that the power is exercisable by a Minister, that the power may be exercised in respect of a class of dwellings (and therefore tenants as a class of persons), and that the exercise of the power involves the consideration of matters outside those which an individual affected by the power could be expected to know.

[100] So far as the first of those matters was concerned, the appellants say that Ministerial powers are regularly, if not routinely, subject to obligations of procedural fairness. To the extent it might be said that imposing an obligation to provide procedural fairness on a Ministerial officer would have oppressive effect, the process of providing

procedural fairness could have been delegated to another functionary. By way of illustration, the appellants submit that the responsible Minister could have delegated the conduct of that process in respect of each potentially affected community to each Housing Reference Group, which are standing bodies made up of remote tenants in each community and designed specifically for such kinds of consultation. The appellants note in that respect that the Housing Reference Groups met on 182 occasions during the course of 2020 and 2021, which was the time leading up to the making of the First Determination.[54]

[101] So far as the second of those matters is concerned, the appellants say that it is not relevantly significant that the power was exercisable in respect of a class of dwellings. Both the classes to be affected and their members were identifiable prospectively by reference to resources such as tenancy agreements and rental payment arrangements already in the possession of the Chief Executive Officer (Housing). Affording an adequate degree of procedural fairness to each class was not impracticable. Even putting that to one side, the legislature also intended that the power could be exercised in respect of a single dwelling, which would not give rise to the same theoretical inconvenience in affording procedural fairness. Accordingly, the implication that procedural fairness was impliedly excluded is not open.

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54 AB 793; AB 857.

[102] So far as the third of those matters is concerned, the appellants say that even if it is accepted that the reasons or considerations underlying an otherwise valid exercise of the power may be of such a nature that there would be nothing on which a person affected could realistically have anything to say, that may not always be the case.[55]

[103] The respondents' position at the hearing of the appeal was to accept that the exercise of the power conferred by s 23 of the *Housing Act* was subject to the requirement to afford procedural fairness 'in a general sense'. The respondents say that the focus of the specific inquiry must be whether the individual appellants were entitled to a hearing in relation to the exercise of the responsible Minister's power, and that no complaint can be levelled by the individual appellants on the basis that procedural fairness was owed and not accorded to other persons who may have been members of remote social housing tenants as a class.[56] The respondents' analysis in that respect commences with the decision of the High Court in *Bread Manufacturers of New South Wales v Evans*,[57] which determined that the exercise of a power to fix the price of bread was not conditioned on giving affected sellers advance notice of any proposed change and an opportunity to be heard. Chief Justice Gibbs stated (footnotes omitted):

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55 See, for example, *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at [25]; *Nathanson v Minister for Home Affairs* (2022) 96 ALJR 737 at [51].

56 *Comcare v Post Logistics Australasia Pty Ltd* (2012) 207 FCR 178 at [99].

57 *Bread Manufacturers of New South Wales v Evans* (1981) 180 CLR 404.

In *Twist v. Randwick Municipal Council*, Barwick CJ said:

> "The common law rule that a statutory authority having power to affect the rights of a person is bound to hear him before exercising the power is both fundamental and universal ... But the legislature may displace the rule and provide for the exercise of such a power without any opportunity being afforded the affected person to oppose its exercise. However, if that is the legislative intention it must be made unambiguously clear."

> As a general statement this is correct. There is no doubt that, in the absence of a clearly expressed legislative intention, no one can be dismissed from office, penalized, or deprived of or prejudiced in relation to his property without being afforded an adequate opportunity to be heard. It may be said that an order fixing the maximum price at which goods may be sold affects the existing right of the seller to sell them at whatever price he chooses. Such an assertion seems rather artificial when the price of the goods is already fixed, and the order that is challenged increases the maximum price. But the question whether a seller who will be affected by an order under s. 20 of the Act must be given an opportunity to put his case against the making of the order before it is made should not be answered in the negative only for the reason that an order increasing the price does not adversely affect his rights. It is necessary to examine the nature of the power in question in deciding whether the observance of the principle audi alteram partem is a condition of its exercise.[58]

[104] In the respondents' submission, a finding that the exercise of a statutory power may attract an obligation to afford procedural fairness in the nature of a right to be heard in some circumstances does not lead to the conclusion that the obligation to afford procedural fairness attends every exercise of the power. That is said to be consistent with the distinction drawn by Mason J (as his Honour then was) in *Kioa v West* between the exercise of a power to make a decision which directly affects a person individually and that which simply affects an individual as member of the public or of a class of the public. In the

58 *Bread Manufacturers of New South Wales v Evans* (1981) 180 CLR 404 at 414-415.

latter case, the decision is of a 'policy' or 'political' character to which a duty to afford a hearing before exercising the power does not apply.[59] The statement by Gibbs CJ in *Bread Manufacturers* concerning the conditional application of the *audi alteram partem* principle is also said to be consistent with the conclusion drawn by Mason J in *Kioa v West* to the effect that a power may be exercised for different purposes or reasons and requiring a hearing for some of those purposes or reasons but not others. The duty to provide a hearing does not necessarily attach to every decision made in exercise of the power.[60]

[105] The fact that a decision may be characterised as of a 'policy' or 'political' nature, although not necessarily determinative, is also relevant to the assessment of whether a person affected by a decision must be afforded natural justice. While it is true, as the appellants submit, that Gleeson CJ observed in *Jarratt v Commissioner of Police (NSW)*[61] that the very breadth of the statutory power under consideration in that case was 'an argument for, rather than against, a conclusion that it was intended to be exercised fairly', that observation needs to be qualified by reference to the nature of the power in question. In that case, the power was one which permitted the Governor to remove a police officer from office. Although open-textured and unconstrained by express limitation, it was a power of very narrow

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59 *Kioa v West* (1985) 159 CLR 550 at 584.

60 *Kioa v West* (1985) 159 CLR 550 at 586.

61 *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at [25].

compass which could only be exercised in relation to an individual and only with adverse effect. Leaving aside that particular type of power, it has been long recognised that the fact that a power is conferred quite unconditionally is a circumstance that suggests, although not conclusively, that the principles of natural justice are not intended to apply.

[106] In *South Australia v O'Shea*,[62] which was decided two years after *Kioa v West*, the High Court considered the operation of a legislative scheme which empowered a judge to declare a person convicted of sexual offences against young children to be incapable of exercising proper control over his sexual instincts, and to order that person's indefinite detention. Under that scheme, the Parole Board could recommend to the Governor in Council the release of a declared person if two medical practitioners had examined him or her and were of the opinion that he or she was fit to be released. In the case in question, the Parole Board had recommended release, the Governor in Council declined to act on that recommendation and the declared person sought review of the decision on the ground that he had been denied procedural fairness. The majority determined that the declared person was not entitled to any further hearing before the Governor in Council exercised the relevant discretion. Justice Brennan (as his Honour then was) stated in that respect:

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62 *South Australia v O'Shea* (1987) 163 CLR 378.

> The public interest in this context is a matter of political responsibility (see Lord Greene MR in *Johnson & Co v Minister of Health* ([1947] 2 All ER 395 at 399) and the Minister is not bound to hear an individual before formulating or applying a general policy for 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.[63]

[107] While that case accords a special position to determinations of general policy, the finding that the Minister was not obliged to afford procedural fairness to the declared person when considering the recommendation of the Parole Board was made in circumstances giving rise to a number of qualifications. First, the declared person had been provided with a hearing before the recommending body such that the decision-making process, when viewed in its entirety, had provided a sufficient opportunity for the declared person to present his case. Second, had the Governor in Council intended to take into account new matters adverse to the declared person which did not appear in the report of the recommending body, and which the declared person had previously had no opportunity of dealing with, there would be an entitlement to be heard on those new matters.

[108] The distinction drawn by Mason J in *Kioa v West* between acts which directly affect a person individually and acts which affect a person simply as a member of a class of the public was drawn from the

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63 *South Australia v O'Shea* (1987) 163 CLR 378 at 411.

reasons of Jacobs J in *Salemi v MacKellar*.[64] Justice Brennan (as his Honour then was) drew a similar distinction in saying:

> But the legislature is more likely to intend the exercise of a statutory power of an executive, administrative or quasi-judicial nature to be so conditioned if an exercise of the powers singles out individuals by affecting their interest in a manner substantially different from the matter in which the interests of the public at large are affected.[65]

[109] Chief Justice Gibbs had also adverted to that same distinction, from the same source, in *Bread Manufacturers,* which distinction was subsequently picked up by the Full Court of the Federal Court in *Comptroller-General of Customs v Kawasaki Motors Pty Ltd (No 1)* in the following passage:

> In determining whether the rules of natural justice apply, high authority warns that the classification of the power as executive or legislative "seems only to introduce a distracting complication into the process of its decision": see *Bread Manufacturers of New South Wales v Evans* (1981) 56 ALJR 89 at 94, per Gibbs CJ. In similar vein, Mason and Wilson JJ commented (at 101) that "the question of the application of the rules of natural justice is not to be determined merely by affixing a label to describe the character of the task which is under consideration".
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> But there are nevertheless features characteristic of the legislative process which, if present where a statutory power is under consideration, may point towards a conclusion that Parliament did not intend exercise of the power to be conditioned on the exercise of the rules of natural justice. Speaking of the authority whose orders were under consideration in *Bread Manufacturers* (supra), Gibbs CJ said (at 94):
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> > "Its function, at least in the present case, was to make a general decision of a discretionary character which affected all consumers and sellers of bread. In *Salemi v MacKellar (No 2)* (1977) 137 CLR 396 at 452 Jacobs J drew a distinction between an act which directly affects a person individually

64 *Salemi v MacKellar (No 2)* (1977) 137 CLR 396 at 452.

65 *Kioa v West* (1985) 159 CLR 550 at 620.

> and one which affects him simply as a member of the public or a class of the public, and an executive or administrative decision of the latter kind is truly a "policy" or "political" decision and is not subject to judicial review. Although it is unsafe to generalise, I respectfully agree with the significance of the distinction."[66]

[110] A similar distinction was subsequently drawn by the New South Wales Court of Appeal in *Medway v Minister for Planning*.[67] That case involved the power of the Minister for Planning to direct the relevant development consent authority to refer a particular development application, or development applications of a particular class or description, to the Minister for determination. The appellants argued that a direction which had the potential to affect their environmental interests could not be given unless they were informed of the case to be made against them and given an opportunity of replying to it. Justice of Appeal Mahoney (with whom Sheller and Cripps JJA concurred), stated:

> There is a further matter of relevance in this regard. The direction given was in respect of development applications of a "class". That class included future applications and would extend to applications of or by different people. Where the persons relevantly affected by the exercise of the statutory power are numerous or difficult to identify, or identify in advance, it may more readily be inferred that it was not the legislative intention that, before the exercise of the power, the case sought to be made be formulated and notified.
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> …
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> I am conscious that s 101(1) may be used in the case of "a particular development application" as well as to a class or

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66 *Comptroller-General of Customs v Kawasaki Motors Pty Ltd (No 1)* (1991) 32 FCR 219 at 239.

67 *Medway v Minister for Planning* (1993) 30 NSWLR 646.

> description of applications. It may be that, in the case of a single application affecting only one person or several identifiable persons, different considerations may arise. What procedural fairness requires in the instant case is affected by the circumstances of that case. But here, those who, within the *Environmental Planning and Assessment Act*, could object were a wider and more amorphous class. And, I think, the evidence shows that others also saw themselves as having an entitlement ("a legitimate expectation") to be consulted.
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> Taking all of these matters into consideration, I am of the opinion that it was the legislative intention that it was not necessary for the Minister, before giving a direction, to formulate "the case sought to be made against" those whose environmental interests were apt to be affected by what he did and to give them an opportunity of making representations before the direction was given.
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> …
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> I do not mean by what I have said that no implications are to be drawn as to procedural fairness in relation to the exercise of the power under s 101(1). The principle illustrated in *Kioa v West* and the cases to which I have referred is a general principle and a beneficial one. But what it will require to be done in a particular case will depend upon the circumstances and context of that case. It is, in my respectful opinion, wrong to treat the content of its requirements as fixed and inflexible.[68]

[111] That determination obviously contemplated that the exercise of a statutory power in some circumstances may attract a requirement to afford natural justice and in other circumstances may not. The question whether the circumstances require natural justice to be afforded is informed by considerations such as whether the persons relevantly affected by the exercise of the statutory power are numerous or difficult to identify.

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68 *Medway v Minister for Planning* (1993) 30 NSWLR 646 at 652-653.

[112] The appellants say that the respondents' reliance on these authorities fails to take into account more recent developments concerning the obligation of procedural fairness and the powers to which that requirement attaches. The appellants say that the recent decision of the Queensland Court of Appeal in *Brisbane City Council v Leahy*[69] reflects and applies the contemporary understanding of the obligation of procedural fairness, and deals with what was said in *Medway* accordingly. The power under consideration by the Queensland Court of Appeal was one which permitted the appellant Council to approve the construction of a sign with an electronic display area of 48 square metres which could be elevated as much as 12 metres above ground level. There was a requirement under the Council's regulations that an advertising sign of that type should not block or compromise a view or vista of high scenic amenity, and should not obscure, dominate or overcrowd the views on neighbouring properties. The first respondent was the owner of residential premises contiguous to the land on which the sign was erected. He was not provided with any notice in relation to the construction proposal or the Council's intended consideration of that proposal. He made application for a review of the Council's decision on the ground that it had failed to afford him procedural fairness, and the primary judge found that to be so.

69 *Brisbane City Council v Leahy* [2023] QCA 133.

[113] Against that background, the Court of Appeal observed that the principles of natural justice may only be excluded by plain words or necessary intendment, by reference to the following statement by the plurality in *Saeed*:

> The presumption that it is highly improbable that Parliament would overthrow fundamental principles or depart from the general system of law, without expressing its intention with irresistible clearness, derives from the principle of legality which, as Gleeson CJ observed in *Electrolux Home Products Pty Ltd v Australian Workers' Union*, 'governs the relations between Parliament, the executive and the courts'.[70]

[114] The Court of Appeal then stated (footnotes omitted):

> Where the decision in question is one for which provision is made by statute, the application and content of the doctrine of natural justice or obligation of procedural fairness depends to a large extent on the construction of the statute. Neither the Local Law nor the Subordinate Local Law expressly excludes the principles of natural justice. Those principles therefore may only be excluded by necessary intendment, noting that the intention must be expressed "with irresistible clearness". On a proper construction of both the Local Law and the Subordinate Local Law, the fact that a decision to approve the exhibition of a sign may affect the interests of various classes of persons in different ways does not, of itself, evince an intention to exclude the principles of natural justice.
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> The authors of Judicial Review of Administrative Action and Government Liability (7th ed, LawBook Co, 2022), by reference to *Minister for Local Government v South Sydney City Council* ("South Sydney City Council") and *Vanmeld Pty Ltd v Fairfield* City Council ("Vanmeld"), state at [8.110]:
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> > "If the affected people cannot be identified, fairness may not apply. But where it is difficult rather than impossible to identify those people, fairness may apply with diminished content." [71]

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70 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [15].

71 *Brisbane City Council v Leahy* [2023] QCA 133 at [33]-[34].

[115] The Court of Appeal considered that in the absence of a clear intention to exclude the principles of natural justice, the question then becomes what the duty to act fairly requires in the particular circumstances of the particular case, and any examination of the statutory provisions and the affected interests is directed to that question. That was said to be consistent with the observation made by Spigelman CJ in *Vanmeld Pty Ltd v Fairfield City Council* [72] that where a power is capable of application to both large classes and to individuals the inquiry will not be whether an obligation to afford procedural fairness exists at all, but what the content of that obligation is in the specific context. In that analysis, the fact that the identity of all those people who form part of a class affected by the exercise of a particular statutory power is difficult to establish does not necessarily sustain a conclusion that procedural fairness is somehow excluded by circumstantial implication.

[116] The Court of Appeal also had regard to the decision in *Greyhound Racing NSW v Cessnock & District Agricultural Association*, in which Basten JA stated:

> *Vanmeld Pty Ltd* involved the promulgation of a local environment plan under the *Environmental Planning and Assessment Act 1979* (NSW). The majority (Meagher and Powell JJA) held that compliance with the statutory scheme was sufficient to satisfy the requirements of procedural fairness. In *South Sydney City Council*, the Court was concerned with consultation with parties who might be affected by recommendation of the Boundaries Commission, operating under the *Local Government Act 1993* (NSW). Again, the statutory context was of importance. In any event, the broadly

72 *Vanmeld Pty Ltd v Fairfield City Council* (1999) 46 NSWLR 78 at [62].

> stated principles derived from the passages [in *Vanmeld* and *South Sydney City Council*] relied upon by the Appellant are not directly applicable in the present case. It became apparent early in the Appellant's deliberations that, although various other cost saving devices were contemplated, to make savings in the order of $3.5 million in a financial year required reductions in prize money payable at TAB club meetings, a reduction in the number of race meetings conducted, or a combination of those two approaches. Once a reduction in the allocation of dates was identified as a real possibility, the parties who would be most directly affected were readily identified as the twelve TAB clubs. Consultations with those clubs was required prior to any operative decision being taken... [73]

[117] Those decisions were taken by the Court of Appeal as illustrating that the preferable approach is to have regard to the nature of the interest which may be affected, but in light of the relevant legislative framework, in order to determine the nature and extent of the obligation to afford procedural fairness.[74] The Court of Appeal then went on to discuss and distinguish three further New South Wales Court of Appeal cases, including *Medway*.

[118] In *Gardner v Dairy Industry Authority of New South Wales*[75] a scheme allocating quotas and fixing production levels for dairy producers affected thousands of persons involved in the dairy industry, and on that basis it was found that the rules of natural justice did not apply. That is because the legislature must have appreciated that the powers would have become unworkable if the rules of natural justice had to be applied in exercising them. Hutley JA stated that, '[t]he rules of natural

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73 *Greyhound Racing NSW v Cessnock and District Agricultural Association* [2006] NSWCA 333 at [73].

74 *Brisbane City Council v Leahy* [2023] QCA 133 at [47].

75 *Gardner v Dairy Industry Authority of New South Wales* [1977] 1 NSWLR 505.

justice are really only applicable to alterations of rights of single individuals or small groups, that is numbers which be adequately handled by an adversary system of litigation'.[76] Those rules are impliedly excluded where the number of persons affected by a particular order, act or decision is so great as to make it manifestly impracticable for them all to be given an opportunity of being heard by the beforehand. The Court of Appeal in *Leahy* distinguished the case before them on the basis that only a small number of people were affected by the decision, namely the owners and occupiers of neighbouring properties whose views might be obscured, dominated or overcrowded by the advertising sign.[77]

[119] In dealing with *Medway*, the Court of Appeal in *Leahy* noted the finding that the principles of natural justice were excluded '[w]here the persons relevantly affected by the exercise of the statutory power are numerous or difficult to identify, or identify in advance', such that 'it may more readily be inferred that it was not the legislative intention that, before the exercise of the power, the case sought to be made be formulated and notified'.[78] In that case, the question was whether the statute required procedural fairness to be afforded to identifiable

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76 *Gardner v Dairy Industry Authority of New South Wales* [1977] 1 NSWLR 505 at 519. It may be noted in this respect that the manner in which the relevant power was exercised in the circumstances considered *Hemmes Trading Pty Ltd v State of New South Wales* [2009] NSWSC 1303 was such that it was properly characterised as directed to individuals rather than to a class.

77 *Brisbane City Council v Leahy* [2023] QCA 133 at [40], [51].

78 *Medway v Minister for Planning* (1993) 30 NSWLR 646 at 652-653.

members of an affected class that was large and predominantly unidentifiable. However, it is clear that the Court in *Medway* was not saying that the obligation to provide procedural fairness could not attach to the exercise of the power at all. So much was apparent from the qualification that in the case of an application affecting only one or several identifiable persons different considerations would arise.

[120] The final New South Wales case considered by the Court of Appeal in *Leahy* was *Castle v Director-General State Emergency Service*.[79] That decision involved the exercise of a statutory power to revoke the registration of an emergency services unit, with the consequence that the local controller's appointment was terminated. The Court in that case accepted that although there may be a general obligation to afford procedural fairness, the content of that obligation would depend upon the size of the class affected and the manner of the affectation. Justice of Appeal Basten stated:

> Thus, one limitation on the operation of the duty to accord procedural fairness arises from the need to identify the obligation by reference to an individual or class of persons. The obligation must be capable of identification and fulfillment, in a reasonable and practical sense, prior to the making of the decision. Some guidance may be obtained by asking whether it was reasonable to expect the officer exercising a particular power to identify, in advance, the applicant as a person whose rights or interest may be affected and the way in which the proposed affectation would occur. The larger the class of persons reasonably expected to be affected, the less the likelihood that procedural fairness will be attracted and, if it is, the lower the likely content of the duty. Similarly, even though the class of those effected may be small,

79 *Castle v Director-General State Emergency Service* [2008] NSWCA 231.

> the duty is less likely to be attracted if membership of the class is variable and not readily ascertained.[80]

[121] Against that background, the appellants say that there must be a clear delineation between the distinct questions of whether an obligation of procedural fairness is owed and, if so, its content.[81] It is said that any attempt to collapse the two questions 'can only be productive of confusion and potential error'. That may well be the case where the power is of narrow compass in that it may only be exercised for a single purpose and in respect of a single applicant, as is the case with the power to grant or refuse a visa. Even with a power of that limited ambit, the observations made by Mason J in *Kioa v West* comprehend that a power may be exercised for different purposes or reasons, some of which will require an opportunity to be heard and others of which will not. The duty to provide a hearing does not necessarily attach to every decision made in exercise of the power.

[122] The proposition that a rigid delineation exists between the analysis of whether there exists an obligation to provide procedural fairness, on the one hand, and the assessment of the content of the obligation to provide reasonable fairness, on the other hand, is at odds with the authorities discussed above. Those authorities, including those commended by the appellants, approach the analysis in terms of

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80 *Castle v Director-General State Emergency Service* [2008] NSWCA 231 at [6].

81 *Re Minister for Immigration and Multicultural Affairs; Ex parte MIAH* (2001) 206 CLR 57 at [29]; *cf Waqa v Technical and Further Education Commission* [2009] NSWCA 213 at [49].

whether the effect of the exercise of the power in the particular circumstances under consideration is such that the content of procedural fairness required a person aggrieved to be given opportunity to be heard. Those authorities simply echo Mason J's observation in *Kioa v West* to the effect that the critical question in most cases is not whether the principles of natural justice apply, but what does the duty to act fairly require in the particular circumstances of the particular case. It does not follow that because the exercise of a power is conditioned in a general sense by a requirement for procedural fairness that some form of hearing is always required.

[123] Properly characterised, the trial judge's finding was not that there was a clear intention on the part of the legislature to exclude the principles of natural justice from the exercise of power under s 23 of the *Housing Act*. It was that having regard to the nature of the interests which might be affected, viewed in light of the relevant legislative framework, the nature and extent of the obligation to afford procedural fairness did not in the circumstances extend to require the Minister to afford the appellants a right to be heard before any Determination was made. The trial judge accepted that the appellants' rights and interests might be, and in fact were, affected by the Determinations; that a statutory power to affect such interests is ordinarily conditioned by a requirement to accord procedural fairness; that procedural fairness ordinarily requires that an affected person be given an opportunity to be heard; and that

the implication can only be ousted by clear words to that effect. The trial judge then made particular reference to the fact that the content of the obligation to accord procedural fairness depends on the statutory context, and the decision was directed to whether that content included the right to a hearing.

[124] So much is apparent from the trial judge's observation that a determination under s 23 of the *Housing Act* in relation to an individual dwelling might give rise to different considerations concerning the nature and extent of the obligation to afford procedural fairness. The appellants say that position finds no support in the text of the legislation. That is not the case. The different types of determination which may be made form part of the relevant legislative framework, and give rise to distinctions concerning the identification of persons affected and the nature of the rights affected. Consistently with the reasoning in *Medway*, *Vanmeld* (per Spigelman CJ) and *Castle*, those distinctions include the one properly drawn between the exercise of a power directed towards the rights and expectations of a particular individual or individuals and the exercise of that same power in a manner which affects the community at large or a large class within the community. The former type of exercise will ordinarily attract a right to be heard but the latter type of exercise may not, particularly where the decision is made by reference to considerations of policy rather than considerations personal to an affected party.

[125] When seen in this light, it was not in error for the trial judge to have regard to the circumstances in which the determinations were made, instead of focusing solely on the terms of the statute. As the respondents submit, there is no inflexible rule about what procedural fairness requires, and the answer to that question requires consideration of both the statutory context and the facts and circumstances of the particular case. As Basten JA stated in *Castle*:

> Whether or not the decisions made in the present case attracted an obligation to accord the applicant procedural fairness will depend in part upon the correct analysis of the decisions themselves and the grounds on which they were made, including the circumstances in which the power came to be exercised. [82]

[126] In a similar vein, in *Day v Harness Racing New South Wales*[83] Leeming JA observed that the 'question whether the valid exercise of... power is conditioned upon the obligation to accord procedural fairness does not depend on the particular facts of a case, but upon the nature of the power', but that 'the particular facts of a case do, of course, impact on the content of any obligation to accord procedural fairness'.

[127] As at the time of trial, there were 5433 dwellings subject to the Determinations.[84] Many of those dwellings had multiple tenants, each with a separate legal obligation to pay rent. The operation of the Determinations extended to unidentified and unidentifiable persons who in the future might take up a tenancy in one of those dwellings

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82 *Castle v Director-General State Emergency Service* [2008] NSWCA 231 at [9].

83 *Day v Harness Racing New South Wales* (2014) 88 NSWLR 594 at [106]-[107].

84 AB 25.

and/or assume an obligation to pay rent for one of those dwellings. This was clearly an exercise of the power in which the persons relevantly affected by the exercise of the statutory power were numerous or difficult to identify. The suggestion that the obligation to afford procedural fairness could be reasonably and practicably fulfilled by engagement of the Housing Reference Groups runs counter to the appellants' contention, pursued principally in the ground asserting administrative unreasonableness, that each of the tenancies required individual consideration in the fixing of rents with reference to matters such as the state of repair and proximity to services.[85]

[128] To those considerations may be added the fact that the general exercise of power did not have a particular effect on a limited class of those people who might be generally affected by the determination (unlike the situation which presented in cases like *Castle* and *Greyhound Racing NSW*), and any determination of rent levels for a large class of tenancies under a social housing program is one overlaid by public finance and political considerations. The decision here involved a policy shift from an income-based rent model to a dwelling-based operational cost model for remote communities and town camps, affecting more than 5000 dwellings. It was formulated over the course

85 Section 7 of the RTA obliges the Minister administering that Act to consult with potentially affected persons before exempting certain classes of tenancy agreements from all or any of the provisions of the RTA or RT Regulations. To the extent the appellant submits that the responsible Minister was able, and in fact obliged, to afford procedural fairness in the same manner, those obligations arise under a different statute and attach to a different Minister. Had the legislature intended a similar procedural requirement should apply to s 23(1) of the *Housing Act*, similar provision could have been made.

of four years having regard to the relative benefits of competing policy options, endorsed by Cabinet and implemented by a succession of responsible Ministers. It was the type of determination which did not cast any obligation on the Minister to afford a hearing to individual public housing tenants before adopting that policy through the instrument of the Determinations.

[129] The Determinations were fixed by reference to matters of public policy rather than considerations personal to either the appellants or to the general class of which they formed part. As Brennan J observed in the passage from *O'Shea* which is extracted earlier in these reasons, when one reaches the area of ministerial policy giving effect to the general public interest, one enters the political field. In that field a Minister may determine general policy or the interests of the general public free of procedural constraints. As the trial judge stated, the fact that the legislature has made the Minister the repository of the power to make a determination is indicative of the policy or political nature of the considerations which may inform the exercise of the power.

[130] That is consistent with the High Court's observation in *Hot Holdings Pty Ltd v Creasy*[86] that the 'whole object' of a statutory provision placing a power into the hands of a Minister 'is that he may exercise it according to government policy'. As the respondents submit, while the repository of the power is not determinative of the question whether

86 *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438.

procedural fairness is required or the content of that requirement, it is a relevant factor to be taken into account. Although the power is delegable, it was exercised by the Minister in this particular case. In any event, an exercise of the power by a delegate would be taken to be that of the Minister and therefore would remain one for which the Minister would be politically accountable.

[131] As stated at the outset, this ground of appeal contends that the trial judge erred by failing to conclude that those parts of the Determinations which gave rise to rent increases, and/or applied to classes of two, three and/or four-bedroom dwellings, were infected by jurisdictional error on the basis of a denial of procedural fairness to the appellants. For the reasons we have given, this ground of appeal is dismissed.

The SAG consultation

[132] The appellants' fourth ground of appeal is that the trial judge erred in concluding that procedural fairness was afforded to the appellants in respect of the Determinations made in 2021 and 2022 on the basis of the SAG consultation in 2018. That error is said to arise in circumstances where the rent rates the subject of the consultation were not replicated in the Determinations; there was no evidence on which to conclude that the persons attending the consultation were, or represented, the people who would be affected by any future determination made under s 23 of the *Housing Act*; and the consultation

did not include any consideration of the timing or effect of the Determinations.

[133] The relevant finding by the trial judge was in the following terms:

> In the event that I am wrong in determining that the defendant was not obliged to provide procedural fairness to the plaintiffs as part of a class of tenants to whom the Determinations applied, I will add my satisfaction that the consultation process undertaken by the defendant through the SAG was all that was reasonably required of the defendant in the circumstances.[87]

[134] As with the third ground of appeal, the appellants submit that the content of any obligation of procedural fairness (and thus the assessment of whether it has been fulfilled) is informed by the statutory context, and will depend on matters such as the nature of the decision to be made, the complexity of the issues, other demands on the decision-maker, and the significance of the decision to the person affected. The submission follows that while the matters of statutory context go some way to attenuating the content of the obligation of procedural fairness, particularly when the power is exercised in respect of a class, even then what is required is that a potentially affected person have an opportunity for meaningful participation in the decision-making process.

[135] The appellants submit that the evidence before the trial judge clearly established that no such opportunity was afforded to the tenants in this case, even though this was the first occasion on which the power in

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87 *Badari & Ors v Minister for Territory Families and Urban Housing & Anor* [2022] NTSC 83 at [49].

s 23(1) of the *Housing Act* had been used to determine rent under the public housing framework. The evidence was that communication with tenants around the new remote rent framework commenced after the decision was made. In the appellant's submission, procedural fairness could not have been afforded to tenants concerning decisions made in December 2021, April 2022 and September 2022 by reason that someone other than the Minister or an authorised delegate of the Minister met with various peak indigenous representative bodies in 2018. The appellants say that quite apart from that temporal dislocation, there was no evidence that any of the persons who attended the SAG consultations were remote public housing tenants.

[136] In addition, the appellants submit that the rent rates in the Determinations were never put to SAG. The public servants who conducted the consultations advised the representatives of the various peak bodies that a rent rate per room between 15% (for one bedroom) and 20% (for four bedrooms) was being considered. There was also no evidence that SAG met after 2018 or that the representative bodies were consulted at all in relation to the decisions to make the Second, Third or Fourth Determinations. Those determinations deferred the second stage of rent changes with an adverse financial effect on at least one of the appellants, and removed 21 communities from those covered by the Determinations without affording other communities the opportunity to also press for exemption. The appellants say that it was

unnecessary to satisfy the requirements of procedural fairness to speak to tenants individually. As already described in the consideration of the third ground of appeal, the appellants say that it may have sufficed for a delegate of the Minister, or the Chief Executive Officer (Housing) under the direction of the Minister, to consult at the appropriate stages with a representative group from each community.

[137] Given the findings we have made in relation to the third ground of appeal, it is unnecessary to consider this ground of appeal. That is because we have found that having regard to the statutory context and the particular circumstances of the case, it was unnecessary for the responsible Minister to afford the appellants an opportunity to be heard, or anything else in respect of procedural fairness, before making the Determinations.

[138] Subject to that qualification, had we found that the appellants were entitled to an opportunity to be heard, it is difficult to see how that requirement was satisfied or how that opportunity was afforded on the basis of the SAG consultations in 2018. Although the relevant government agency made a laudable attempt to consult with various peak Aboriginal justice, housing, land management and medical organisations, there is no evidence that any of those organisations were representing the appellants in any relevant sense, or that by consulting with those organisations the appellants were accorded a right to be heard.

Unreasonableness

[139] The appellants' fifth ground of appeal is that the trial judge erred by failing to conclude that the Determinations were legally unreasonable to the extent that they purported to effect rent increases and have application to classes of two, three and/or four bedroom dwellings. That unreasonableness is said to arise from the fact that in those respects the Determinations took no account of either any individual failure on the part of the landlord in relation to the statutory requirements concerning habitability and security set out in ss 48 and 49 of the RTA, having particular regard to s 3(e) of the RTA; or the proximity of the premises to government, health and education services, in contradistinction to determinations made under s 23 of the *Housing Act* in relation to urban premises. Further, or in the alternative, the appellants say that legal unreasonableness is apparent from the fact that the Determinations are inconsistent with the model endorsed by the SAG consultation.

[140] When considering assertions of administrative law unreasonableness (which is sometimes described as 'legal irrationality'), the essence of the question is whether the statutory decision-maker has exceeded the limits on the grant of statutory power. The focus of that analysis is on whether the decision was 'within a range of possible [and] acceptable

outcomes which are defensible in respect of the facts and law'.[88] The threshold for that form of legal unreasonableness is high, and the test is necessarily stringent and confined.[89] Ultimately, the result will turn on whether the decision was illogical or not based on findings or inferences of fact supported on logical grounds such that it was not possible to reach on the available material.[90]

[141] The relevant principles are not controversial and there is no suggestion that the primary judge misdirected himself concerning the principle of legal unreasonableness. As the respondents submit, that principle does not provide a vehicle for a court to remake the particular determination under challenge in a manner which the court might consider to be reasonable, and thereby to find any contrary determination unreasonable by implication. It is not enough to persuade a court on review that another rational decision-maker might have come to a different determination or approached the matter differently.

[142] However, a breach of the 'legal standard of reasonableness' is not limited to what is in effect an irrational or bizarre decision. Where

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88 *Minister for Immigration v SZVFW* (2018) 264 CLR 541 at [81]-[82]. See also *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [105]; *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 at [2]; *Stran v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 233 at [119].

89 *Minister for Immigration v SZVFW* (2018) 264 CLR 541 at [52]; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [108]-[113].

90 See, for example, *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 289 FCR 21 at [33]-[35]; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12 at [38]; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [133]-[136]; *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at [33].

there are no written or oral reasons for a decision, a claim of legal unreasonableness directs attention to the outcome. In that analysis, the outcome will show the decision to be legally unreasonable where the decision in question lacks evident and intelligible justification.[91] As Allsop CJ stated in *Minister for Immigration and Border Protection v Stretton*:

> The boundaries of power may be difficult to define. The evaluation of whether a decision was made within those boundaries is conducted by reference to the relevant statute, its terms, scope and purpose, such of the values to which I have referred as are relevant and any other values explicit or implicit in the statute. The weight and relevance of any relevant values will be approached by reference to the statutory source of the power in question. The task is not definitional, but one of characterisation: the decision is to be evaluated, and a conclusion reached as to whether it has the character of being unreasonable, in sufficiently lacking rational foundation, or an evident or intelligible justification, or in being plainly unjust, arbitrary, capricious, or lacking common sense having regard to the terms, scope and purpose of the statutory source of the power, such that it cannot be said to be within the range of possible lawful outcomes as an exercise of that power. The descriptions of the lack of quality used above are not exhaustive or definitional, they are explanations or explications of legal unreasonableness, of going beyond the source of power.[92]

[143] The appellants say in the application of that approach that the assessment of legal unreasonableness is an 'evaluative process' judged as at the time the administrative power was exercised.[93] The bounds of reasonableness are informed by the statutory context such that a justification that might be intelligible in some respects might

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91 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [76].

92 *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 at [11].

93 *BMV16 v Minister for Home Affairs* [2018] FCAFC 90 at [79]; *Minister for Home Affairs v DUA16* (2020) 271 CLR 550 at [26].

nevertheless be legally unreasonable in a particular statutory context. In illustrating this submission, the appellants point to the hypothetical situation in which a decision to raise a person's rent because they are not a member of the military would provide an intelligible justification for the decision of a statutory agency tasked with housing military personnel, but it would not provide an intelligible justification for an exercise of the power under s 23 of the *Housing Act*, which contains no textual or contextual indicator of a preference for military personnel.

[144] Applying those principles to the case at hand, the appellants submit that the starting point for the analysis is the fact that the Determinations purported to operate such that all premises across all remote communities and town camps were required to pay the same rent per bedroom regardless of the state of that premises or its location. The appellants say that 'a particular vice' of that approach is its lack of responsiveness to access to services from each location, in circumstances where the Ministerial approach to determining urban rent (on the 'factor principle approach') is the fact that 'service availability and general amenity' inevitably impact property value, and thus rational rent. The appellants say that in the application of that approach, increments of as little as five dollars, and variations of as little as three kilometres, are used to inform other exercises of power under s 23 of the *Housing Act*. In the appellants' submission, a failure to take into account the state of the premises and the proximity to

services is necessarily unreasonable given the objective factual salience of those considerations.

[145] It should be noted in this respect that the appellants' assertion of non-compliance by the Chief Executive Officer (Housing) in respect of the premises is irrelevant to the assessment of reasonableness, beyond the proposition that administrative rationality required the state of each premises to be taken into account for the purpose of fixing rent. Even leaving aside the fact that the trial judge made no finding of non-compliance, the question of non-compliance by landlord is a matter which is addressed under the mechanisms of the RTA, including the power to order compensation for breach, rather than one which operates as a limiting factor on the exercise of the power under s 23(1) of the *Housing Act*.

[146] The appellants submit further that the adoption of classes in the Determinations was 'based on an unwarranted assumption' of uniformity which does not exist. The appellants seek to illustrate this lack of uniformity through a comparison of the respective locations of Laramba in central Australia and Gunbalanya in west Arnhem Land, and the different defects apparent in the three relevant premises. In the appellants' submission, those differences should rationally have borne on the assessment of reasonable rent, and the fact they did not rendered each Determination 'plainly unjust, arbitrary, capricious, or lacking common sense'.

[147] The trial judge was satisfied that the 'operational cost model – cost per bedroom' recommended by the SAG provided a sufficient justification for a class-wide determination of rent without reference to differences dwelling condition, location, proximity to services or other variables. In making that finding, the trial judge had particular regard to the fact that the power under s 23 of the *Housing Act* was expressly available in respect of 'a class of dwelling', and considered that the submission made by the appellants would 'either render nugatory the power thus provided to the [responsible Minister], or would make its exercise dependent upon identification of classes of dwelling with similar attributes'.[94] The appellants say that alternative result would both allow the power meaningful operation and permit the calibration of rents by reference to an individual dwelling or a class of dwellings. The appellants say that result is to be preferred over one in which individual circumstances are elided by class-wide determinations for the sake of administrative convenience.

[148] Even leaving those matters aside, the appellants assert that the 'operational cost approach – cost per bedroom' was not ultimately implemented in the Determinations. That model produced a bedroom-based flat rent rate of around (and often less than) $60 in 2018. By the time the First Determination was made in 2021, and when the Second and Third Determinations were made in 2022, the original model had

94 *Badari & Ors v Minister for Territory Families and Urban Housing & Anor* [2022] NTSC 83 at [57].

been replaced by a scheme which adopted a bedroom-based flat rent rate of $70. The appellants say this resulted in an increase in rent of up to 20 percent per household more than that under discussion during the SAG consultation. The appellants say that to the extent the respondents' affidavit evidence seeks to attribute this increase to 'increases in Centrelink entitlements during the period between 2018 and 2021', that rationale was irrational because:

(a) an 'income based rent' model had been rejected by 'stakeholders' during the SAG consultation and not thereafter pursued by the responsible Minister; and

(b) a significant proportion of remote tenants were not reliant on Centrelink, including two of the appellants, and whose income may have been reduced between 2018 and 2021 (for example, as a result of the impact on the pandemic on the tourism industry).

[149] The appellants say on this basis that even if the 'operational cost approach – cost per bedroom' was capable of furnishing an evident and intelligible justification for a determination that accurately implemented that approach, the departure from that approach deprived the Determinations of that justification.

[150] A number of observations may be made in relation to the proposition that the model adopted during the course of the SAG consultation was not ultimately implemented. While it is correct to say that the Determinations adopted a rate of $70 per room when the SAG had

adopted a model based on a rate of $60 per room, there is nothing to suggest that a rate of $60 per week would have been legally reasonable but $70 per room would not. Moreover, both the SAG and Cabinet were briefed about the proposed increase,[95] which was modest taking into account inflation across the four year period between the consultation and the implementation. There is no evidence that the responsible Minister adopted the increased rate on the basis that there had been an increase in Centrelink entitlements, and no basis for any conclusion that the responsible Minister was thereby adopting an income-based rent model. Even if the responsible Minister's decision was informed by an increase in Centrelink entitlements, the model remained bedroom-based and it could not be said that the capacity of a class of tenants to pay for a social housing service was an irrelevant or irrational consideration in the fixing of rent for that service.

[151] Against that background, the respondents submit that close attention must be given to the relevant features of the particular statutory framework within which the authority arises because 'the question to which the standard of reasonableness is addressed is whether the statutory power has been abused'. Because there were no limiting criteria and no obligation to provide a statement of reasons for the Determinations under s 23(1) of the *Housing Act*, the Court's inquiry is 'outcome focussed'. In the assessment of outcome the Minister had a

95 AB267 [14]-[15].

degree of 'decisional freedom' within which 'reasonable minds may reach different conclusions about the correct or preferable decision'.[96] Accordingly, it may only be concluded that the Determinations were unreasonable if they lay outside the zone of rational choices available to the responsible Minister. In the application of those principles, the respondents make the following submissions.

[152] First, the conferral of power under s 23(1) of the *Housing Act* to make a determination in relation to a class of dwelling contemplates that although there will be individual variations within a class consisting of dwellings with a uniform number of bedrooms, the application of a uniform rent across those variations does not constitute an abuse of power. Moreover, the Determinations were consistent with the longstanding practice of determining maximum dwelling rents by class rather than individual attributes or characteristics. There is no textual basis for the implication of a limitation on the power which would operate to require the responsible Minister to adopt classes constituted only by dwellings with similar attributes or characteristics. The relevant criterion of class or commonality adopted by the responsible Minister was the number of bedrooms, and the assertion that different criteria should have been adopted is essentially a merit-based criticism rather than a matter demonstrating unreasonableness in the relevant sense. That is because there is nothing self-evidently controlling or

96 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [28], [56].

determinative about the relationship between reasonable rent and criteria such as the proximity to services or non-compliance by the landlord.

[153] Second, market factors are not the only 'legally reasonable' criteria for fixing rent for public housing, any more than they are the only reasonable criteria governing the other aspects of a social housing system. There is nothing in the text of s 23(1) of the *Housing Act* which limits the policy which the responsible Minister may pursue in determining rents, and it was quite open, as the trial judge found, for the responsible Minister to adopt a cost-based model. There is nothing arbitrary or capricious about the rent charged to public housing tenants bearing a relationship with the cost of providing (including maintaining) that housing, or with the adoption of the number of rooms in a dwelling as a rough measure for that cost. Although the concept of 'market value' may limit the capacity of the Chief Executive Officer (Housing) to sell publicly owned properties (*Housing Act*, s 37(2)(c)),[97] no similar limitation is imposed in respect of fixing rent.

[154] Third, the evidence disclosed a course of policy formulation and decision-making which provided an intelligible justification for the Determinations. That process has already been described briefly in the context of the second ground of appeal. There was a Cabinet determination that the previous framework was in need of reform and a

97 *Housing Act*, s 37(2)(c).

determination to set up a new policy framework.[98] The SAG was convened to evaluate replacement models, and considered a number of models including cost-recovery, market rent and the factor principle approach now urged by the appellants as the only rational basis for fixing rent. Different stakeholders advocated for different models during the course of the consultation. That process culminated in the SAG resolving that the best model was a dwelling-based operational cost model which comprised a flat rent on a per bedroom basis. The basis for that determination was essentially because an income-based model yielded increased rent with any increase in the number of tenants in a dwelling, and it was important to ensure that rent remained affordable and that the scheme remained sustainable.[99] The new remote rent framework was considered and adopted by the SAG without objection at a meeting conducted on 9 November 2021.[100] The endorsement of this model by the SAG, and subsequently by Cabinet, militates against proposition that the model adopted in the Determinations fell outside the 'range of possible [and] acceptable outcomes which are defensible in respect of the facts and law' or lacked 'evident and intelligible justification'.

[155] Fourth, the discretion conferred by s 23 (1) of the *Housing Act* is broad and textually unconfined. That is particularly so where the repository

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98 AB 303.

99 AB 313, AB 317 et seq; AB 322; AB 325; AB 331; AB 336-337; AB 343-347.

100 AB 363-377.

of the power is a Minister of the Crown and the exercise of the power is legitimately informed by considerations of policy.[101] Those considerations include such matters as fiscal, economic and social policy, involving a 'polygenic exercise' which also militates against any finding that the Determinations were not within the range of available outcomes available to the responsible Minister.

[156] The respondents also draw attention to the contextual fact that the maximum rents for all classes of dwellings covered by the Determinations are substantially lower than those for all other classes of public housing in the Territory. In the period between 2 May 2022 and 5 February 2023, remote maximum dwelling rents were set in line with the lowest public housing urban full rent in 2010. Urban full rents have since increased, with the lowest being those in Pine Creek at $200 (1 bedroom), $245 (2 bedroom/duplex), and $310 (3 bedroom). Those rents are substantially and significantly higher than the rents payable for properties covered by the Determinations, and substantially and significantly lower than rents in the private market.[102]

[157] The respondents' submissions in that respect should be accepted. As Gageler J (as his Honour then was) observed in *Li*,[103] this ground of review is particularly difficult to satisfy where the decision is made by

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101 See, for example, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [108].

102 AB466-468.

103 See, for example, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [113].

an administrative decision-maker and influenced by matters of public policy. The successful invocation of legal unreasonableness is rare and the more recent developments in this field do not necessarily encourage any greater frequency in relation to policy determinations, even allowing for the fact that this ground of review now has broader operation in relation to the decisions of tribunals. There was in this case no failure on the part of the responsible Minister to consider a mandatory consideration. At the other end of the process, it cannot be said that this particular outcome was unreasonable in the sense that it fell outside the boundaries of the responsible Minister's decisional freedom. There was an evident and intelligible justification for the adoption of the new framework represented in the Determinations, even allowing for the fact that it might be legitimately criticised on policy grounds or that another reasonable decision-maker might have come to a different result.

[158] The adoption of a uniform cost-based model for the fixing of rent for remote social housing was plainly justifiable by reference to the principles that underpinned the assessment of the various options and models which were considered. The fact that administrative convenience and ease of implementation formed part of that justification did not render the determination in any sense unreasonable, illogical or irrational. Nor does the fact that the application of a cost-based model to a class which may include

members with different salient features necessarily lead to a conclusion of legal irrationality in the context of a social housing program. Almost any determination made with reference to a class will be susceptible to that criticism, because a class by its very nature involves a grouping by reference to a particular standard which in real life application will fall short of uniformity. To say that too much weight was accorded to the cost of public housing and insufficient weight accorded to the particular amenity of each dwelling and the circumstance of each tenant invites the review court to conduct a merits-based review and usurp the decision-maker's policy and operational function. In this particular context, that intervention would only be warranted if it could be concluded that the Determinations were antithetical to the 'public interest sought to be protected and enhanced' by the statutory scheme, which they were not. That conclusion does not follow from the fact that the Determinations adopted a cost-based model on policy and political grounds rather than by reference to individual tenants and premises.

[159] For these reasons, this ground of appeal is also dismissed.

The reference in 2023-01110-SC

[160] As stated at the outset, the second matter to be determined is an adjunct to the appeal from the decision of the trial judge. It is an application for judicial review seeking, amongst other relief, a declaration that the fourth Determination of Rent Payable for Dwellings dated 1 February 2023 made in purported pursuance of s 23 of the *Housing Act* was *ultra*

vires by operation of s 41 of the RTA and cl 2(2) of Sch 2 of the RT Regulations. It raises the same issues as have been determined above for the purpose of the appeal, and attracts the same findings.

The application for leave to appeal in 2023-01346-SC

[161] The third matter to be determined is an application for leave to appeal from a decision of the NTCAT made on 29 March 2023.[104] The substance of the decision is that NTCAT lacks jurisdiction to determine applications made by the applicants (as tenants) for declarations under s 42 of the RTA. That section provides:

> **Tribunal may declare rent excessive**
>
> (1) The Tribunal may, on the application of the tenant, declare that the rent payable under a tenancy agreement is excessive.
>
> (2) The Tribunal must not make a declaration under subsection (1) unless it:
>
> (a) has given 14 days notice to the landlord of the application; and
>
> (b) has invited the landlord to make submissions to the Tribunal in relation to the application before the date specified in the notice; and
>
> (c) has considered any submissions made by the landlord.
>
> (3) The Tribunal may only make a declaration under subsection (1) if the rent paid in respect of the tenancy agreement is, in the opinion of the Tribunal, excessive:
>
> (a) having regard to the general level of rents for comparable premises in the same or similar localities and the cost of any services provided in connection with the tenancy agreement by the landlord or the tenant; or
>
> (b) because the level of services provided under the agreement has, in the opinion of the Tribunal, been reduced to a significant extent, having regard to the cost

104 *Badari & Galaminda v Chief Executive Officer (Housing)* [2023] NTCAT 6.

of any services provided in connection with the tenancy agreement by the landlord or the tenant.

(4) If the Tribunal makes a declaration under subsection (1), it may by order:

(a) specify the rent payable for the premises and vary the agreement by reducing the rent payable under the agreement accordingly; and

(b) specify a date (which is not to be before the date of the application) from which the variation takes effect; and

(c) specify the period of not more than 12 months that the order is to remain in force.

(5) The Tribunal may, on the application of the landlord, vary or revoke an order under this section as the Tribunal thinks fit.

[162] The matter proceeded on the agreed position that s 7(5) of the RTA does not exclude the application of s 42 of the RTA, on the basis that none of the tenancy arrangements in question are 'a tenancy or proposed tenancy under the *Housing Act 1982*'. That is because the term 'tenancy under the *Housing Act*' was at the material time defined in s 4 of the RTA not to include a tenancy relating to premises not owned by the Territory or a statutory authority, unless the landlord is the Territory.[105] Accordingly, the issue for determination was whether the NTCAT was precluded from making an order under s 42(1) of the RTA where rent for a dwelling has been set by the Minister pursuant to s 23(1) of the *Housing Act*.

105 The definition has since been amended to include 'a social housing tenancy' or a tenancy granted under the *Housing Act* in relation to premises owned or leased by the Chief Executive Officer (Housing) or under which the Chief Executive Officer (Housing) is the landlord. However, that subsequent amendment does not bear upon the position adopted by the parties for the purpose of the application to the NTCAT or this application for leave to appeal.

[163] The NTCAT determined that s 42 of the RTA had application to 'rent payable under a tenancy agreement', and that descriptor did not extend to rent payable under a determination made in pursuance of s 23 of the *Housing Act*. Were that not so, s 42 of the RTA would operate as an avenue for review of the Minister's determination, in circumstances where the NTCAT was not conferred with any original or supervisory jurisdiction in relation to that category of decision, the proceeding would be inconsistent with the review processes in Part 3, Division 3 of the *Northern Territory Civil and Administrative Tribunal Act 2014* (NT), and any declaration made by the NTCAT would have no legal force having regard to the operation of s 23(4) of the *Housing Act*. That decision was necessarily made on the premise that the Determinations made under s 23 of the *Housing Act* were valid.

[164] The appeal for which the applicants seek leave to prosecute is an appeal restricted to a question of law. The ordinary principles which govern an appeal of that nature have application. The proposition that an appeal of this nature is somehow equivalent to an application for judicial review should not be accepted,[106] except in the limited sense that jurisdictional errors of law may be amenable to judicial review. However, the question whether the NTCAT was precluded from making an order under s 42(1) of the RTA where rent for a dwelling has been

106 Cf *HN v NTCAT & Ors* [2020] NTSC 48 at [9]; *Young & Conway v Chief Executive Officer (Housing)* (2020) 355 FLR 290 at [8].

set by the Minister pursuant to s 23(1) of the *Housing Act* is ultimately one of law.

[165] In seeking to establish error of law on the part of the NTCAT, the applicants submit that on existing appellate authority the Tribunal's power in s 42(1) of the RTA in relation to 'the rent payable under a tenancy agreement' is properly construed to mean rent a tenant has a legally enforceable obligation to pay by virtue of, pursuant to or under the authority of an agreement to occupy premises.[107] The legislature chose that formulation rather than, for example, 'rent payable in accordance with a tenancy agreement'. The formulation selected by the legislature is said to implicate the tenancy agreement as the source of the obligation to pay rent, rather than the means by which the quantum of rent is calculated. The applicants seek to illustrate that principle by reference to the circumstances of the first and second applicants, whose tenancy agreements were silent as to the rent rate. Despite that, each of them paid rent at a rate later agreed with the Chief Executive Officer (Housing). Those payments were properly characterised as 'rent payable under a tenancy agreement' because the agreement remained the source of the obligation to pay.

[166] The conclusion that s 42 of the RTA operates in relation to the applicants' tenancy agreements is said by the appellants to be

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107 See *Grocon Constructors (Victoria) Pty Ltd v APN DF2 Project 2 Pty Ltd* [2015] VSCA 190 at [117]-[119]; *R v Tkacz* (2001) 25 WAR 77 at [25]; *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242 at 249.

reinforced by the fact that at the material times s 34 of the *Housing Act* expressly provided that the RTA applies to and in relation to premises let under the *Housing Act*, subject only to the exceptions and exemptions in ss 6 and 7 of the RTA. The applicants say that conclusion is further reinforced by the fact that s 23(4) of the *Housing Act* only overrides rent determined by way of any agreement or arrangement 'between the tenant of the dwelling and any other person'. A declaration of the NTCAT under s 42 of the RTA does not satisfy the description 'agreement or arrangement', and the Tribunal is not a 'person'. The applicants also say no conflict arises by the operation of s 42(4) of the RTA, by which the NTCAT may couple a declaration with an order specifying the rent payable, because a declaration would bind the Crown and its emanations without need for a coercive order.

[167] Section 23 of the *Housing Act* as originally enacted empowered and required the Minister to determine the rent to be paid for each dwelling to be let under the *Housing Act* subject to such terms and conditions as the Minister deemed fit. Under the previous housing legislation, rents were based on the actual cost of constructing and maintaining dwellings. The purpose underlying the enactment of s 23 of the *Housing Act* was to vest the responsible Minister with what was described in the course of the parliamentary debates as 'complete discretionary powers in the matter of rental determination'. The purpose of vesting that power was to require the Housing Commission

to comply with both intergovernmental funding agreements and 'purely Northern Territory policy initiatives'. The power was subsequently amended in 1987 to make it clear that the responsible Minister could also in the exercise of that power make determinations for a class of dwellings. Section 23 of the *Housing Act* was re-enacted in substantially its present form in 2000. There is nothing in that re-enactment which suggests that the legislative intention was to displace the conferral of complete discretionary powers on the Minister in the matter of rental determination. Rather, the enactment of s 23(4) of the *Housing Act* at the same time made it plain that the responsible Minister's determination was to prevail over any tenancy or other form of agreement.

[168] Section 34 of the *Housing Act* relevantly provided that, with certain exceptions and express disapplications, the RTA 'applies in relation to premises let under [the *Housing Act*]'. So far as the sequence of enactment is concerned, the RTA commenced operation on 1 March 2000 and s 34 of the *Housing Act* was repealed and re-enacted from that same date so that it made reference to the RTA rather than the former tenancies legislation. Section 23 of the *Housing Act* was then further repealed and re-enacted with effect from 31 January 2001 with the express purpose of making it clear that a determination under that section prevailed as the terms of a tenancy agreement.

[169] Section 34 of the *Housing Act* is not determinative of this issue. The operative question is whether the powers of the NTCAT under s 42 are engaged in relation to a Ministerial determination under s 23(1) of the *Housing Act*. Although the legislative scheme in this respect is lacking in clarity, we cannot accede to the submission that a coherent reading of the scheme created by the two pieces of legislation leads to the conclusion that the NTCAT has power to strike down a determination made by the Minister with responsibility for social housing of the rent payable for social housing dwellings.

[170] In arriving at that result, it is unnecessary for s 23 of the *Housing Act* to provide expressly that a determination made under that provision overrides or is not amenable to a determination of the NTCAT pursuant to s 42 of the RTA. Section 42 of the RTA is concerned with the modification of tenancy agreements in circumstances where the rent payable is excessive having regard to market considerations. That is a very different field of operation to s 23 of the *Housing Act*, which provides for the fixing of rents for social housing schemes. Such a determination is necessarily based upon a multiplicity of considerations which are not amenable to a form of merits review by a quasi-judicial tribunal in the same manner as a market-based residential leasing arrangement would be. That anomaly is reflected in the fact that the declarations and orders sought by the applicants included that the rent determined by the responsible Minister is excessive and that the rent to

be paid should reflect the 'market value' of the premises. The provision of social housing is the antithesis of a market-based system.

[171] The fact that the power in s 42(1) of the RTA is conferred in relation to 'the rent payable under a tenancy agreement' is not determinative of the issue. The meaning and effect of the word 'under' must be determined having regard to the particular legislative scheme in question and the subject matter of the inquiry. Depending upon the context, 'by' and 'under' are commonly used to mean 'in accordance with', 'pursuant to' or 'covered by'.[108] When considered in that light, the contrast sought to be drawn by the appellants between 'rent payable under a tenancy agreement' and 'rent payable in accordance with a tenancy agreement' is of little moment.

[172] Section 42 of the RTA is directed to the level or amount of the rent payable. It is not primarily concerned with the fact that rent is payable or the source of the legally enforceable obligation to pay that rent. To say that the tenancy agreement is the source of the legal obligation does not lead inexorably to the conclusion that s 42 of the RTA has application to rents determined by the Minister pursuant to s 23 of the *Housing Act*, or that such a determination does not itself give rise to a legal obligation on the part of a person occupying premises subject to such a determination. The seminal source of the obligation is the determination rather than the tenancy agreement, and s 23(4) of the

108 *R v Tkacz* (2001) 25 WAR 77 at [23]-[24].

Housing Act provides that rent in accordance with that determination is to be paid despite anything to the contrary in (or under) the tenancy agreement. It is not to the point that in the absence of a declaration under s 23 of the *Housing Act* the source of the obligation to pay rent will lie elsewhere.

[173] That conclusion receives some textual support from ss 42(2) and (5) of the RTA. Those provisions confer procedural rights only on a 'landlord' in relation to an application and order made under s 42(1) of the RTA. For the reasons already given in the context of the appeal in proceeding AP 13/22 (2237775), it is the Minister who makes the determination of rent under s 23(1) of the *Housing Act* but it is the Chief Executive Officer (Housing) who is the 'landlord' in the relevant sense under the legislative scheme. That tells against any construction which would bring determinations by the Minister within the ambit of s 42 of the RTA while denying the procedural rights otherwise available under the provision.

[174] The fact that a bare declaration under s 42(4) of the RTA need not be coupled with an order specifying the rent payable does not lead to the conclusion that there is no conflict between the power reposited in the NTCAT to declare rent excessive and the singular power of the responsible Minister to fix the rent to be paid for a dwelling or a class of dwelling in a social housing scheme. Even allowing for the ordinary presumption that the Crown will act consistently with a declaration

without need for a coercive order, the effect of the declaration is still to override the Minister's determination. That inconsistency is not obviated by the fact that the NTCAT has power to make an order varying a tenancy agreement to reduce the rent payable under that agreement. In any event, whatever speculation there might be about the NTCAT making a declaration and adjourning the proceedings to allow the parties opportunity to reach agreement as to the appropriate rent, the reality is that in the absence of an order a declaration by itself does not specify how much the rent should be in a manner which would allow the parties to give effect to or comply with the NTCAT determination. It is for that very reason that the appellants' prayer for relief in the proceedings before the NTCAT included an application for an order specifying the rent payable.

[175] There is a particular aspect of the potential conflict between a declaration and order pursuant to s 42 of the RTA and the operation of a determination under s 23 of the *Housing Act*. Until 2018, s 42 (6) of the RTA provided that it was an offence for a landlord to ask for or receive rent exceeding the amount fixed by an order made under s 42(1). That provision was repealed with effect from 1 July 2018 on the basis that s 84B of the *Northern Territory Civil and Administrative Tribunal Act 2014* already created the offence of failing to comply with an order of the NTCAT. That gives rise to a situation in which in the face of an order under s 46(4) of the RTA having application to a

determination under s 23 of the *Housing Act*, the Chief Executive Officer (Housing) would be placed in the invidious position of having to ignore the direction of the responsible Minister in order to avoid criminal liability. It would seem unlikely that the legislature intended the scheme to have that operation.

[176] The review by the NTCAT of rent payable for social housing premises pursuant to a Ministerial determination would, contrary to the appellants' submissions, permit something in the nature of a merits review of the Minister's determination. In order to make a declaration in those terms, the NTCAT would need to form the opinion on the basis of evidence that the rent is excessive having regard to the general level of rents for comparable premises in the same or similar localities and the cost of services provided by the landlord in connection with the tenancy agreement; or because the level of services provided under the tenancy agreement has been reduced to a significant extent having regard to the cost of the services provided in connection with the tenancy agreement. It would be impossible in the present circumstances to make either of those determinations without gainsaying the Minister's determination as to the rent properly payable for social housing premises, and the policy basis on which that rent is properly determined, including in remote communities. That reality is not altered by the fact that the NTCAT is not 'standing in the shoes of the decision-maker' in terms of making the same type of decision, or that

the NTCAT determination is made in respect of an individual dwelling rather than a class of dwellings.

[177] Contrary to the appellants' submissions, the exercise of the two powers are quite incompatible. Rather than providing a 'protective backstop' to the operation of a determination under s 23 of the *Housing Act*, the application of s 42 of the RTA to such determinations would bring into play limitations and market-based considerations which do not find voice in the text of s 23 of the *Housing Act*. There is, in any event, no correlation between the general level of rents for comparable premises in the same or similar localities and a social housing tenant's financial circumstances. To take the present circumstances by way of example, a declaration on that basis could only be made in the application of a factor principle approach, which would undermine the operational cost model reflected in the Minister's determination. Similarly, any application on the basis that the level of services provided under the tenancy agreement had been reduced could only be directed to the issue of non-compliance by the landlord in relation to habitability obligations. The question of non-compliance by landlord is a matter which is addressed under quite different mechanisms of the RTA, including the power to order compensation for breach, rather than one which is properly addressed under s 42 of the RTA.

[178] In this matter, leave to appeal should be granted and the appeal dismissed.

Disposition

[179] For these reasons, the appeal in proceeding AP 13/22 (2237775) should be dismissed, and the same consequence follows in relation to the application for judicial review of the Fourth Determination the subject of proceeding 2023-01110-SC. In proceeding 2023-01346-SC we have determined that leave to appeal should be granted and the appeal dismissed. We will hear the parties in relation to the precise form of the orders which should be made consequent upon those findings, and as to costs.

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