

CITATION: *Badari & Ors v Minister for Housing, Local Government and Community Development & Anor* [2026] NTSC 43

PARTIES: BADARI, Asher

and

GALAMINDA, Ricane

and

NADJAMERREK, Lofty

and

TILMOUTH, Carmelena

and

NAWIRRIDI, Roseanne

v

MINISTER FOR HOUSING, LOCAL  
GOVERNMENT AND COMMUNITY  
DEVELOPMENT

and

CHIEF EXECUTIVE OFFICER (HOUSING)

TITLE OF COURT: SUPREME COURT OF THE NORTHERN  
TERRITORY

JURISDICTION: SUPREME COURT exercising Territory  
jurisdiction

FILE NO: 2023-01110-SC

DELIVERED: 28 May 2026

HEARING DATE: 5 May 2026

JUDGMENT OF: Grant CJ

## **CATCHWORDS:**

CIVIL PROCEDURE – Originating process – Amendment

CIVIL PROCEDURE – Endorsement of claim – Striking out

CIVIL PROCEDURE – Stay of proceedings – Inherent power – Pleadings – Striking out – Abuse of process

Whether leave to amend the originating motion should be granted – Whether material facts and grounds for relief properly articulated – Whether Court has power to strike out endorsement on originating motion – Whether endorsement of claim on originating motion should be struck out – Whether proceedings abuse of process given plaintiffs pursuing same relief in representative proceeding in another court – Case management orders made

*Interpretation Act 1978* (NT), s 4, s 55.

*Supreme Court Rules 1987* (NT) r 23.01, r 23.02

*Australian Securities & Investments Commission v Rich* [2004] NSWSC 836, *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, *Insurance Commission of Western Australia v Woodings (No 2)* [2017] WASC 372, *Kermani v Westpac Banking Corporation* [2012] VSCA 42, *Moore v Inglis* (1976) 9 ALR 509, *Oliver v Commonwealth Bank of Australia (No 2)* [2012] FCA 755, referred to.

## **REPRESENTATION:**

### *Counsel*

Plaintiffs:

M Albert with JR Murphy

Defendants:

P Knowles SC with L Spargo-Peattie

### *Solicitors*

Plaintiffs:

Daniel Kelly

Defendants:

Hutton McCarthy

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B

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IN THE SUPREME COURT OF THE  
NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*Badari & Ors v Minister for Housing, Local Government  
and Community Development & Anor* [2026] NTSC 43  
No 2023-01110-SC

BETWEEN:

**ASHER BADARI**  
First Plaintiff

AND

**RICANE GALAMINDA**  
Second Plaintiff

AND

**LOFTY NADJAMERREK**  
Third Plaintiff

AND

**CARMELENA TILMOUTH**  
Fourth Plaintiff

AND

**ROSEANNE NAWIRRIDI**  
Fifth Plaintiff

v

**MINISTER FOR HOUSING, LOCAL  
GOVERNMENT AND COMMUNITY  
DEVELOPMENT**  
First Defendant

AND

**CHIEF EXECUTIVE OFFICER  
(HOUSING)**  
Second Defendant

CORAM: GRANT CJ

REASONS FOR DECISION  
(Delivered 28 May 2026)

- [1] In its original form, this proceeding was an application seeking the following relief:
- (a) a declaration that a Determination of Rent Payable for Dwellings dated 1 February 2023 made in purported pursuance of s 23 of the *Housing Act 1982* (NT) 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);
  - (b) a declaration as to the amount of rent required by law to be paid by each plaintiff to the second defendant since November 2021;
  - (c) an order in the nature of certiorari quashing the Determination on the ground that the plaintiffs were not afforded procedural fairness and/or that the Determination was legally unreasonable and/or that the determination was *ultra vires* s 23 of the *Housing Act* due to inconsistency with the *Racial Discrimination Act 1975* (Cth).
- [2] In a decision involving a related proceeding which challenged the validity of three earlier 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, the High

Court ordered that those determinations be quashed for a failure to afford the plaintiffs procedural fairness.<sup>1</sup> Both parties accept that the reasoning in the High Court’s decision governs the validity of the fourth Determination dated 1 February 2023, and on 2 April 2026 this Court made an order by consent quashing that Determination.

- [3] The Legislative Assembly subsequently amended the *Housing Act* to provide that the responsible Minister is not required to afford tenants an opportunity to be heard when making determinations under s 23 of the *Housing Act*.<sup>2</sup> On 12 February 2026, the first defendant subsequently made a fifth Determination purporting to revoke the fourth Determination and determining the rent to be paid for the class of dwelling in specified locations, including the dwellings occupied by the plaintiffs. The plaintiffs now seek to reconfigure the within proceeding to challenge the fifth Determination.

### **The interlocutory applications**

- [4] Against that background, the plaintiffs have filed interlocutory applications by summonses dated 6 March and 17 April 2026 and the defendants have filed an interlocutory application by summons dated 27 March 2026. It is convenient to deal first with the applications made by the plaintiffs because they have in large part been either resolved or deferred by consent.

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<sup>1</sup> *Badari v Minister for Territory Families and Urban Housing* [2025] HCA 47.

<sup>2</sup> *Housing Amendment Act 2026* (NT), s 4, enacting s 23(3A) of the *Housing Act*.

- [5] The summons filed on 6 March 2026 seeks orders granting leave to amend the originating motion to direct the application for judicial review to the fifth Determination made by the first defendant on 12 February 2026 and to specify the relief sought; to substitute the first defendant with the portfolio title for the responsible Minister now appearing in the Administrative Arrangements Order; and to join a fifth plaintiff to the proceeding.
- [6] Prior to the hearing of the applications the defendants indicated that they did not oppose the applications for substitution and joinder or the grant of leave to amend the originating motion in relation to paragraph 1A, paragraph 1 (to the extent that it deletes former paragraph 1(a)), and paragraph 3(a). For reasons described further below, during the hearing of the applications the defendants also consented to a grant of leave to the plaintiffs to amend the originating motion in relation to paragraph 1B and paragraph 1C. The defendants' consent to orders in those terms has been filed and consent orders made. The defendants' consent to the amendment of the originating motion is subject to their application to permanently stay or strike out parts of that document, which is addressed further below.
- [7] The summons filed on 17 April 2026 seeks an order granting leave to serve interrogatories on the defendants and an order that the defendants make specific discovery of documents relating to the formulation of the fifth Determination. The parties have agreed to adjourn the application

pending the defendants filing their evidence on all parts of the proceeding, with the plaintiffs at liberty to press that summons if need be within 10 days of the defendants filing such evidence. Consent orders have also been filed and made in those terms.

- [8] Following the defendants' consent to the application for leave to amend the originating motion in relation to paragraph 1A, paragraph 1B, paragraph 1C, paragraph 1 (to the extent that it deletes former paragraph 1(a)) and paragraph 3(a), the defendants' opposition to the application for leave to amend the originating motion was limited to paragraphs 1 and 3(b) to the extent they seek in their terms to direct the claim for relief to the fifth Determination. Consistently with that position concerning leave to amend, the relief pressed by the defendants by the summons filed on 27 March 2026 resolved to the following:

- (a) that paragraphs 1B, 1C, 1 and 3(b) of the originating motion (as amended) be struck out; and
- (b) that paragraph 2 of the originating motion (as amended) be permanently stayed or, alternatively, struck out.

- [9] For contextual purposes, paragraph 1A of the originating motion (as amended), against which no complaint is made, seeks a declaration that each of the premises is not a 'dwelling' as defined in the *Housing Act* such that the fifth Determination has no application to the plaintiffs.

[10] Paragraph 1B of the originating motion seeks a declaration that each plaintiff is not required to pay the rent set by the fifth Determination because it was not ‘rent’ either at law or within the meaning of s 23 of the *Housing Act*. As stated, the defendants do not oppose the plaintiffs’ application for leave to amend the originating motion by inserting paragraph 1B. The defendants now also do not press their application to strike out paragraph 1B. That position has been adopted on the basis that plaintiffs have agreed to limit their argument on this claim to the matters set out at paragraphs 4 and 5 of the letter from the plaintiffs’ solicitors to the defendants’ solicitors dated 27 March 2026.<sup>3</sup>

[11] During the course of oral submissions, counsel for the defendants characterised the remaining challenges to paragraphs 1C, 1 and 3(b) of the originating motion as essentially pleading points, and the remaining challenge to paragraph 2 as more substantive in nature.

**The scope of r 23.02 of the *Supreme Court Rules***

[12] The plaintiffs have raised a preliminary issue concerning the defendants’ application that those paragraphs be struck out in pursuance of r 23.02 of the *Supreme Court Rules 1987* (NT) and/or this Court’s inherent power to regulate its own proceedings. Rule 23.02 of the *Supreme Court Rules* provides:

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**3** Affidavit of Jared Donald Clow affirmed on 1 April 2026, Annexure JDC-10.

### **Striking out pleading**

Where an endorsement of claim on a writ or originating motion or a pleading or a part of an endorsement of claim or pleading:

- (a) does not disclose a cause of action or defence;
  - (b) is scandalous, frivolous or vexatious;
  - (c) may prejudice, embarrass or delay the fair trial of the proceeding; or
  - (d) is otherwise an abuse of the process of the Court,
- the Court may order that the whole or part of the endorsement or pleading be struck out or amended.

[13] The plaintiffs contend that r 23.02 is concerned with pleadings and only empowers the Court to order a strikeout or amendment in respect of an ‘endorsement or pleading’. Order 56 of the *Supreme Court Rules* requires an application for relief or a remedy in the nature of certiorari, mandamus, prohibition or quo warranto to be commenced by originating motion. In the plaintiffs’ contention, because there are no pleadings in a matter commenced by originating motion, r 23.02 can have no application in its terms. The plaintiffs say that conclusion is consistent with the evident policy of r 23.02, and of the *Supreme Court Rules* generally, which contemplate that proceedings commenced by originating motion, and particularly proceedings seeking judicial review, involve short hearings without any contest concerning pleadings. Conversely, the power of amendment or strike out is required to manage proceedings commenced by writ which involve pleadings.

[14] The plaintiffs rely on two authorities from the New South Wales Supreme Court to the effect that a proceeding commenced by originating summons rather than statement of claim does not fall within the rule allowing for the whole or any part of a pleading to be struck out.<sup>4</sup> Those decisions are concerned with r 14.28 of the *Uniform Civil Procedure Rules 2005* (NSW). That rule is expressly limited in its application to ‘the whole or any part of a pleading’, and appears in Part 14 of the Rules which has exclusive application ‘to proceedings commenced by statement of claim and to proceedings in which a statement of claim has been filed’.<sup>5</sup> The result in the New South Wales decisions is predicated on the terms of the governing legislation rather than any inherent incompatibility between the power to strike out and its application to the particulars of a claim commenced by originating summons or originating motion.

[15] The text of r 23.02 of the *Supreme Court Rules* is quite different to the relevant parts of the New South Wales Rules. Although the heading to r 23.02 makes reference only to a ‘pleading’, it has done so since the *Supreme Court Rules* were enacted in 1988 and does not form part of the rule or govern its interpretation.<sup>6</sup> The chapeau to the provision expresses its application to ‘an endorsement of claim on a writ or

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<sup>4</sup> *Moore v Commonwealth Director of Public Prosecutions* [2022] NSWSC 1458 at [26]; *GHZ v Commissioner of Police, New South Wales Police Force* (2025) NSWSC 1091 at [52].

<sup>5</sup> *Uniform Civil Procedure Rules 2005* (NSW), r 14.1.

<sup>6</sup> *Interpretation Act 1978* (NT), ss 4 and 55(2).

originating motion or a pleading’. Contrary to the plaintiffs’ submission, the reference to an ‘originating motion’ is not incongruous in context. Properly read, the chapeau applies the rule to both an ‘endorsement of claim on a writ’ and an ‘endorsement of claim on a[n] ... originating motion’. In turn, those terms have the meanings attributed by the *Supreme Court Rules*.

[16] Rule 5.04 requires a writ to contain an endorsement of claim and stipulates that the endorsement of claim shall be ‘(a) a statement of claim; or (b) a statement sufficient to give, with reasonable particularity, notice of the nature of the claim and the cause of the claim and of the relief or remedy sought in the proceeding’. The rule goes on to provide that an endorsement of claim on a writ will constitute a statement of claim only if it is headed ‘Statement of Claim’. By way of complement, the term ‘pleading’ is defined in r 1.09 to include ‘an endorsement of claim on a writ which constitutes a statement of claim’. Rule 5.05 requires an originating motion to contain an endorsement of claim which shall ‘specify the relief or remedy sought and the Act, if any, under which the claim is made and, where it includes a question to be answered, the question shall be stated’.

[17] Under the terms of the *Supreme Court Rules*, the statement of the relief or remedy sought in a proceeding may take the form of: (a) an endorsement of claim on a writ which does not constitute a statement

of claim; (b) an endorsement of claim on an originating motion; or  
(c) an endorsement of claim on a writ which does constitute a statement of claim and is therefore a ‘pleading’. The reference to an ‘originating motion’ in the chapeau, rather than being incongruous or anomalous, reflects the content of the Rules in relation to originating process and those three different categories of statement. That same structure and content is reflected at the foot of r 23.02, which empowers the Court to order that ‘the whole or part of the endorsement or pleading be struck out or amended’. The word ‘endorsement’ there appearing picks up both an endorsement of claim on a writ which does not constitute a statement of claim and an endorsement of claim on an originating motion. It follows that r 23.02 of the *Supreme Court Rules* as properly construed empowers the Court to order a strikeout or amendment in respect of an endorsement of claim on an originating motion.

### **Paragraph 1C of the originating motion**

[18] Paragraph 1C of the originating motion seeks:

A declaration of right pursuant to s 18(1) of the *Supreme Court Act 1979* (NT) that the purported tenancy agreement with the Second Defendant dated 14 December 2022 for the premises occupied by the Third Plaintiff was and is:

- a. invalid and of no effect, by reasons including that his previous tenancy agreement for the same premises was not lawfully terminated before this purported tenancy agreement; or
- b. alternatively, is a tenancy agreement in which the operative rent quantification term is provided in clause 2(2) of

Schedule 2 of the *Residential Tenancies Regulations 2000* (NT), by reason that it was not signed by the Second Defendant.

[19] The first aspect of this claim relates to an invalidity argument which has been previously ventilated and addressed in proceedings before the Northern Territory Civil and Administrative Tribunal,<sup>7</sup> and which causes the defendants no embarrassment. The second aspect of this claim concerns a foreshadowed allegation of unconscionable conduct in accordance with the *Amadio* principles<sup>8</sup> in the second defendant's dealings with the third plaintiff. That is an issue which the parties characterise variously as 'evidence-rich', 'fact-intensive' and 'fact-sensitive', and in respect of which the defendants assert that paragraph 1C in its present form does not adequately identify the material facts on which the *Amadio* principles are said to be implicated. Both parties accept that the process of pleading, hearing and determining that issue would preclude any expedited resolution of the plaintiffs' claims under the other paragraphs of the originating motion.

[20] The plaintiffs have proposed a case management mechanism under which the unconscionability aspect of paragraph 1C would be temporarily stayed while the other parts of the claim are heard and determined. That would preserve the *status quo*, and the third plaintiff would only press the issue in the event that his claim of invalidity on

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<sup>7</sup> *Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [2019] NTCAT 7 at [59]-[62].

<sup>8</sup> *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.

the other grounds is unsuccessful. The plaintiffs say that having regard to the factual issues which present in the balance of the claim and the way they envisage the case running, that proposal would not require the third plaintiff to give evidence and be cross-examined on two occasions, or at least not in any substantive manner.

- [21] While the defendants do not necessarily accept that the grant of a temporary stay is the proper mechanism by which the plaintiffs' purpose could be achieved, the defendants have no objection to the unconscionability issue being tried as a separate question. Rule 47.04 of the *Supreme Court Rules* empowers the Court to order that a question in a proceeding be tried after the trial of the proceeding and is the appropriate mechanism for the deferral of the unconscionability issue until after the other claims have been determined.

### **Paragraph 1 of the originating motion**

- [22] Paragraph 1 of the originating motion (as amended) seeks:

A declaration of right pursuant to s 18(1) of the *Supreme Court Act 1979* (NT) that, prior to the [fifth] Determination, any rent increase by way of an increase in the percentage of income used to set the rent to be paid by any Plaintiff is and was unlawful having regard to s 41 of the *Residential Tenancies Act 1999* (NT) for those tenancy agreements in which the operative rent quantification term is that, or is the same as that, provided in cl 2(2) of Schedule 2 of the *Residential Tenancies Regulations 2000* (NT).

- [23] The defendants' principal complaint in relation to this claim as it is presently formulated is that it seeks declaratory relief without

providing notice of the material facts said to give rise to an entitlement to that relief. In particular, the prayer for relief it is not framed with reference to whether there was any increase in rent for each of the plaintiffs; the quantum of the increase; the mechanism by which that increase is said to have been effected; whether each plaintiff became liable to pay or incurred any such increase pursuant to that mechanism; and/or which tenancy agreement or agreements had operative rent quantification terms as provided in cl 2(2) of Schedule 2 of the *Residential Tenancies Regulations*. The defendants say that the form of the declaration sought is problematic for those same general reasons.

- [24] The defendants also draw attention to the fact that, on its face, this is the same relief sought in the application for judicial review which was the subject of the plaintiffs' second ground of appeal in *Badari v Minister for Territory Families and Urban Housing* (2025) 393 FLR 73 at [80]-[95]. Relief had been sought in terms that, '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 submission advanced by the plaintiffs in the earlier proceeding was that the policy was contrary to both s 41 of the *Residential Tenancies Act* and s 23 of the *Housing Act*, and quite distinct from the Determinations. In particular, the Determinations calculated rent by reference to the number of rooms of the dwelling whereas the policy was calculated by reference to household income and purported to increase rent by a

series of circumstances and directives which did not comply with s 41 of the *Residential Tenancies Act*.

[25] The Court of Appeal found that on proper characterisation it was the Determinations which operated to increase the rent payable under the relevant tenancy agreements. The effect of the application of the policy was only to reduce the rent otherwise payable under the Determinations. Accordingly, there had been no increase in rent by operation of the policy. That finding by the Court of Appeal was not subject to any application for special leave to appeal to the High Court. The relief sought in those proceedings is in materially the same terms as the relief sought in paragraph 1 of the originating motion (as amended) and operates in relation to some of the same facts and circumstances. The defendants say that the same argument and prayer for relief cannot properly be advanced in these proceedings.

[26] The plaintiffs' response to those concerns was as set out in paragraph 10 of the letter from the plaintiffs' solicitors to the defendants' solicitors dated 27 March 2026.<sup>9</sup> That response is to the effect that the plaintiffs now contend that what had previously been characterised as rent rebates were, at law, rent reductions pursuant to s 46(1)(b) of the *Residential Tenancies Act*, and unlawful for that reason. That is said by the plaintiffs to be a matter raised in submissions in reply in the appeal

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<sup>9</sup> Affidavit of Jared Donald Clow affirmed on 1 April 2026, Annexure JDC-10.

to the High Court concerning the challenge to the Court of Appeal's finding in relation to legal unreasonableness. As the defendants have submitted, however, paragraph 1 of the originating motion (as amended) is not couched in those terms, and what arguments may have been advanced in relation to legal unreasonableness have no necessary application to whatever assertion of unlawfulness might be made, or intended to be made, in paragraph 1 as presently framed.

[27] The defendants submit further that the 'pleading' deficiency is compounded by the discretionary restraints on the Court's power to grant declaratory relief. Section 18 of the *Supreme Court Act 1979* (NT) provides:

- (1) The Court may, in relation to any matter in which it has jurisdiction, make binding declarations of right, whether or not any consequential relief is or could be claimed.
- (2) A proceeding is not open to objection on the ground that a declaratory order only is sought.

[28] The provision (and its Australian analogues) has been construed as vesting the Court with power to grant declaratory relief in the absence of a conventional cause of action, so long as the plaintiff has a 'right' in the material sense.<sup>10</sup> Since *Dyson*, the balance of authority is to the effect that there are few, if any, jurisdictional bars to the court's power to grant declaratory relief. However, whether characterised as jurisdictional objection or discretionary restraint, a declaration will not

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**10** See *Dyson v Attorney-General* [1911] 1 KB 410; *Guaranty Trust Company of New York v Hannay* [1915] 2 KB 536; *Sankey v Whitlam* (1978) 142 CLR 1 at 23. See also *Supreme Court Rules*, r 23.05.

be granted in relation to a hypothetical question and will not ordinarily be granted in a matter in which the applicant has no real and immediate interest.<sup>11</sup>

[29] A declaration will be hypothetical where it is not based on facts which have not been found or agreed. In *Bass v Permanent Trustee Co Ltd*<sup>12</sup> the High Court considered preliminary questions which had been answered by the Full Court of the Federal Court. The Federal Court answered those questions by way of declaration that the respondents were immune from claims to the extent that the acts or omissions sought to be impugned were carried out pursuant to the direction of the State government within the scope of a home funding scheme. As the majority observed in *Bass*:

At best, the answers do no more than declare that the law dictates a particular result when certain facts in the material or pleadings are established. What those facts are is not stated, nor can they be identified with any precision. They may be all or some only of the facts. What facts are determinative of the legal issue involved in the question asked is left open. Such a result cannot assist the efficient administration of justice. It does not finally resolve the dispute or quell the controversy. Nor does it constitute a step that will in the course of the proceedings necessarily dictate the result of those proceedings.<sup>13</sup>

[30] This present situation is different in that the plaintiffs are not seeking a preliminary declaration before the facts are either agreed or found. The

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11 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582; *Forster v Jododex Australia* (1972) 127 CLR 421 at 437-8.

12 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334.

13 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at [49].

plaintiffs are seeking a declaration following a trial in which the facts relevant to the question of the lawfulness of the policy have been determined. The issue sought to be addressed by the declaration is not hypothetical in any strict sense because if it is to be made it must necessarily be made based on a finding that there had been some form of unlawfulness in the operation of the policy. However, that requirement draws attention to the fact that the terms of the relief sought in paragraph 1 of the originating motion lack the precision required in a declaration. The declaration sought speaks of ‘any rent increase by way of an increase in the percentage of income used to set the rent to be paid by any Plaintiff’.

[31] Leaving aside that the plaintiffs now assert that the policy effected a rent reduction rather than a rent increase, the claim in its present form does not assert with any particularity that there was an increase (or reduction) in rent, the mechanism by which that increase (or reduction) was effected, whether that increase (or reduction) in rent was referable to the percentage of income used to set the rent, or whether any plaintiff became liable for the payment of any unlawful increase in rent. At the front end of the process, that is potentially embarrassing to the defendants in their response to the claim, and at the back end of the process the form of the declaration as presently configured would not specify the ‘increase’ on which it operates and would not resolve any

specific controversy. A declaration must be self-contained and intelligible in its terms without reference to extrinsic material.<sup>14</sup>

[32] Those deficiencies are not adequately addressed by plaintiffs' bald contentions that the issue plainly identified by the prayer for relief is the limit on rent increases imposed by s 41 of the *Residential Tenancies Act*, and that the only necessary factual assumption underlying the form of the declaration as presently framed is that there has been a rent increase. However, it may be accepted that the previous decision of the Court of Appeal concerning the operation and lawfulness of the 'safety net policy' does not give rise to any issue estoppel which would preclude the plaintiffs from prosecuting the issue in this proceeding. The plaintiffs also say that the issues in dispute are well known to the parties, the form of the declarations sought need not be perfected in the originating process, and that the appropriate course – said to have been adopted in the conduct of the proceeding at first instance concerning the earlier Determinations – is for the parties to adduce their evidence whereupon the matters for determination and the terms of the necessary orders will become manifest. In my opinion, that course is not properly adopted in these circumstances.

[33] The statutory scheme requires that a proceeding must be commenced by originating motion where there is no defendant to the proceeding,

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<sup>14</sup> *Australian Securities & Investments Commission v Rich* [2004] NSWSC 836 at [46].

where an application is authorised to be made to the Court under an Act, and where required by the Rules.<sup>15</sup> The *Supreme Court Rules* require certain types of proceeding to be commenced by originating motion, including matters such as an application for discovery to identify a defendant,<sup>16</sup> a summary proceeding for recovery of land<sup>17</sup> and, as already noted above, an application seeking relief in the nature of certiorari, mandamus, prohibition or quo warranto.<sup>18</sup> A proceeding may be optionally commenced by originating motion where it is unlikely that there will be a substantial dispute of fact and for that reason it is appropriate that there be no pleadings or discovery.<sup>19</sup>

[34] The plaintiffs say, in effect, that this proceeding is an application for judicial review and therefore required to be commenced by originating motion, such that the ordinary requirements for the particularisation of the claim either do not apply or are substantially qualified. That is not entirely accurate. The only part of the plaintiffs' claim which was required to be commenced by originating motion is the claim in paragraph 3 for an order in the nature of certiorari quashing the fifth Determination on the basis that it is *ultra vires*. There was and is no requirement that the applications for declaratory relief in paragraphs 1A, 1B, 1C, 1 and 2 be commenced by originating motion. In addition,

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15 *Supreme Court Rules*, r 4.05.

16 *Supreme Court Rules*, r 32.08.

17 *Supreme Court Rules*, r 53.02.

18 *Supreme Court Rules*, r 56.01.

19 *Supreme Court Rules*, r 4.06.

the declaration is not exclusively a public law remedy.<sup>20</sup> While it may be accepted that it is the supervisory jurisdiction which is exercised when a superior court declares that a legislative action, decision or administrative act is invalid, other forms of claim against government and its agencies will involve private law issues rather than public law grievances.<sup>21</sup> For example, an application for declaratory relief may be used, and a declaration may be granted, to clarify the construction or validity of a contract and to establish the rights of parties in a contractual relationship, including where a government agency as one of the parties. Although the precise boundary between private law and private rights and public law and public rights is elusive, the declarations sought in paragraphs 1C and 2 arguably seek the vindication of private rights, and the relief sought in paragraph 2 also concerns private rights and is potentially a precursor to or a vehicle for the recovery of overpaid rent or some form of restitution.

[35] Having said that, the defendants do not take objection to the commencement of the proceeding by originating motion. The foregoing

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**20** The English Courts of Chancery had the power to grant declaratory relief as ancillary to the grant of principal relief in a cause of action which properly invoked the equitable jurisdiction in aid of some private right. Following the introduction of the *Judicature Acts* the Parliament promulgated the historical analogue to s 18 of the *Supreme Court Act*, which preserved and liberalised the remedy.

**21** Quite outside the supervisory jurisdiction, a subject could, and still can, bring suit against the Crown to obtain declaratory relief concerning private rights. Thus, a subject could obtain a declaration that, for example, property vested in the Crown was subject to a trust or mortgage in favour of the plaintiff (*Hodge v Attorney-General* (1839) 160 ER 734), or that the completion of a taxation return could not be compelled (*Dyson v Attorney-General* [1911] 1 KB 410), or in some circumstances that the Crown owed the plaintiff a sum of money (*Pool v Attorney General* (1708) 145 ER 777).

discussion is only to draw attention to the fact that in proceedings where there is no defendant, or where the matter involves an application of narrow compass under an Act, there will ordinarily be little doubt as to the basis for the claim and form of the relief sought. However, there are other types of proceeding commenced by originating motion in which there will be complex factual issues and/or in which discovery is required. That this is such a case is apparent from the fact that paragraph 1 requires an examination of each plaintiff's rental circumstances over an extended period and the plaintiffs have made application for discovery (albeit limited to the formulation and promulgation of the fifth Determination). In those circumstances, a bare endorsement of claim, even one which correctly states the basis for the claim, will be insufficient to define the issues, ensure the defendant knows the case it must meet, and establish the boundaries for evidence and relief. The ordinary and long-standing practice in this Court in those circumstances was to order the plaintiff to provide a more expansive statement or particularisation of the basis for the claim in a document informally described as 'Points of Claim'.

- [36] Under the statutory scheme, an endorsement of claim on an originating motion need not descend into the same level of detail and particularity as a pleading, but that does not mean that the basic requirements of procedural fairness are thereby abrogated. Rule 5.05 of the *Supreme Court Rules* requires an originating motion to contain an endorsement

of claim which shall ‘specify the relief or remedy sought and the Act, if any, under which the claim is made and, where it includes a question to be answered, the question shall be stated’. That requires at least reasonable particularity concerning the basis for the claim and form of the relief sought. It is not satisfactory that the defendants be referred to submissions in a different proceeding to define the issues, or that the defendants must assume the mechanism, occasion and quantum by which the plaintiffs became subject to what they assert were unlawful rent increases (or reductions). As the defendants say, if the material facts have been subject to affidavit evidence in another proceeding, they are amenable to proper particularisation in the originating process.

[37] However, rather than strike out paragraph 1 of the originating motion (as amended) at this point, I will grant the plaintiffs leave to amend that paragraph within 14 days of the delivery of this decision to particularise the case which they now advance on this issue and to address the deficiencies which these reasons identify. The amendment must state the legal basis for the claim, apprise the defendants of the case they must meet, and properly establish the boundaries for evidence and relief. I will defer any decision on the defendants’ application to strike out paragraph 1 of the originating motion until that time has expired.

### **Paragraph 3(b) of the originating motion**

[38] Paragraph 3(b) of the originating motion is in the following terms:

The Determination purportedly made under s 23 of the *Housing Act 1982* (NT) be quashed by reason that it is infected by jurisdictional error, or is otherwise beyond the power conferred by that provision by reason that:

- (b) that Determination and/or the decision not to make the Determination subject to any condition under s 23(2) of the *Housing Act 1982* (NT) was legally unreasonable.

[39] It is relevant to the defendants' complaint that prior to the amendments to the originating motion, paragraph 3(b) was directed to the making of the earlier determination in February 2023 and provided particulars of legal unreasonableness in the following terms:

- i. [the Determination] takes no account of whether the rent is fair having regard to whether each tenant is being provided with safe and habitable accommodation; and/or
- ii. [the Determination] takes no account of the proximity to government, health and education services of each location specified in Schedule 1 of that Determination; and/or
- iii. [the Determination] is arbitrary as to which non-urban communities it applies, having regard to previous Determinations of Rent Payable for Dwellings purportedly made under s 23 of the *Housing Act* since November 2021;

[40] Paragraph 3(b) of the originating motion as amended provides no particulars of the basis on which it is asserted that the making of the fifth Determination was legally unreasonable. The descendants submit that as paragraph 3(b) is presently configured, the plaintiffs' case is at large. The plaintiffs' response in correspondence is that, '[i]t is anticipated that the complaint for legal unreasonableness will include the same approach as was argued in the NT Court of Appeal and the

High Court’ in the earlier proceeding.<sup>22</sup> In that correspondence, and in their submissions on this application, the plaintiffs said that they cannot expressly limit their position because they have not, at that stage, received the material that was the basis for the decision to make the fifth Determination.

[41] The same general considerations as have been discussed in the context of the challenge to paragraph 1 of the originating motion also have application to the defendants’ challenge to paragraph 3(b). I will also grant the plaintiffs leave to amend that paragraph within 14 days of the delivery of this decision to particularise the case which it now advances on this issue. I will defer any decision on the defendants’ application to strike out paragraph 1 of the originating motion until that time has expired. If any further ground of alleged unlawfulness is identified through the discovery process the plaintiffs will be able to make application to amend the endorsement to include that further ground.

### **Paragraph 2 of the originating motion**

[42] Paragraph 2 of the originating motion seeks:

A declaration of right pursuant to s 18(1) of the *Supreme Court Act 1979* (NT) as to the amount of rent that was required by law to be paid by each Plaintiff to the Second Defendant for the premises at which each was a tenant on each day since November 2021 to the date of the final hearing of this proceeding.

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**22** Affidavit of Jared Donald Clow affirmed on 1 April 2026, Annexure JDC-10, para 14.

[43] The defendants seek an order that this claim be stated as an abuse of process or, in the alternative, that it be struck out. The assertion of abuse of process is made with reference to the following observation in *Insurance Commission of Western Australia v Woodings (No 2)* (footnotes omitted):

The circumstances in which an abuse of process may arise are extremely varied and the courts have refrained from attempting any exhaustive categorisation of those circumstances. ... It is ... prima facie vexatious to bring two extant civil actions where one will lie, if the issues overlap or significantly overlap or there is a similarity of subject matters of the proceedings. That will be so irrespective of whether the two proceedings are in separate courts or one, and even if the parties, or the relief sought, are not identical.<sup>23</sup>

[44] The basis on which the defendants say that the claim at paragraph 2 constitutes an abuse of process is that the relief sought and the basis for that relief overlaps with a class action filed in the Federal Court by two applicants naming the ‘Chief Executive Officer (Housing)’ as the respondent (**the representative proceeding**). The applicants in the representative proceeding are tenants of remote public housing in the community of Gunbalanya. The representative proceeding is commenced on behalf of all Aboriginal persons who between specified dates in 2007 and 2024 have entered into tenancy agreements with the respondent and who believe they have suffered loss and damage by reason of the matters pleaded. The claims in the representative proceeding include claims for restitution for overpaid rent on behalf of

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<sup>23</sup> *Insurance Commission of Western Australia v Woodings (No 2)* [2017] WASC 372 at [35].

group members who were subject to default tenancy agreements, which includes each of the plaintiffs.

[45] As the defendants submit, the fact that none of the plaintiffs are named applicants in the representative proceeding overlooks the representative nature of the proceedings. All group members will be bound by answers to common questions. Although there will be no abuse of process arising from the parallel conduct of representative proceedings prior to the time fixed for opt out, that time has now passed and the plaintiffs have not opted out. Those circumstances are said to attract the principle expressed in *Oliver v Commonwealth Bank of Australia (No 2)* in the following terms:

‘It is prima facie vexatious and oppressive, in the strict sense of those terms, to commence a second or subsequent action in the courts of this country if an action is already pending with respect to the matter in issue’: *Henry v Henry* [1996] HCA 51; (1996) 185 CLR 571 at 591 per Dawson, Gaudron, McHugh and Gummow JJ. Consequently, it lies upon the party bringing the second action to show that is not so: *Moore v Inglis* (1976) 9 ALR 509 at 514 per Mason J, citing the dissenting judgment of Lord Esher MR in *The Christiansborg* (1885) 10 PD 141 at 148; *Henry v Henry* at 591 (footnote 66).

Representative proceedings give rise to complexities in this area because of the possibility that proceedings by the representatives, on the one hand, and separate proceedings brought by those represented, on the other, may infringe the above principle. In this Court representative proceedings operate on an ‘opt-out’ basis; that is, persons remain in the class of those represented unless they take the affirmative step of indicating they do not wish to be in that class: *Federal Court of Australia Act 1976* (Cth), s 33J(2). Even though that is the case, however, class members are not parties to the proceeding unless they choose to be one of the nominated representative parties: s 33C(1); *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2002] FCA

1560 at [9] per Moore J; *Courtney v Medtel Pty Ltd* [2002] FCA 957; (2002) 122 FCR 168 at 179 [35]- [36] per Sackville J.

Consequently, the view in this Court is that the existence of proceedings by a class member (not being a representative party) at the same time as a representative proceeding in which that class member is represented is not necessarily an immediate abuse of process. In *Johnson Tiles Pty Ltd v Esso Australia Ltd* [1999] FCA 56 per Merkel J, albeit in the context of competing representative proceedings, thought that at least at an early stage the Court should determine which of the proceedings should be permitted and it was not necessarily the case that the proceeding which was filed first should be the proceeding which would go forward: see [14]-[15]. On the other hand, Lehane J thought that, after a party had failed to opt out of a representative proceeding, it was likely that the Court would prevent further pursuit of presently subsisting and overlapping ordinary proceedings: *Bright v Femcare Ltd* [2000] FCA 742; (2000) 175 ALR 50 at 83 [101]; [2000] FCA 742 at [101]. Considerations of commonsense and these two decisions suggest, therefore, that it is prima facie vexatious and oppressive for a person who has not opted out of a representative proceeding (when the opt-out time has passed) to maintain ordinary proceedings against the same respondent dealing with substantially the same subject matter. I so conclude.<sup>24</sup>

[46] The plaintiffs say in response that the principles governing abuse of process are as enumerated in the decision of Robson AJA in *Kermani v Westpac Banking Corporation*.<sup>25</sup> They are (footnotes omitted):

- (1) The court possesses an inherent jurisdiction to stay its proceedings as an abuse of process if the proceedings are unjustifiably oppressive and vexatious or manifestly unfair or otherwise bring the administration of justice into disrepute among right-thinking people: *Walton v Gardiner*; *Rogers v R* and *PNJ v R*; *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd*.
- (2) The jurisdiction should only be exercised in exceptional cases or sparingly with the utmost caution: *Jago v The District Court (NSW)*.

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<sup>24</sup> *Oliver v Commonwealth Bank of Australia (No 2)* [2012] FCA 755 at [1]-[3].

<sup>25</sup> *Kermani v Westpac Banking Corporation* [2012] VSCA 42 at [97].

- (3) The jurisdiction to stay for abuse of process is not limited to cases where the proceedings have been brought for an improper purpose or where there is no possibility of the court affording the affected party a fair hearing: *Walton v Gardiner*; *Rogers v R*.
- (4) The circumstances in which abuse of process may arise are extremely varied and the courts have refrained from limiting the circumstances to fixed categories: *Hunter v Chief Constable of the West Midlands Police*; *Rogers v R*; *Batistatos v Roads and Traffic Authority (NSW)*.
- (5) In considering whether to grant a stay as an abuse of process, the court should undertake a weighing process involving a subjective balancing of a variety factors and considerations: *Walton v Gardiner*.
- (6) Among those factors and considerations are the requirements of fairness to the accused, the legitimate public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime, and the need to maintain public confidence in the administration of justice: *Walton v Gardiner*.
- (7) These principles apply to civil penalty proceedings: *Gill v Walton*.
- (8) The rationale underlying the principle against double jeopardy, in that an individual should not be vexed twice for the same cause, is a factor properly to be taken into account in the weighing exercise: *Walton v Gardiner*.
- (9) It is prima facie vexatious to bring two extant civil actions where one will lie: *Moore v Inglis*; *Thirteenth Corporation Pty Ltd v State*.
- (10) This prima facie rule applies whether or not the two proceedings are in separate courts or one: *Branir Pty Ltd v Wallco Pastoral Co Pty Ltd*.
- (11) The prima facie rule applies where the issues overlap or significantly overlap or there is a similarity of subject matters of the proceedings.
- (12) The fact that the parties may not be identical, or the relief different, does not necessarily disentitle relief under this principle: *Moore v Inglis*.
- (13) In considering whether the rule should apply, the court should consider whether there was no reasonable justification for the second proceeding based on legitimate considerations of

convenience, cost or the like: *Thirteenth Corporation Pty Ltd v State*.

- (14) The guiding considerations are oppression and unfairness to the other party to the litigation and concern for the integrity of the system of administration of justice. Regard may be had to:
- (a) the importance of the issue in and to the earlier proceeding, including whether it is an evidentiary or ultimate issue;
  - (b) the opportunity available and taken to fully litigate the issue;
  - (c) the terms and finality of the finding as to the issue;
  - (d) the identity between the relevant issues in the two proceedings;
  - (e) any plea of fresh evidence, including the nature and significance of the evidence and the reason why it was not part of the earlier proceeding;
  - (f) the extent of the oppression and unfairness to the other party if the issue was relitigated and the impact of the relitigation upon the principle of finality of judicial determination and public confidence in the administration of justice; and
  - (g) an overall balancing of justice to the alleged abuser against the matters supportive of abuse of process: *Rippon v Chilcotin Pty Ltd*.

[47] The plaintiffs draw attention to the principles set out at (9) to (13) above, and particularly the proposition that legitimate considerations of cost and convenience may provide reasonable justification for the maintenance of two proceedings with an overlap or similarity of issues or subject matter. In that respect, the plaintiffs point to the fact that this proceeding was commenced before the representative proceeding, will be concluded prior to the representative proceeding, and will afford a less expensive resolution of the issue than the representative proceeding.

- [48] As to the question of overlap or similarity, the plaintiffs say that there are six fundamental differences between this proceeding and the representative proceeding which preclude any finding of overlap.
- [49] First, the plaintiffs say that the claims are made by different people. As already observed above, that that none of the plaintiffs are named applicants in the representative proceeding cannot obscure the fact that all group members will be bound by answers to common questions.
- [50] Second, the plaintiffs say that the claims relate to different periods of time and different circumstances, in that the representative proceeding is concerned only with events taking place before 25 October 2024, whereas the current proceeding also engages events taking place after that time, including the promulgation of the fifth Determination in February 2026.
- [51] Third, the plaintiffs say that the proceedings involve different key documents, and particularly the tenancy agreements made between these plaintiffs and the second defendant.
- [52] Fourth, the plaintiffs say that this proceeding will involve a different factual and legal matrix if the fifth Determination is found to be valid.
- [53] Fifth, the plaintiffs say that the declaratory relief sought in this proceeding is limited in its terms to the plaintiffs and can be of no aid to the applicants in the representative proceeding.

[54] Sixth, the plaintiffs say that this proceeding is of a different nature because it is an application for judicial review as opposed to a claim for restitution. As has also been observed above, the declaration is not exclusively a public law remedy. The claim for declaratory relief arguably seeks a vindication of the plaintiffs' private rights the only utility of which is to found a later claim for reimbursement of overpaid rent. That characterisation or purpose was not disavowed by the plaintiffs in the correspondence leading up to this application. However, in submissions on the application the plaintiffs say that the 'main utility' of the declaration is to afford the plaintiffs (and the second defendant) clarity as to how the rents should be calculated into the future. The plaintiffs say further that they have not sought the repayment of overpaid rent in this proceeding because it would constitute an application for monetary relief and expose them to a risk of an adverse costs order in the event they are unsuccessful. None of that disavows the subsequent use of any declaration to pursue a claim for compensation or restitution, and the 'main utility' which the plaintiffs seek could be achieved by seeking a declaration of the rent required by law to be paid by each plaintiff since the purported promulgation of the fifth Determination on 12 February 2026.

[55] Moreover, and as the defendants submit, the fact that different forms of relief have been sought in the two proceedings does not necessarily deny overlap or similarity between the substantive issues. The

plaintiffs refer in that respect to the decision in *Moore v Inglis*.<sup>26</sup> That decision involved an application for a stay of a proceeding commenced in the High Court alleging conspiracy against the Commonwealth government and its agents. The proceeding sought declaratory and injunctive relief in circumstances where the plaintiff had already commenced proceedings in the Supreme Court of the Australian Capital Territory seeking damages against a number of government employees. Although each proceeding alleged different conspiracies and did not name all the same defendants, the object of the conspiracies alleged was identical. In staying the proceeding seeking declaratory and injunctive relief, Mason J stated:

Consequently, the circumstance that the relief claimed in the two courts is different is not in itself a reason for allowing the two actions to continue. ... [T]here is no reason why the plaintiff could not, or cannot, seek relief by way of declaration and injunction in addition to, or in substitution of, damages in the action in the Supreme Court. Any difficulty which the plaintiff may encounter in securing appropriate amendments in the proceeding in the Supreme Court will stem, not from jurisdictional limitations, but from the manner in which the plaintiff has presented her case to date and from the insufficiency of the matters upon which she relies to ground the relief which she claims. However, these difficulties do not provide a reason for allowing the plaintiff to maintain a second proceeding in this court relating to the subject matter already in course of litigation in the Supreme Court.<sup>27</sup>

[56] That result, together with the decision in *Woodings* and the authorities cited there,<sup>28</sup> establishes that there need not to be an identity between

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26 *Moore v Inglis* (1976) 9 ALR 509.

27 *Moore v Inglis* (1976) 9 ALR 509 at 515.

28 *Insurance Commission of Western Australia v Woodings (No 2)* [2017] WASC 372 at [35].

parties or subject matter for an abuse of process to arise. However, the stay in *Moore v Inglis* was granted in circumstances in which the claim made in the High Court was based on allegations concerning the same acts, facts and matters which formed the basis of the claim for damages in the Supreme Court. In addition, consideration would need to be given to whether there are legitimate reasons<sup>29</sup> for the plaintiffs seeking declaratory relief in this form and in this proceeding in the event that some similarity or overlap was present. Whether any significant similarity or overlap arises in this case requires an examination of the relevant claim in the representative proceeding.

[57] The representative proceeding is brought on behalf of the applicants and all other persons who are Australian Aboriginal persons who entered into a tenancy agreement with the second defendant in this proceeding during the period between 18 August 2007 and 25 October 2024 and/or were identified as a person responsible for the payment of rent under such an agreement and/or were identified as persons residing at the premises under such an agreement, who allege they suffered loss or damage by reason of the matters set out in the Fifth Statement of Claim.<sup>30</sup> The plaintiffs in this proceeding are clearly Group Members in the representative proceeding as each occupied one of the ‘approximately 5,300 premises in the Remote Communities for

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<sup>29</sup> See *Kermani v Westpac Banking Corporation* [2012] VSCA 42 at [97]; *Thirteenth Corp Pty Ltd v State* [2006] FCA 179 at [41].

<sup>30</sup> Fifth Statement of Claim, para 3.

whom CEOH is a landlord’.<sup>31</sup> The claim made for damages referable to contractual breaches expressly excludes the premises at Santa Teresa and Laramba for which separate proceedings were commenced in the Northern Territory Civil and Administrative Tribunal seeking statutory compensation for alleged breaches of tenancy agreements.<sup>32</sup> The plaintiffs say this exclusion was inserted into the Statement of Claim on the basis that the defendants’ legal representatives had to the present time identified only those proceedings and those tenancies as giving rise to any overlap with the representative proceeding.

[58] Part G of the Fifth Statement of Claim seeks restitution for rent overpayment. That claim is limited to Group Members who ‘were Tenants under a Default Agreement’<sup>33</sup> and so sets up a subgroup for this particular cause of action. A ‘Default Agreement’ is defined to mean an Agreement under which the terms were as prescribed by Schedule 2 of the *Residential Tenancies Regulations*.<sup>34</sup> That subgroup is comprised by Group Members who were subject to default agreements because no valid tenancy agreement existed. That would include each of the plaintiffs on their own cases in this proceeding, subject to the defendants’ contention that a valid tenancy agreement was created with the third plaintiff on and from 14 December 2022.

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31 Fifth Statement of Claim, para 4.

32 Fifth Statement of Claim, paras 34A, 34B and 34C.

33 Fifth Statement of Claim, para 67.

34 Fifth Statement of Claim, para 14(a).

That contention does not displace the fact that on the third plaintiff's case that tenancy agreement was invalid, with the effect that he would fall within the subgroup.

[59] The restitution claim pleads that by operation of s 41 of the *Residential Tenancies Act* a landlord operating under a default agreement could only increase the rent payable if there was a right to do so under, and a method for calculation of the increase specified in, the tenancy agreement; and that the default agreements had no such provision.<sup>35</sup> The restitution claim pleads further that the rent claimed could not lawfully be increased during the currency of a default agreement, and could only be reduced by agreement or a valid and applicable determination under s 23 of the *Housing Act*.<sup>36</sup> The restitution claim then identifies what constitutes lawful rent with particulars directed specifically to the applicants' circumstances, and seeks restitution in the amount of the overpayment of rent on behalf of all subgroup members.<sup>37</sup>

[60] The plaintiffs submit that the rent increases by policy determination which are the subject matter of this proceeding have no role to play in the representative proceeding; that the declaration sought in paragraph 2 of the originating motion bears only on the Determination

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35 Fifth Statement of Claim, paras 68 and 69.

36 Fifth Statement of Claim, para 70.

37 Fifth Statement of Claim, paras 71 to 80.

made by the Minister on 1 February 2023 which forms no part of the particularisation of the claim for restitution in the representative proceeding; and that the restitution claim as particularised in the representative proceeding is singularly concerned with the applicants. While those matters may well be so, it would seem inescapable that the entitlement of the members of the subgroup to restitution for the overpayment of rent for the period up to 25 October 2024 will be determined on the basis of largely the same acts, facts, matters, circumstances, legislative prescriptions and reasons as will the determination of the amount of rent that was required by law to be paid by each plaintiff between November 2021 and 25 October 2024. Even after October 2024, that factual and legal matrix remained unchanged until the promulgation of the fifth Determination.

[61] However, it is not possible to draw that conclusion definitively, or any further conclusion concerning overlap or similarity and consequential abuse of process, in circumstances where the plaintiffs' contention concerning the rent lawfully payable by them since November 2021, as described in the originating motion, is presently inscrutable. At the very least, the claim in paragraph 2 of the originating motion is problematic for that reason. As the defendants submit, it does not disclose any cause of action, it does not advance any positive case, and it does not identify any basis on which it is asserted the rent during the relevant period was not due and payable.

[62] Moreover, the subject matter of the claim is not readily amenable to the formulation and grant of declaratory relief. On its face, it seeks a declaration of the rent payable over something in the order of 1800 individual days in relation to each of the five plaintiffs. The nature of the claim suggests that it is one very much concerned with the plaintiffs' private property rights which would ordinarily have been brought by writ with appropriate pleadings, and that its purpose is more aptly characterised as a vehicle for a subsequent claim for reimbursement of overpaid rent rather than an application for judicial review of administrative or legislative action.

[63] Alternatively, if the claim is intended to be one brought exclusively in the supervisory jurisdiction it might more appropriately be pursued by an application for certiorari to quash those determinations of rent by administrative or legislative action which the plaintiffs assert are invalid on administrative law grounds.<sup>38</sup> That determination would equally clarify how the rents should be calculated into the future, and the satisfaction of that purpose would not require a determination of the rent payable on every day since November 2021. Although that distinction between prerogative and declaratory relief does not go to

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**38** The superior courts in England had adopted the approach that where a plaintiff's right arises out of public, rather than private law, such that judicial review by way of the prerogative writs was available, the existence of that avenue would often form a sound discretionary reason for refusing declaratory relief: see, for example, *O'Reilly v Mackman* [1983] 2 AC 237; *Gillick v West Norfolk & Wisbech Area Health Authority* [1986] AC 112. Those decisions have not been followed by the Australian courts, which recognise that in some cases a declaration will be appropriate even where the plaintiff's right is 'public' rather than 'private'.

the Court's power to grant relief in the terms and for the purpose claimed, it may well constitute a sound discretionary reason for refusing declaratory relief.

[64] At this point, however, paragraph 2 of the originating motion as it is presently framed does not properly state the factual or legal basis for the relief claimed, apprise the defendants of the case they must meet, and establish the boundaries for evidence and relief. Those matters have been pleaded in relation to the applicants in the representative proceeding without apparent difficulty, and there is no reason why they cannot or should not be specified in relation to the plaintiffs in the context of this proceeding. I will also grant the plaintiffs leave to amend paragraph 2 within 14 days of the delivery of this decision to particularise the case which they wish to advance on this issue. I will defer any decision on the defendants' application to strike out paragraph 2 of the originating motion until that time has expired.

## **Orders**

[65] In accordance with these reasons, I make the following orders:

1. Pursuant to r 47.04 of the *Supreme Court Rules*, the question raised by paragraph 1C(b) of the originating motion (as amended) as to whether the tenancy agreement for the premises occupied by the third plaintiff was and is invalid by reason of unconscionable conduct on the part of the second defendant by its servants or

agents is to be tried after the trial of the other claims in the proceeding.

2. The plaintiffs have leave to amend paragraphs 1, 2 and 3(b) of the originating motion by close of business on 12 June 2026.
3. The parties have liberty to apply on seven days' notice.

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