HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF THE NORTHERN TERRITORY (D7/2025)

BETWEEN:

Asher Badari

First Appellant

Ricane Galaminda

Second Appellant

Lofty Nadjamerrek

Third Appellant

Carmelena Tilmouth

Fourth Appellant

and

Minister for Territory Families and Urban Housing

First Respondent

Minister for Housing and Homelands

Second Respondent

APPELLANTS' SUBMISSIONS

Part I: These submissions are in a form suitable for publication on the internet.

Part II: Issues

1. The first issue is whether the power in s 23 of the ***Housing Act** 1982* (NT) (**Determination power**) is conditioned by an obligation to afford procedural fairness – in particular, a fair hearing – when it is exercised in respect of a 'class' of dwellings. If that issue is answered in the affirmative, a subsidiary issue arises as to the content of that obligation and thus whether procedural fairness was afforded each time the Determination power was exercised to impact the Appellants.
2. The second issue is how the requirements of legal reasonableness apply to the Determination power. That too gives rise to a subsidiary issue as to whether the requirements of legal reasonableness were adhered to in respect of each exercise of the Determination power at issue in this proceeding.

Part III: Notice of constitutional matter: No notice is considered necessary.

Part IV: Reports of the judgments below

3. The judgments below are unreported and their medium neutral citations are: *Badari & Ors v Minister for Territory Families and Urban Housing & Anor* [2022] NTSC 83 (**PJ**); *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 (**CoA**).

Part V: Facts

4. The Appellants homes are in two remote communities in the Northern Territory (**NT**).
5. The First Appellant, Asher Badari, and the Second Appellant, Ricane Galaminda, are partners. They live together with their six children and Mr Badari's brother in a four bedroom home in lot 553, Gunbalanya in Arnhem Land. Their house was built in 1980 (Applicants / Appellants' Joint Book of Further Materials (**ABFM**) 164[64(a)]); it has been their home since 1997 (ABFM 128[3]). They were party to a tenancy agreement dated 2 November 2011 for which the rent amount was left blank (ABFM 155[43]). Its operative terms were deemed by operation of the *Residential Tenancies Act 1999* (NT) (**RTA**) to be those set out in schedule 2 of the *Residential Tenancies Regulations 2000* (NT) (CoA [13]-[14], [39]-[40]). Their home had a number of problems, including broken air-conditioner units and only a single functional stove burner (ABFM 129[10]). Prior to the exercises of executive power that are the subject of these proceedings, Mr Badari and Ms Galaminda's

joint rent was $81 per week (ABFM 345, 346, 390).[1]

6. The Third Appellant, Lofty Nadjamerrek, also lives in lot 699, Gunbalanya. He lives in a two bedroom house built in June 2012 (ABFM 164[64(b)]). He was party to a tenancy agreement dated 20 November 2012 for which the rent amount was also left blank (ABFM 58, 159[51]) and the operative terms were also deemed. Mr Nadjamerrek is an elderly, unpartnered, amputee living on a disability support pension (ABFM 132[2]-[3]). He too had a number of problems with his house, including lights and a fan that were not operational (ABFM 132-3[7]). Mr Nadjamerrek's rent was $99 per week (ABFM 348-9, 390).[2]

7. The Fourth Appellant, Carmelena Tilmouth, lives in a three bedroom house at lot 51 in Laramba in the Central Desert. It was built in 2008 (ABFM 164[64(c)]). She lives in that house with four others (ABFM 136[2]). There were similar problems with her house (ABFM 136[5]). Ms Tilmouth's rent was $140 per week (ABFM 85, 390), as recorded on her tenancy agreement dated 20 October 2020 (PJ [7]).

8. Like almost all people living in remote NT communities, the Appellants reside in public housing for which a statutory corporation, Chief Executive Officer (Housing) (**CEOH**), is a landlord (PJ [4]).[3] Each of the Appellants were only eligible for public housing because they were of 'limited means' and were not 'adequately housed'.[4]

9. Until 2021, the Appellants (and all public housing tenants in remote NT communities) had their rent rate set by individual agreement with their landlord, CEOH. One significant consequence of that was that the Appellants were afforded rent-related protections under the RTA. *First*, they were protected by a statutory prohibition on the landlord increasing the rent except in circumstances where the tenancy agreement specified the right to increase the rent (RTA s 41(1)). None of the Appellants had a tenancy agreement with such a specification (CoA [13]-[14], [39]-[40], [50]).[5] As a result, their rent could not increase without each of their express, further agreement. *Second*, each had a statutory right to apply to the Northern Territory Civil and Administrative Tribunal (**NTCAT**) for a declaration that the rent payable by them under a tenancy agreement was excessive. The NTCAT could then reduce the rent, including prospectively for up to 12 months (RTA s 42(1) and (4)(a)).

[1] These documents were put into evidence by the Respondents. It recorded the 'rent payable' from 26 September 2016. Any purported rent increase after that was not operative, by operation of s 41 of the RTA.
[2] See, by analogy, the comments in the footnote above.
[3] *Young v Chief Executive Officer (Housing)* (2023) 278 CLR 208, [2], [39].
[4] *Housing Regulations 1983* (NT) rr 3–4.
[5] Their tenancy agreements were in a standard form used across the NT: ABFM 91[3]-92[5]. The deemed rent term of each tenancy agreement was provided by *Residential Tenancies Regulations 2000* (NT), sched 2, cl 2(2).

10. The Determination power was introduced in 1982 and amended to allow a determination by 'class' in 1987.[6] It was exercised many times in the following decades, but only for urban dwellings (see, eg, ABFM 171-3). On 23 December 2021, the relevant Minister exercised the power for the first time in respect of remote dwellings, albeit not all remote dwellings (ABFM 6-10, 149[21] **First Determination**).

11. If valid, the First Determination had five immediate financial and legal effects on those whose dwellings were covered by it:

    (a) It deprived tenants of the protection against rent increases (CoA [12], [38]-[46]).

    (b) It prevented tenants from seeking merits review of their rent rate, including if their house became uninhabitable, unsafe, or insecure (CoA [161], [167]-[177]). That review was in a default no-costs jurisdiction (NTCAT) and could be sought from time to time.

    (c) Relatedly, it meant that tenants could only challenge their rent by way of judicial review. That more limited review was in a default adverse costs risk jurisdiction (NT Supreme Court) and could be sought only once within 60 days of the Determination.[7]

    (d) It rendered individually agreed rent rates inoperative (*Housing Act* s 23(4)).

    (e) It changed the rent and increased it for most remote community tenants. It did so by setting the rent to be paid for dwellings in these communities by reference only to the number of bedrooms, unless the tenant was in one of the 172 houses (AB 381-2) with five or more bedrooms. This was 'the first time in any Australian jurisdiction [that] housing rents will be set at a flat rate … per bedroom, regardless of occupancy rates or occupants' incomes'.[8]

12. The First Determination was structured to have a two-stage effect. In the first stage until 1 May 2022, rent was fixed at a specific amount for each of the four 'classes'. In the second stage from 1 May 2022, weekly rent was fixed at $70 per bedroom up to four bedrooms.

13. The First Determination differed from the subsequent two which are the subject of this appeal in that it came shortly after Cabinet consideration. On 7 December 2021, the NT Cabinet approved a model by which, using the Determination power, 'rent payable in remote public housing … is determined by the number of bedrooms that the dwelling contains' up to four bedrooms (ABFM 147[16]-[17(a)], 222). There was no evidence, however, that Cabinet considered or approved: *first*, the new framework applying only to

[6] *Housing Amendment Act 1987* (NT) s 7.
[7] *Supreme Court Rules 1987* (NT) r 56.02, noting the 'special circumstances' exception.
[8] Francis **Markham** and Michael Klerck, 'Simplifying the System or Deepening Poverty? The New Remote Rent Framework in the Northern Territory' [2022] (3) *CAEPR Topical Issue* Centre for Aboriginal Economic Policy Research, Australian National University, 1. This was before the trial judge and the NTCA in this matter.

some remote communities (noting that the list of communities changed in the Second and Third Determinations without Cabinet consideration); *second*, repeated extensions of the first stage rent rates and corresponding delays of the second stage rent rates (ABFM 230, (recommendation 3) 232 (first dot point)); and *third*, affected tenants losing access to the protections in ss 41 and 42 of the RTA (see above at [9]).

14. On 27 April 2022, the relevant Minister again exercised the Determination power (ABFM 11-15) (**Second Determination**). The Second Determination had three effects.
    (a) It prolonged each of the changes listed above at [11(a)]-[11(d)].
    (b) It extended the first stage to 4 September 2022, thus deferring the second stage until after that date. This change cost Mr Nadjamerrek $630 and Ms Tilmouth $360.
    (c) It prospectively extended the geographic application of the first and second stage by adding six further remote communities to the original 103.[9] This Second Determination was said to be applicable to 5,313 houses (ABFM 152[30], cf PJ [26], [44]).
15. On 2 September 2022, the relevant Minister again exercised the Determination power (ABFM 16-20) **(Third Determination**). It had the same effects as listed at [14(a)]-[14(c)] above, but it further extended the first stage to 5 February 2023, thus deferring the second stage until after that date. This change cost Mr Nadjamerrek $770 and Ms Tilmouth $440.
16. On 1 February 2023, the Minister again exercised the Determination power (ABFM 21-24) (**Fourth Determination**). The effect of the Fourth Determination was to defer further the second stage on and from 6 February 2023. It prospectively excluded 17 communities.[10] (The related special leave application in D1 of 2025 concerns the Fourth Determination).
17. Each of the Determinations was expressed as being referable to four 'class[es]' of dwelling (one bedroom, two bedroom, three bedroom, and four or more bedroom houses) but in respect of a different list of communities. The communities in each list were spread over the expanse of the NT: some were walking distance from a hospital, high school offering up to year 12, and supermarket (e.g. Anthelk Ewlpaye, which was less than 2.7km from each service), others were many hundreds of kilometres from those services (e.g. Kintore, which was more than 630km from each service). As to the classes, they were of very different sizes, ranging from less than 139 one bedroom dwellings to less than 3,066 three

[9] The additional communities were Anmatjere, Arumbera, Ciccone, Davenport, Thamarrurr, and Wilton.
[10] The excluded communities were Akngwertnarre, Anthelk Ewlpaye, Anthepe (Drive In), Aper Alwerrknge, Ewyenper Atwatye, Hoppy's Camp, Ilperle-Tyathe, Ilyiperenya, Inarlenge, Itwiyethwenge, Karnte, Kunoth, Larapinta Valley, Mount Nancy, Mpwetyerre, New Ilparpa, and Nyewente.

bedroom dwellings (cf PJ [26]).[11]

18. Every rent payer in each class had an individual agreement with an entity under the relevant Minister's control, being CEOH (*Housing Act* s 17). The Respondents could therefore, via CEOH, access contact details and addresses for every member of each class (contra CoA [127]). By exercise of s 14(1) of the *Housing Act*, the relevant Minister could also delegate the procedural fairness obligation or the Determination power to CEOH or any Housing Reference Group. Those Groups were specifically established for the purpose of consulting public housing tenants in most of the affected communities (CoA [100], ABFM 378).

19. The Determinations had significant financial repercussions. For the NT, the implementation of the second stage rents was said to be a gain of $9.7 million per annum (ABFM 232). That was achieved by adding to the financial burden of public housing tenants who were 'among the most impoverished people in Australia'.[12] For the Appellants, the effect of the determinations was to increase their liability to pay rent.[13] Mr Badari and Ms Galaminda's rent was purportedly raised by over 200% (from $81 to $280 per week), being an annual increase of $10,348. Mr Nadjamerrek's rent was purportedly raised by over 40% (from $99 to $140 per week), being an annual increase of $2,132. Ms Tilmouth's rent was purportedly raised by 50% (from $140 to $210 per week), being an annual increase of $3,640.[14]

20. As a result, the Appellants commenced proceedings challenging each of the first three determinations, including on the grounds of procedural fairness and unreasonableness.

Part VI: Argument

21. 'Housing and shelter are basic human needs.'[15] '[T]he provision of social housing to vulnerable and powerless people is of real significance and importance, not just to those

[11] The Respondents' evidence was that for the larger number of communities impacted by the Third Determination there were 134 one bedroom remote dwellings (and 5 in town camps); 1,008 two bedroom remote dwellings (and 86 in town camps); 2,852 three bedroom remote dwellings (and 214 in town camps); and 1,041 four or more bedroom remote dwellings (and 93 in town camps): ABFM 381-2.

[12] Markham 2.

[13] This consequence of the Determinations is expressed in terms of the Appellants' 'liability to pay rent' because there was a policy by which some tenants might not be required to pay the full amount of rent for which they were liable 'initially for up to 6 months' (ABFM 147-8[17(b)] ; PJ [17]; CoA [89], [91]), despite *Housing Act* s 23(4). The application of the policy was discretionary and thus did not change the exposure of the Appellants to a liability to pay rent in the amounts fixed by the Determinations (CoA [93]).

[14] These figures were in the Appellants' aide memoire in the NTCA: ABFM 390. The Respondents relied on a competing aide memoire, however when asked by the Chief Justice at the hearing in the NTCA 'is the appellant's submission in terms of impact still correct in terms of legal liability as opposed to what she might have actually paid', the Respondents counsel answered 'Yes'. That exchange applies equally to the Appellants: ABFM 389.

[15] *Housing Assistance Act 1996* (Cth), preamble (repealed in 2014). See also *Housing Authority v* ***Garlett*** [2025] WASC 125, [205]-[206] (this judgment is the subject of a forthcoming appeal); *London Borough of Harrow v Qazi* [2004] 1 AC 983, [89].

people, but to the community more generally.'[16] Parliament would ordinarily be expected to ensure safeguards when conferring on the Executive a power that has the capacity to jeopardise such a fundamental need and social good by the housing provider of last resort. Statutory safeguards would also be expected against interference with existing contractual relations concerning property, and derogation from long-standing statutory protections (s 41 RTA) and rights (s 42 RTA) of impacted indigent tenants. This appeal concerns two such safeguards: procedural fairness and legal reasonableness.

22. The NT Court of Appeal (**NTCA**) erroneously deprived these safeguards of their protective force and, accordingly, erroneously held that they were not infringed. To explain those errors, it is convenient to begin with the text, purpose, and context of the Determination power, which informs the analysis of both procedural fairness and reasonableness.

A. Text, purpose and context of the Determination power

23. *Text*: The Determination power permits a Minister responsible for the *Housing Act* to 'determine the rent to be paid for a dwelling or a class of dwelling' (s 23(1)). Any such determination can be 'subject to conditions that the Minister thinks fit' (s 23(2)). And any such determination overrides the rent amount agreed between the parties to the tenancy agreement, and thus expressly undermines freedom of contract (s 23(4)).

24. Six features apparent in the text of the Determination power are presently significant.

(a) It is bald: the power is not expressly qualified or conditioned.

(b) Its subject matter is the 'rent to be paid' for a dwelling, which means that the power operates upon a person (the indigent rent payer, see below at [27]) by reference to their living in a particular dwelling or a dwelling in a particular class.

(c) It can be exercised in respect of just one dwelling or a class of dwellings.

(d) The Minister could ameliorate the blunt effect of a class determination by adding conditions as 'the Minister thinks fit'. That could include protective conditions as to habitability or a person's ability to pay in a way consistent with a purpose of the Act.

(e) It is for the Minister to determine the nature of any 'class of dwelling' that is the subject of the adjusted rent (within the bounds of legal reasonableness).

(f) While it is reposed in a Minister, that Minister is empowered to delegate the exercise of the power (s 14(1)), and that same Minister has control over the affected tenants' landlord, CEOH (s 17). The combination of these features gives flexibility in the

[16] *Garlett*, [204]. See also *Housing Assistance Act 1996* (Cth), preamble and ***Nicholson*** *v New South Wales Land and Housing Corporation,* unreported Supreme Court of New South Wales, 24 December 1991, per Badgery-Parker J, 33

exercise of the Determination power and allows the Minister access to the details of impacted tenants, their homes, and their individually agreed rent rates.

25. *Purpose*:[17] A dominant purpose of the *Housing Act* is 'the provision of housing', as stated in the long title and the title of Part 3, in which the Determination power is placed.[18]

26. *Context*: One of the means by which the *Housing Act* achieves that purpose is by establishing a statutory body, CEOH (pt 2). CEOH is constituted by an officer from within the agency under the Minister (s 7) and subject to the Minister's control (s 17). The functions of CEOH relevantly include 'to provide and to assist in the provision of residential accommodation' (s 15(a)), including the power to 'let premises' (s 16(2)(e)).

27. The *Housing Act* contains a general regulation-making power (s 37). The *Housing Regulations 1983* (NT) (**the Regulations**) came into operation on the *Housing Act*'s commencement (r 2). Part 2 of the Regulations relates to the letting of 'dwellings'. Relevantly, the Regulations only permitted CEOH to let 'dwellings' to a person who is 'of limited means' and not 'adequately housed'[19] (r 4, read with r 3 definition of 'eligible person'). Further, within that cohort of indigent people, the Regulations permit CEOH to give preference to homeless persons and persons living in insanitary, overcrowded, or otherwise unsatisfactory conditions (r 4(3)).

28. The purpose and context around the Determination power show that the *Housing Act* generally, and Part 3 specifically, are directed towards the protection of the basic need for shelter for indigent Territorians, not increasing income nor administrative ease for the NT (contra CoA [158]). Indeed, a central feature of the context is a concern to offer statutory protections to persons in need.

B. Ground 1 – procedural fairness was owed and was denied to the Appellants

29. The Determination power is apt to have significant potential effects on a vulnerable group; those in a contractual relationship of tenant-landlord with CEOH who are necessarily of 'limited means' and who, without CEOH's involvement, would not be 'adequately housed'. In one of its dimensions, the Determination power can either be beneficial or detrimental to rent payers – by either increasing or reducing their liability to pay rent. In another of its dimensions, however, the Determination power is inevitably adverse. It removes the protections an indigent tenant would otherwise have by reason of ss 41 and 42 of the RTA.

[17] *Interpretation Act 1978* (NT) s 62A.
[18] Contrast with the following part, Part 4, which deals with the provision of housing 'assistance'.
[19] As to the meaning of this phrase, see *Chief Executive Officer (Housing) v Young* (2022) 43 NTLR 196, [46]; see also UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), 13 December 1991, E/1992/23.

The text of the Determination power, understood in the context of the significant potential and immediate effects of its exercise on a person's ability to have adequate housing, should have led to the conclusion that Parliament intended that the power be conditioned by procedural fairness and that that obligation required at least a modicum of a hearing.[20] The NTCA was wrong to conclude otherwise (CoA [128], [131]). The NTCA was right, however, to conclude that if a hearing was required, none was afforded (CoA [138]).

30. Correct framework for analysis: The obligation of a repository of statutory power to afford procedural fairness arises by reason of an assumption about Parliament's intent.[21] There is 'an established and "strong" common law presumption, generally applicable to any statutory power the exercise of which is capable of having an adverse effect on legally recognised rights or interests, that the exercise of the power is impliedly conditioned on the observance of procedural fairness.'[22] If the obligation to afford procedural fairness is to remain plausibly[23] grounded in Parliament's intent, the questions of whether the obligation applies, and what it requires, must be capable of being clearly ascertained prospectively by reference to the text, context, and purpose of the statute and the proposed exercise of power, rather than only retrospectively by reference to the facts of a particular case. With that in mind, the proper approach proceeds in two stages.

31. *First*, one asks whether Parliament intended that the obligation of procedural fairness condition the power. That question is ordinarily easily answered affirmatively by resort to the 'innate … natural … basic … fundamental' presumption that statutory powers are so conditioned.[24] That presumption may only be overcome by 'plain… extremely, "unambiguously", or "unmistakeabl[y]" clear' words or implication in the statute.[25]

32. *Second*, the inquiry turns to the content of the obligation to afford procedural fairness. In general terms, procedural fairness 'requires the repository of a statutory power to adopt a procedure that is reasonable in the circumstances to afford an opportunity to be heard to a person who has an interest apt to be affected by exercise of that power'.[26] What is

[20] By analogy and also concerning the provision of public housing, see *Nicholson*, 31-34.
[21] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, [39]-[41]; *Plaintiff **S10**/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, [97]; *Minister for Immigration and Border Protection v **SZSSJ*** (2016) 259 CLR 180, [75]; ***Disorganized Developments** Pty Ltd v South Australia* (2023) 97 ALJR 575, [32].
[22] *Disorganized Developments*, [33], see also [49].
[23] Cf Basten, 'The Supervisory Jurisdiction of the Supreme Courts' (2011) 85 *Australian Law Journal* 273, 288. See also Mason, 'The Foundations and the Limitations of Judicial Review' (2001) 31 *AIAL Forum* 1.
[24] ***Nathanson** v Minister for Home Affairs* (2022) 276 CLR 80, [88]. See also ***Jarratt** v Commissioner of Police (NSW)* (2005) 224 CLR 44, [150]; *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, [74].
[25] *Nathanson*, [88] and citations therein.
[26] *SZSSJ*, [82].

'reasonable' will be informed by the text, context, and purpose of the statute as those matters bear upon the proposed exercise of power. For example, a power that Parliament envisaged could be exercised to affect a group of people that are difficult to ascertain or contact, may require less in the way of a fair hearing than one that Parliament intended could only be exercised in respect of an easily-ascertained and contactable person or group.[27]

33. This two-step approach is supported by the authority of this Court,[28] including recently,[29] and has also been applied in lower courts.[30] This is so even though the question of whether procedural fairness is owed is now almost always answered in the affirmative.[31]

34. First step – does the obligation of procedural fairness condition the Determination power?

Nothing in the text of the Determination power specifically or the *Housing Act* more generally expressly rebuts the presumption. 'The very breadth of the statutory power seems … to be an argument for, rather than against, a conclusion that it was intended to be exercised fairly' (contra CoA [105]).[32] The fact the power can be exercised in respect of just one dwelling or a class that is small (here, as small as less than 139 dwellings: ABFM 372-3) supports the implication. It would be odd if the duty to afford procedural fairness conditioned the power when exercised in respect of one dwelling, but not a class of just two dwellings.[33] It would also create uncertainty if the duty to afford procedural fairness impliedly evaporated once the class got to a certain unspecified size: the Minister would not know prospectively whether they were obliged to afford procedural fairness, and a rent payer would not know whether they were entitled to procedural fairness.

35. Two related aspects of NT legislative history buttress the conclusion that the Determination power is conditioned by a requirement to afford procedural fairness. *First,* in 2000 and to coincide with the introduction of the RTA, s 23 of the *Housing Act* was 'repealed and… substituted' in a different form.[34] The amending legislation also provided a 'one-off' power to retrospectively determine rent.[35] That retrospective power provided for a bespoke form

[27] ***Vanmeld*** *Pty Ltd v Fairfield City Council* (1999) 46 NSWLR 78, [74]; *Castle v Director-General, State Emergency Services* [2008] NSWCA 231, [6]; *Brisbane City Council v* ***Leahy*** (2023) 15 QR 101, [34].
[28] ***Kioa*** *v West* (1985) 159 CLR 550, 614; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, [29]; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [47].
[29] *Disorganized Developments*, [32]-[45].
[30] See, eg, *Hemmes Trading Pty Ltd v State of NSW* [2009] NSWSC 1303, [42]-[52], [53]-[90]; *Blanket v Housing Authority* [2014] WASC 409, [80]-[118], [119]-[122]; *Berih v Homes Victoria (No 4)* [2025] VSC 169, [100].
[31] Aronson, et al., *Judicial Review of Administrative Action and Government Liability* (7th ed, 2022) 497 [9.10].
[32] *Jarratt*, [25], see also [129], [139], [154]; *Disorganized Developments*, [32], [41].
[33] See, by analogy, *Jarratt*, [14].
[34] *Housing Amendment Act 2000* (NT), discussed in substance at CoA [167]-[168].
[35] *Housing Amendment Act 2000* (NT) s 4, so described by the Minister when introducing the bill; Northern Territory, *Parliamentary Debates*, Legislative Assembly, 11 October 2000, 6782 (Loraine Braham).

of individual re-assessment by the Minister. It also expressly ousted 'any form of judicial review'. No similar re-assessment mechanism nor judicial review ouster appeared in the provision that re-enacted the *prospective* Determination power, being the version of that power utilised for each Determination challenged by this appeal. Those two omissions are telling. The absence of an after-the-fact review mechanism for prospective determinations suggests that Parliament was comfortable that affected persons would have had an opportunity to be heard before the exercise of the power. The absence of an ouster clause suggests that Parliament was comfortable with the prospective Determination power being judicially reviewable on established grounds (such as procedural fairness). It would be unorthodox to conclude that Parliament, when dealing with the one statutory power, intended to oust all forms of judicial review by clear, express terms in respect of one provision but left to implication a related ouster in respect of the neighbouring provision. *Second* and relatedly, that Parliament intended the power be conditioned by procedural fairness is confirmed by contrast with other statutory powers given to a Minister by the NT Parliament around the time the Determination power was introduced and since.[36] Those similarly and expressly ousted 'procedural fairness' specifically.

36. Further, none of the previously identified circumstances in which the presumption has been rebutted by context are present here.[37]

(a) The Determination power is not preceded by a statutory procedural fairness process,[38] nor followed by a right of review or appeal that might offer equivalent protection.[39]

(b) The Determination power does not impact persons only as members of the public, or a class of the public.[40] The power impacts very specific, identifiable groups of indigent tenants (current occupants of some remote dwellings) solely in their 'individual capacity'[41] as a party to ongoing contractual relations with CEOH. There is no analogy between such persons and the 'classes' considered in the authorities (contra CoA [128]), including because those classes were not in any pre-existing private legal relationship with someone within the control of the repository of the power, as was the case here.

[36] *Parole Orders (Transfer) Act* 1981 (NT) s 10A (introduced 1989); *Correctional Services Act* 2014 (NT) s 116.
[37] This is not intended to suggest there is a check-list. The task is, in each case, a question of statutory construction of the particular statutory power in issue; *CLM18 v Minister for Home Affairs* (2019) 272 FCR 639, [145].
[38] ***Twist*** *v Randwick Municipal Council* (1976) 136 CLR 106, 110-1; *South Australia v* ***O'Shea*** (1987) 163 CLR 378, 385-6, 387, 389-90, 400, 402, 403, 409-10, cf 415-6; *S10*, [29], [107], [115].
[39] ***Namatjira*** *v Raabe* (1959) 100 CLR 664, 668-70; *Twist*, 113, 114-6, cf 118. Cf *Burgess v Director of Housing* [2014] VSC 648, [158]. As to a review not offering equivalent protection, see *Nicholson*, 31
[40] See, eg, ***Bread Manufacturers*** *of New South Wales v Evans* (1981) 180 CLR 404; *Comptroller-General of Customs v Kawasaki Motors Pty Ltd [No 1]* (1991) 32 FCR 219.
[41] *Disorganized Developments*, [34].

(c) The Determination power could result from the 'application of a policy', but the exercise of that power is not 'the formulation of policy' itself.[42] Policy formulation *per se* is usually understood not to require procedural fairness. Here, to the extent that there was a policy related to the exercises of the Determination power, the policy was not reflected in the Determinations (discussed below at [46], [51]).

(d) There is nothing in the Determination power which requires exercise in circumstances of urgency nor involving 'national security'[43] nor 'imminent danger'.[44] Each os a circumstance which can be a basis to rebut the presumption.[45] The fact the Determination power was not exercised at all in respect of remote communities for the first 34 years it was available demonstrates as much.

(e) The 'practical difficulties'[46] in affording an opportunity to be heard could not be described as significant or insurmountable, as discussed below at [40]. This is especially so in circumstances where the Minister, via CEOH, has access to contact information for every tenant whose interests were liable to be immediately affected.

(f) While the Determination power is reposed in the Minister, that is not determinative (contra PJ [46]).[47] Where a power is non-delegable and personal to a Minister, this Court has taken that as an indication that Parliament intended to rebut the presumption that procedural fairness was required.[48] That is not the case here: the Determination power is delegable (see above at [18]).

37. Although in tension with later reasoning, the NTCA appeared to accept that there was no 'clear intention on the part of the legislature to exclude the principles of natural justice from the exercise of power under s 23' (CoA [123]). This Court can and should so conclude.

38. <u>Second step – what did the obligation of procedural fairness require?</u> The next question that the NTCA should have asked is what the obligation of procedural fairness required in respect of the particular exercises of power under challenge. Determining what procedural fairness requires in a particular case requires attention in the first place to the degree and nature of the impact upon affected persons' interests, as compared to the interests of

[42] *Disorganized Developments*, [43]. See also *O'Shea*, 388-9, 411, 413.
[43] *Disorganized Developments*, [63], [78]; *Jarratt*, [156].
[44] *Sydney Corporation v Harris* (1912) 14 CLR 1, 14.
[45] *Disorganized Developments*, [76].
[46] *O'Shea*, 402. See also ***CPCF*** *v Minister for Immigration and Border Protection* (2015) 255 CLR 514, [52].
[47] *O'Shea* 386, citing *FAI Insurances v Winneke* (1982) 151 CLR 342, 364-6. See also *Jarratt*; *Disorganized Developments*, [36]-[38], [70], [81].
[48] *S10*, [99(i)], [100], [111]. See similarly *Namatjira*, 669-70.

others.[49] The relevant people were only current tenants whose existing contractual liability to pay rent would immediately be affected (contra CoA [127]). It was not impractical to afford a hearing to them by reason of uncertainty as to who would be immediately affected. The impact on them involved pre-existing and ongoing contractual and statutory rights and entitlements, and the continued possessory interests in their homes.[50] Such an impact can be analogised with those powers which impact upon rights in relation to property, rights which have a long history of attracting strong procedural fairness obligations.[51]

39. It is unnecessary for this Court to decide exactly what sort of hearing (however minimal) would be 'reasonable in the circumstances' because no form of hearing was offered. This was by design. When asked '[a]re tenants… aware [the rent changes are] coming?', the Deputy CEOH told the 'stakeholder' event in November 2021: 'It is our intent that as soon as this decision is made, staff will travel to communities and begin communicating the upcoming changes.' (ABFM 218) This was consistent with what the Minister was advised: 'Communication with tenants around the new remote rent framework will commence on 4 January 2022' (ABFM 222). No different approach was taken to later determinations.

40. The Respondents only ever relied on the Stakeholder Advisory Group (**SAG**) process in 2018 to assert procedural fairness was afforded (PJ [49]). The NTCA rejected that (CoA [132]-[148]) and there is no notice of contention. None of the Appellants were afforded a hearing of any form in respect of any of the Determinations (ABFM 129[9], 130[2]-[3], 132[6], 134[3]-[4], 136[4]). This was conceded by the Respondents at trial (ABFM 384).

41. In practical terms and without intending to prescribe, there were a number of means by which 'class' members could have been given prior notice of the rent changes and an opportunity to address them before the Determination power was exercised each time. *First*, the very same 'staff [that were expected to] travel to communities and begin communicating the upcoming changes' (ABFM 218) could have done so before each Determination was made, not after. That communication could, for example, have notified tenants of the proposal and identified how they could have input into the proposed rent rates and list of communities. *Second*, each of the Appellants' communities and most others impacted by the Determinations (ABFM 378) have a Housing Reference Group convened by operation of the head lease with CEOH (ABFM 246-275, 277-343). Those are comprised of community leaders, including tenants, who meet to discuss public housing issues and to

[49] Cf *Kioa*, 584-5.
[50] *Gnych v Polish Club Ltd* (2015) 255 CLR 414, [41].
[51] *Disorganized Developments*, [28].

advise government on them as they impact that particular remote community (ABFM 258-259, 313-314, 331-332). Those Groups could have been used to give prior notice and an opportunity to be heard. *Third* and at a minimum, the RTA provides a mechanism for informing tenants of their potential exclusion from statutory protections in that Act, including ss 41 and 42. Section 7(4) of the RTA requires the Minister to publish notice in a newspaper of the proposed change and give at least 21 days for responsive submissions. That method too might have been sufficient.

42. NTCA's errors: In light of the above, the NTCA's errors can be identified briefly.

43. The NTCA's reasoning as to the content of any procedural fairness obligation tended to take it back to a conclusion that procedural fairness did not 'apply', *scil.* condition the power (CoA [105], see also [111]). Even if the NTCA's analysis be generously read as concluding that while fairness conditioned the power, it did not require anything in the particular case (cf CoA [137]), the considerations it identified do not support that conclusion. The most important of those considerations were set out at CoA [127]-[129] and are discussed at [36(b), (c) and (e)] above, and further below.

44. The NTCA considered that '[t]his 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' (CoA [127]; see also PJ [47]). A better understanding of the authorities is that number ordinarily only reduces the content of a procedural fairness obligation if the large number means that it would be impracticable to afford any hearing.[52] That was not the case here, as discussed above at [40]. The number of people in some classes was small and, in any event, their precise address and individual contact details were available to the Respondents through CEOH. Further, the NTCA's suggestion that the class was 'difficult to identify' was based on erroneous reasoning: a repository of power is not obliged to afford procedural fairness to anyone (future renters) who might later come to make decisions (about where to rent) in the changed landscape caused by the exercise of power (see also PJ [44], [46]). No hearing was required for persons with only a speculative or indirect interest.

45. The NTCA considered that '[t]he 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' (CoA [129], see also [128], PJ [46], [47]). There are three problems with that reasoning. *First*, the determinations are (if anything) better characterised as entailing the application, rather than formulation, of policy (see above at [36(c)] although

[52] *Leahy,* [38], [40] quoting *Vanmeld*, [74].

qualified by the discussion at [51]-[60] below). *Second*, even assuming the power was in fact exercised by reference to matters of policy that, at the level of the statute, does not make the personal circumstances of tenants irrelevant. That the power was broadly conferred but could be exercised individually or conditioned confirms that personal considerations were a permissible relevant consideration (cf CoA [105]). *Third*, it is not correct that the Determinations were fixed without reference to the circumstances of tenants: the class description was fixed by reference to features of the tenants' dwellings (how many bedrooms they had) and their location (what community they were in). These were matters about which the tenants could comment (for example, by explaining that bedrooms were not an accurate proxy for amenity or value, or making a case for their community to be excluded from the determinations as 17 were in the Fourth Determination).

46. The errors in the NTCA's analysis can also be revealed by what it did not consider, or mischaracterised. The NTCA mischaracterised or ignored the nature and the legal effects (or non-pecuniary impacts) of the exercises of the Determination power. In particular, the NTCA focused on only one purported effect, namely implementing 'a fixed rate of $70 per room' (CoA [91], [150]) per week. Even assuming that was the policy and effect, it tells one nothing about inviting comment on the other legal effects of the Determinations (see above at [11(a)]-[11(d)], [14(a)]-[14(c)], [15]). By way of example, there was no evidence that anyone considered, let alone sought comment on, the fact that each Determination deprived those impacted of the statutory protections in ss 41 and 42 of the RTA. Those other effects are not mentioned in the NTCA's analysis. Importantly, there is no reason to think that depriving public housing tenants of those rights was a concern of government policy or public finances (cf CoA [128]–[129]). This goes to show both error and the dangers of exercising a power without hearing from anyone affected by it.[53] Another effect of the Determination power not considered by the NTCA was the repeated deferrals of the first stage of the changed rent regime (see above at [14(a), [15]). Yet a further effect of the Determination power not considered by the NTCA was the adding and subtracting of communities to the new rent regime (see above at [14(c)], [15]). These were all matters on which affected tenants could reasonably be expected to have meaningful input. Parliament should not readily be taken to have intended that the power could be exercised without seeking such input. The NTCA thus erred and the appeal should be allowed for that reason.

[53] *Nathanson*, [51], [81].

C. Ground 2 – each Determination decision was legally unreasonable

47. The complaint of unreasonableness in this case is outcome-focussed because no reasons for each Determination were given by either Respondent (CoA [142]). The outcome of each of the Determinations was irrational, unjust or arbitrary.[54] The irrationality, injustice or arbitrariness is the product of the choice of the number of bedrooms (only up until four) as the single criterion by which the quantum of rent is fixed and only for some remote dwellings, even when the impacted dwellings were otherwise significantly different and vastly differently located. The NTCA's attempt to rationalise that approach as a 'uniform cost-based model' (CoA [158]) should have failed including because the Determinations diverged in important respects from that model.

48. '[A]ssessment of whether a decision was beyond power because it was legally unreasonable depends on the application of the relevant principles to the *particular* factual circumstances of the case'.[55] This is because any exercise of public power must be sensitive to 'the recognition of the human consequences of exercise of power, [and] not [proceed] in some mechanical way'.[56] The facts of the case need to be viewed in light of 'the scope, purpose and objects' of the power.[57] Here, the following six '*particular* factual circumstances' of the Determinations, separately or in combination, required the conclusion that the Determinations were legally unreasonable.

49. *First*, the Determinations were irrational because they treated unlike dwellings alike. This was in tension with two aspects of the statutory power: the implicit Parliamentary intention that when it is exercised in respect of more than one dwelling those dwellings share sufficient commonalities to be properly described as a 'class'; and the express power to add conditions to a Determination (s 23(2)), which could lessen the otherwise blunt effect of a Determination.[58] When the Determination power was amended in 1987 to allow for 'class' determinations, the Minister told Parliament that such classification would be 'taking into account location or style of building'.[59] The Determinations do neither. In their resulting

[54] *SZVFW*, [59]; *Minister for Immigration and Citizenship v Li* (2013) 240 CLR 332, [27]-[28], [72]; *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437, [44]–[45]; *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, [6], [11].
[55] *Minister for Immigration and Border Protection v* ***SZVFW*** (2018) 264 CLR 541, [84] (with original emphasis).
[56] *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* (2021) 287 FCR 364, [2]. See also *SZVFW*, [59].
[57] *SZVFW*, [79].
[58] *Friends of the Gelorup Corridor Inc v Minister for the Environment and Water* (2023) 299 FCR 236, [65].
[59] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 29 April 1987, 86 (Raymon Allan Hanrahan, Deputy Chief Minister, Minister for Lands and Housing, Minister for Conservation and Minister for Tourism); as to the significance of this in the interpretative task, see *Interpretation Act 1978* (NT) s 62B(2)(f).

injustice or arbitrariness, the Determinations applied uniformly to houses, among other things, with two bathrooms, or one; recently built or refurbished as well as those built decades ago and those never re-furbished (the Appellants homes were built between 9 and 41 years before the First Determination; ABFM 164[64]); as well as those walking distance from a high school, hospital, and supermarket, and those many hours drive away from those amenities (see above at [17]).

50. In those ways, the Determinations untethered the 'rent to be paid' from what Parliament can be expected to have understood 'rent' to mean – a monetary amount (at least) approximately reflecting the value of the right of occupancy. Bedroom numbers alone do not tell one that value. The fact that 'service availability and general amenity' inevitably impact that value – and thus rational rent – is recognised not only in the Respondents' materials leading up to the First Determination (ABFM 185, 202[2.1], 207) but in the same Minister's approach to determining urban rent (ABFM 207). Whereas remote communities had a uniform rent per bedroom up to four bedrooms imposed, when the same Minister repeatedly determined urban rent, there was nuanced accounting for the location of each dwelling and the exact number of bedrooms. In urban settings, increments of as little as $5 (CoA [144]) are used by the Minister exercising the same Determination power to reflect differing 'service availability and general amenity' of public housing, including over distances of a mere 3km.[60] In urban settings, public housing rent is higher for more bedrooms in the same location. Rapid Creek in Darwin illustrates the point (ABFM 172). A one bedroom unit there is $300 per week. Less than 3km away in Coconut Grove,[61] the same is $20 less per week. Unlike in remote communities – but rationally – those urban public homes with more bedrooms are not indirectly subsidised by those with fewer, such that rent is higher for five and eight bedroom dwellings in Rapid Creek than for four bedroom dwellings. A failure to take account of the number of bedrooms over four bedrooms, as well as proximity to services or the built facilities and age of any remote house, rendered the Determinations unreasonable because of the objective salience of those considerations.[62]

51. *Second*, even if it was intelligible that there be a uniform per bedroom weekly rent rate for all remote communities, that was not what the Determinations imposed. Only some remote

[60] ABFM 172. See, for example, a one bedroom duplex comparing Larapinta with Araluen or a four bedroom house in parts of Katherine.
[61] For judicial notice on geographic matters pertaining to reasonableness, see, eg, *TTY167 v Republic of Nauru* (2018) 93 ALJR 111, [30].
[62] *Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 276 CLR 579, [41].

public housing tenants were impacted by the Determinations, while others were left on the rent rate agreed by them in individual contracts. This had significant impacts. By way of illustration, Ms Tilmouth had a rent rise of 50% in Laramba as a result of the First Determination.[63] A house with the same number of bedrooms in the neighbouring remote community of Anmatjere was excluded from that Determination's impact. The arbitrary exercise of the Determination power in this way cost Ms Tilmouth $560.[64] Similarly, Mr Badari and Ms Galaminda were the subject of a rent rise of over 200% by reason of the Determinations.[65] That meant that they could no longer give a birthday present to their child (ABFM 131[8]). Their community, Gunbalanya, continued to be subject to the Determinations when 17 communities were exempted from their operation by the Fourth Determination. This occurred for reasons unexplained and despite those communities being much closer to some of the most proximate public services to Gunbalanya.

52. *Third*, even if it was intelligible to impose an operational cost per bedroom rent, that was also not what the Determinations did. By way of illustration, and like many others impacted by the Determinations, the final weekly rent for Mr Nadjamerrek was set at $70 per bedroom. However, that was not in accordance with the 'costs-based model' on which the SAG was consulted and the NTCA relied. The SAG was told that the 'costs-based model' for a house with two bedrooms like Mr Nadjamerrek's would involve weekly rent of $117 (ABFM 200, 209). Under that model, his rent increase would have been only 18%, instead of 41%.[66] Contrary to the NTCA's speculation (based on a misunderstanding of the period involved (CoA [150])), the increase in rent per bedroom implemented in 2021 was well above inflation compared with what was put to the SAG in 2018. In any event, there was no evidence before the NTCA about inflation, nor was there evidence that inflation drove the jump in imposed weekly rent from less than $60 to $70 per bedroom.[67] For Mr Badari and Ms Galaminda, for example, that change costs them over $2,392 per year.[68] Thus, the

[63] From $140 to $210 per week: ABFM 10, 162[59].
[64] The period between the first two determinations was 16 weeks (5 January 2022–1 May 2022) during which Ms Tilmouth paid $175 instead of $140 per week (ABFM 145[3]). That additional $35 weekly totalled $560.
[65] The true increase is more likely to be greater than 245%, from $81 to $280 per week: ABFM 10, 345-6. Although it is noted that the original rent paid is not known: ABFM 167-8[49]). That is rent to which Mr Badari and Ms Galaminda agreed, as evidenced by their own actions.
[66] From $99 to $140 per week: ABFM 10, 348-9, 351.
[67] In fact, inflation was less than one third of what the NTCA speculated. According to the Reserve Bank of Australia, $60 in 2018 was worth $63.24 in 2021: see 'Inflation Calculator', *Reserve Bank of Australia* (Web Page) <https://www.rba.gov.au/calculator/annualDecimal.html>.
[68] According to the cost-based model put to the SAG, a four bedroom house would pay $234 per week: ABFM 200, 209. Under the Determinations, at the second stage, they were to pay $280. The difference of $46 multiplied by 52 weeks results in the increase identified.

rent rise was arbitrary even if the operational cost model from 2018 was intelligible.

53. That $10+ per bedroom per week increase was also irrational. The NTCA's asserted that there was 'no evidence' that that increase was 'on the basis that there had been an increase in Centrelink entitlements' (CoA [150]). That was contrary to the evidence filed by the Respondents. That evidence recorded that the increase was 'to reflect increases in Centrelink entitlements during the period between 2018 and 2021' (ABFM 146-147[15]). This was irrational in at least two ways. *First*, Centrelink is a source of income and an 'income based rent model' had been rejected by 'stakeholders' and not pursued as policy by the Respondents since 2018 (PJ [16]-[17]). *Second*, a significant proportion of remote public housing tenants, including Mr Badari (ABFM 128[5]), are not reliant on Centrelink.

54. *Fourth*, even if it would have been 'intelligible' for weekly rent to be set uniformly at $70 per bedroom, this is also not what the Determinations did. The first stage weekly rent was not $70 per bedroom for any dwelling. For example, it was $150 per bedroom for one bedroom dwellings (see, eg, ABFM 10). Even the second stage rent was not uniformly set at $70 per bedroom. The effect of 'capping' the rent for the 172 dwellings over four bedrooms (ABFM 381-382) was that the weekly rent per bedroom was effectively $56 for a five bedrooms, $46.67 for six bedrooms, $40 for seven bedrooms, $35 for eight bedrooms and only $31.11 for nine bedrooms. The Determinations thus did not impose 'a fixed rate of $70 per room' (cf CoA [91], [150]). The rents were more arbitrary than that.

55. *Fifth*, neither the involvement of the SAG nor the NT Cabinet changes the analysis (cf CoA [154]). There was no evidence that the SAG or Cabinet were involved at all after the First Determination (CoA [11], [90], [136]). When they were involved, they approved a model which applied equally to *all* remote communities, not an oscillating list. When the SAG was last involved in dialogue in 2018, they were also told that the rent rate for five bedroom houses would be greater than four bedroom houses, not that five bedroom house tenants would pay less rent even than the rate they were told reflected the 'cost-based model' (ABFM 146-7[14]-[15]). Further, neither the SAG nor Cabinet had any role in the decision to defer the second stage rent, even though that adversely impacted all tenants of three and four or more bedroom dwellings. Thus, even if it was intelligible to enact the policy the SAG or Cabinet approved, that is not what either Respondent did.

56. *Sixth*, the exercises of the Determination power were legally unreasonable because they were fundamentally unfair.[69] This was the result of any combination of the effects identified

[69] *SZVFW,* [59].

above at [10], [14] and [15]. In particular, each imposed an indefinite statutory bar on any remote tenant having rent rises and access to merits review of the rent applied to their particular dwelling. This was what excessive rent review by NTCAT under s 42 of the RTA allowed. By way of illustration, a tenant in a dwelling hit by a cyclone has no forward-looking legal recourse in respect of their rent during any reconstruction or repair process. That is objectively harsh when the purpose of the particular legislative scheme is to aid in the 'provision of housing' for those indigent people who have to depend for shelter on public housing (see above at [21], [25]-[27]). Even if that unfairness is a legal effect of the Determination power, putting it into effect with no prior notice at all (see above at [39]-[40]) made the effect especially harsh and legally unreasonable as a result.

57. NTCA's errors: On an appeal against a decision rejecting a ground of legal unreasonableness it is not necessary to establish any specific error, only error in the ultimate conclusion.[70] Nevertheless, it is worth noting where the NTCA erred.

58. *First*, the NTCA (mis)understood the recent case law of this Court concerning legal unreasonableness to be limited in significance to 'the decisions of tribunals' (CoA [157]).

59. *Second*, the NTCA eschewed the fact-intensive inquiry required (see above at [48]). Instead of considering how each of the three exercises of power affected the Appellants and all tenants of dwellings in the identified classes (see, eg, CoA [136]), the NTCA engaged in a global search for a policy rationale for the Determinations (CoA [158]). Even then, the NTCA failed to note that the asserted policy (CoA [158]) was only partially, as well as unjustly or arbitrarily, implemented by the Determinations, as set out above.

60. *Third*, the NTCA did not identify, let alone weigh, how the text, context, and purpose of the power (discussed at [23]-[27] above) informed the boundaries set by legal reasonableness. The most important such indicators relevant to the assessment of legal unreasonableness were that the Determination power appears in a suite of provisions designed to address homelessness and inadequate housing by providing for the leasing of houses by CEOH to persons of 'limited means'. In light of those statutory concerns, it was unreasonable for the new rent regime to be structured without regard to the existing tenants' ability to meet the new increased liability to pay rent, and without regard to the effect of depriving these indigent people of the statutory rights and protections in ss 41 and 42 of the RTA.

Part VII: Orders sought

61. There were four distinct classes in each of the Determinations. So much is made plain by

[70] *SZVFW*, [18], [20], [56]-[57], [78], [154]-[155].

the term 'class' being used as the descriptor of schedule 2 column 1 of each of those Determinations. The better view[71] is that each 'Gazette notice' in issue in this appeal records four distinct exercises of the power to determine 'the rent to be paid for… a class of dwelling': one exercise of the power for one bedroom dwellings, a separate exercise of the power for two bedroom dwellings, a further exercise of the power for three bedroom dwellings, and a fourth exercise of the power for four and more bedroom dwellings.

62. If that is accepted and the appeal is allowed, it would affect the appropriate relief, as arguably none of the Appellants had standing to challenge each exercise of the Determination power in respect of one bedroom dwellings.[72] As a result, the Court would only quash the Determinations as they relate to the other classes. Adopting the language of the relief initially sought (ABFM 399-400), the resulting order would be:

    (a) Appeal allowed.
    (b) Set aside order 1 made by the Court of Appeal, and *in lieu* thereof it be ordered that:
        (i) appeal allowed in proceeding AP 13/22 (2237775); and
        (ii) part (a) of the Determination of Rent Payable for Dwellings dated 23 December 2021, part (b)(i) of the Determination of Rent Payable for Dwellings dated 29 April 2022 and part (b) of the Determination of Rent Payable for Dwellings dated 2 September 2022 purportedly made under s 23 of the *Housing Act* be quashed *to the extent each is for the classes of two, three and/or four or more bedroom dwellings*;
    (c) The respondents pay the appellants' costs in this Court, and below in proceedings AP 13/22 (2237775) and 2022-01585-SC in the Supreme Court of the Northern Territory.

63. If the Court concludes that each Determination represented one exercise of the Determination power, the Appellants seek the same orders without the italicised phrase in (b)(ii) above, or those sought in the notice of appeal to this Court.

Part VIII: Estimate: The Appellants require 2 hours for their oral argument in chief.

DATED: 26 June 2025

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[71] This has been the Appellants' position throughout this proceeding (ABFM 385-386).
[72] *S10*, [68].

IN THE HIGH COURT OF AUSTRALIA

DARWIN REGISTRY

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF THE NORTHERN TERRITORY (D7/2025)

BETWEEN: **Asher Badari**

First Appellant

Ricane Galaminda

Second Appellant

Lofty Nadjamerrek

Third Appellant

Carmelena Tilmouth

Fourth Appellant

and

Minister for Territory Families and Urban Housing

First Respondent

Minister for Housing and Homelands

Second Respondent

ANNEXURE TO APPELLANTS' SUBMISSIONS

Pursuant to Practice Direction No 1 of 2024, the Appellants set out below a list of the statutes and statutory instruments referred to in their submissions.

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates
1.	*Interpretation Act 1978* (NT)	Version in force between 1 January 2022 and 3 March 2023.	Part VII, Division 1	This version was applicable at the time each of the four determinations was gazetted.	5/1/2022 (First Determination) 29/4/2022 (Second Determination) 2/9/2022 (Third Determination) 3/2/2023 (Fourth Determination)
2.	*Housing Act 1982* (NT)	Version in force between 1/7/2021 and 1/5/2023	ss 14, 15, 16, 17, 23 remainder of parts 1, 2 and 3 for contextual purposes heading to part 4 s 37	As above	As above
3.	*Housing Regulations 1983* (NT)	Version in force between 18/7/2016 and 30/4/2023	rr 2, 3, 4	As above	As above
4.	*Residential Tenancies Act 1999* (NT)	Version in force between 1/4/2021 and 2/1/2024	ss 4, 7, 19, 20, 41, 42	As above.	As above
5.	*Residential Tenancies Regulations 2000* (NT)	Version in force since 22/12/2021	r 10, Schedule 2	As above	As above
6.	*Housing Amendment Act 2000* (NT)	There is only one version.	ss 3, 4	As above	As above