

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
GROUP PROCEEDINGS LIST

Not Restricted

S ECI 2024 00280

BARRY BERIH

Plaintiff

v

HOMES VICTORIA

Defendant

JUDGE: Richards J
WHERE HELD: Melbourne
DATE OF HEARING: 28-29 October 2024, 27-28 February 2025
DATE OF JUDGMENT: 4 April 2025
CASE MAY BE CITED AS: Berih v Homes Victoria (No 4)
MEDIUM NEUTRAL CITATION: [2025] VSC 169

ADMINISTRATIVE LAW — Judicial review — Decision of Homes Victoria to implement a program to retire and redevelop 44 public housing towers in Melbourne — Group proceeding brought by resident of one public housing tower, seeking judicial review of Homes Victoria's decision — Whether Homes Victoria's decision justiciable — *Housing Act 1983* (Vic) ss 9, 15 — *Public Administration Act 2004* (Vic) ss 3, 5 — *Berih v State of Victoria* (No 2) [2024] VSC 230 — *Comcare v Banerji* (2019) 267 CLR 373.

ADMINISTRATIVE LAW — Judicial review — Procedural fairness — Whether Homes Victoria was obliged to give Group Members opportunity to be heard before making decision — Whether relevant power conditioned on observance of procedural fairness — Whether decision affected any legally recognised right or interest of Group Members — Whether realistic possibility of Homes Victoria making different decision if Group Members had been heard — *Housing Act 1983* (Vic) ss 6, 9, 10, 13, 14, 15, 18, 19, 32 — *Residential Tenancies Act 1997* (Vic) s 91ZY, pt 7 div 1 — *Keasey v Director of Housing* (2022) 66 VR 45 — *Badari v Minister for Territory Families and Urban Housing* [2025] NTCA 1.

HUMAN RIGHTS — Charter of Human Rights and Responsibilities — Right to home — Whether s 38(1) of Charter applied to decision — Whether Homes Victoria gave proper consideration to relevant human rights in making decision — Whether decision limits Group Members' human rights — Whether any limitation to human rights justified under s 7(2) of Charter — *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 4, 7(2), 13(a), 17(1), 20,

38 — *Keasey v Director of Housing* (2022) 66 VR 45 — *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441 — *Thompson v Minogue* (2021) 67 VR 301.

EVIDENCE — Objection to evidence — Plaintiff objected to evidence on grounds of inadmissible opinion and hearsay without identified basis, and sought exclusion of unfairly prejudicial evidence — Reasons for ruling that evidence admissible, other than some evidence excluded as unfairly prejudicial — *Evidence Act 1995* (Cth) ss 135, 136.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Ms K O’Gorman SC, with Mr L Howard, Mr T Farhall, and Ms G Cafarella	Inner Melbourne Community Legal
For the Defendant	Mr L Brown SC, with Ms E Smith and Mr J Maxwell	Victorian Government Solicitor

TABLE OF CONTENTS

Relevant provisions – Housing Act	4
The Decision	9
Ruling on objections to evidence.....	12
Can the Decision be reviewed by the Court?	18
Was Homes Victoria obliged to give Group Members an opportunity to be heard?	26
Was Homes Victoria obliged to observe procedural fairness?	34
Content of any obligation to observe procedural fairness	41
Could a hearing have made a difference to the Decision?	43
Did s 38(1) of the Charter apply to the Decision?	45
Did Homes Victoria give proper consideration to human rights?	47
Did the Decision limit human rights?.....	55
Is any limitation of human rights justified?.....	72
Should any remedy be granted?.....	87
Disposition.....	87

HER HONOUR:

- 1 Barry Berih lives in a flat in the public housing tower at 33 Alfred Street, North Melbourne, under a rental agreement with **Homes Victoria**. The Alfred Street tower is one of 44 public housing towers built by the former Housing Commission of Victoria in Melbourne between the 1950s and 1970s. All these public housing towers are now owned and managed by Homes Victoria, under the *Housing Act 1983* (Vic).
- 2 Homes Victoria is a body corporate established under the Housing Act, consisting of the Chief Executive Officer, Homes Victoria.¹ At the relevant time, that person was Simon Newport.
- 3 In September 2023, the Victorian Government decided to retire all of Melbourne's public housing towers and redevelop the land on which they are located, commencing with towers in Flemington, North Melbourne, and Carlton. Among the first towers to be retired are the Alfred Street tower in which Mr Berih lives and the towers located at 120 Racecourse Road, Flemington and 12 Holland Court, Flemington (together, the **Towers**). The **Redevelopment Program** was one of a number of policies related to housing supply and affordability set out in *Victoria's Housing Statement: The decade ahead 2024-2034*, announced by the Premier on 20 September 2023.
- 4 On 18 September 2023, Mr Newport decided to implement the Redevelopment Program. That implementation **Decision** is the subject of this proceeding.
- 5 On 24 January 2024, Mr Berih commenced this proceeding as a representative proceeding under pt 4A of the *Supreme Court Act 1986* (Vic), on his own behalf and on behalf of other renters in the Towers (**Group Members**). The defendant to the proceeding is Homes Victoria.²

¹ *Housing Act 1983* (Vic), s 9(2).

² Mr Berih initially brought the proceeding against the State of Victoria, the Minister for Housing, and Homes Victoria. He reformulated his claim following my earlier decision in *Berih v State of Victoria* (No 2) [2024] VSC 230 (*Berih No 2*), including by removing the State and the Minister as defendants.

- 6 Mr Berih seeks judicial review remedies in respect of the Decision, on three grounds:
- (a) First, he claims that in making the Decision under s 15(1) of the Housing Act, Homes Victoria was obliged to give Group Members an opportunity to be heard, it failed to do so, and its failure was material to the Decision.
 - (b) Second, he says that in making the Decision, Homes Victoria did not give proper consideration to relevant human rights of Group Members, contrary to s 38(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
 - (c) Third, he contends that the Decision was incompatible with Group Members' human rights, specifically their right under s 13(a) of the Charter not to have their home and family unlawfully or arbitrarily interfered with, their right under s 17(1) to protection of family, and their right under s 20 not to be deprived of their property other than in accordance with law.
- 7 Mr Berih seeks declarations that the Decision was invalid and unlawful. He also seeks injunctions restraining Homes Victoria from taking any further steps to implement the Decision, and requiring it to consult with Group Members before making any further decision to develop or demolish the Towers.
- 8 The issues for determination are:
- (a) Can the Court review the Decision? In legal terms, is the Decision justiciable?
 - (b) Was Homes Victoria obliged to give Group Members an opportunity to be heard before making the Decision? If so, did it fail to do so?
 - (c) Was there a realistic possibility that Homes Victoria could have made a different decision if it had given Group Members an opportunity to be heard?
 - (d) Did s 38(1) of the Charter apply to the Decision?
 - (e) In making the Decision, did Homes Victoria give proper consideration to relevant human rights?

- (f) Does the Decision limit Group Members' human rights?
- (g) Is any limitation of Group Members' human rights justified under s 7(2) of the Charter?
- (h) Should Mr Berih be granted the relief he seeks?

9 In summary, I have concluded that:

- (a) The Decision is justiciable and can be reviewed by the Court.
- (b) Homes Victoria did not have to give Group Members an opportunity to be heard before making the Decision. That is because Homes Victoria's statutory power to develop land is not conditioned on observing procedural fairness, and the Decision did not affect any legally recognised right or interest of Group Members.
- (c) In any event, there was no realistic possibility that Homes Victoria could have made a different decision, if it had heard from Group Members beforehand. A better understanding of the impact of the Decision on Group Members could not have changed Homes Victoria's assessment that residents must be relocated in order to address the many problems with the Towers, whether the Towers are redeveloped or retrofitted. Further, a substantial increase in the amount of housing on the sites can only be achieved by demolishing the Towers and redeveloping the sites. Hearing from Group Members could not have changed that reality.
- (d) Section 38(1) of the Charter applied to the Decision.
- (e) In making the Decision, Homes Victoria gave proper consideration to relevant human rights.
- (f) The Decision limited Group Members' human right not to have their homes arbitrarily interfered with, under s 13(a) of the Charter. It diminished their

security of tenure and will disperse the community that is an intrinsic part of their homes in the Towers. The Decision was made without prior notice or consultation, and so was arbitrary in the sense of being capricious and the result of unpredictable conduct.

- (g) The Decision was lawful, reasonable, and justified in accordance with s 7(2) of the Charter. Homes Victoria must do something to address the ongoing deterioration of the Towers. The Redevelopment Program is rationally directed to achieving that purpose. While the implementation of the Decision has diminished Group Members' security of tenure and will disperse their community, the alternative option of retrofitting the Towers would have a similar effect. In addition, the Redevelopment Program will substantially increase the amount of housing on the sites, to the benefit of a much wider group than the current renters in the Towers.
- (h) Mr Berih has not made out a case for the relief he seeks, and so the proceeding must be dismissed.

10 My reasons for those conclusions follow.

Relevant provisions – Housing Act

11 The Housing Act was enacted in 1983 to modernise housing law and improve housing administration in Victoria.³ The objects of the Housing Act are set out in s 6(1), as follows:

The objects of this Act are –

- (a) to ensure that every person in Victoria has adequate and appropriate housing at a price within his or her means by encouraging –
 - (i) the provision of well maintained public housing of suitable quality and location;
 - (ia) the participation of non-profit bodies in the provision of well maintained, affordable rental housing of suitable quality and location;

³ Housing Act, long title.

- (ii) the distribution, according to need, of Government housing financial assistance;
- (iii) the promotion of the orderly planning, assembly and development of land;
- (b) to expand and develop the role of the public sector in the provision of housing;
- (c) to promote cost effectiveness in the provision of housing;
- (d) to promote the integration of public and private housing;
- (e) to provide in the public sector a variety of housing types in various locations;
- (ea) to provide a regulatory framework to encourage the development of rental housing agencies serving the housing needs of low-income tenants by providing for the registration of those rental housing agencies and the regulation and monitoring of registered agencies;
- (f) to promote security and variety of tenure;
- (g) to seek the participation of tenants and other community groups in the management of public housing and non-distributing co-operatives engaged in the provision of rental housing to their members;
- (h) to promote consultation on major housing policy issues with all persons and groups of persons involved in housing;
- (i) to monitor the house building and housing finance industries in both the public and private sectors and to assist those industries to achieve growth and stability;
- (j) to co-ordinate the provision of all necessary community services and amenities ancillary to public housing;
- (l) to maximize employment opportunities in the housing sectors;
- (m) to give due regard to the environmental impact of the activities of the public housing sector;
- (n) to provide a safe and satisfying work environment for persons employed in the public housing sector; and
- (o) to promote public awareness of the role and functions of the public housing sector.

12 Section 6(2) provides:

It is the intention of the Parliament that the provisions of this Act shall be interpreted so as to further the objects set out in subsection (1) and that every power, authority, discretion, jurisdiction and duty conferred or imposed by this Act shall be exercised and performed so as by design and intent to promote

and achieve those objects.

- 13 Homes Victoria is established by s 9(2) of the Housing Act as a body corporate constituted by the Chief Executive Officer of Homes Victoria and their successors in office.⁴ It is capable of suing and being sued, acquiring, holding, and disposing of real property, and doing all other acts and things that a body corporate may by law do that are necessary for or incidental to the purposes of the Housing Act.⁵
- 14 The Chief Executive Officer of Homes Victoria is appointed and may be removed from office by the Governor in Council, and is in respect of that office subject to the *Public Administration Act 2004* (Vic), other than pt 3 of that Act.⁶
- 15 The functions of Homes Victoria are those conferred by the Housing Act, together with any functions conferred by the Minister.⁷
- 16 Section 10 of the Housing Act provides that Homes Victoria is subject to the direction and control of the Minister, in the following terms:
- (1) In the exercise of the powers, discretions, functions and authorities and in the discharge of the duties conferred or imposed upon Homes Victoria by or under this or any other Act, Homes Victoria shall be subject to the direction and control of the Minister.
 - (2) Homes Victoria shall furnish the Minister with such reports, documents, papers, minutes and other information as may be required by Parliament pursuant to any Act or pursuant to any order of either House of Parliament.
 - (3) Homes Victoria shall also provide the Minister with regular reports on all business of Homes Victoria and shall furnish the Minister with any information which the Minister may require.
- 17 Part III of the Housing Act gives Homes Victoria various powers in relation to property, which are also subject to Ministerial control. Section 13 provides:

⁴ Housing Act, ss 4(1) (definition of 'Homes Victoria'), 9.

⁵ Housing Act, s 9(2).

⁶ Housing Act, s 9(1)(a). Part 3 of the *Public Administration Act 2004* (Vic) deals with public service employment.

⁷ Housing Act, sub-ss 9(3), (3A).

Ministerial control

Without derogating from the generality of section 10(1), Homes Victoria shall be subject to the direction and control of the Minister in exercising the powers, discretions, functions and authorities and discharging the duties conferred or imposed upon Homes Victoria by or under this Part.

18 Section 14 enables Homes Victoria to acquire and dispose of land. Its powers under s 14 include a power to lease any land vested in it, subject to the *Residential Tenancies Act 1997* (Vic).⁸

19 Section 15 provides:

Power to develop and manage land

- (1) Homes Victoria may for the purposes of this Act and for all purposes ancillary to those purposes –
 - (a) develop any land which is vested in Homes Victoria or in respect of which Homes Victoria has a leasehold estate; and
 - (b) generally control, manage or use any land which is vested in or leased to or subject to any mortgage or security in favour of Homes Victoria; and
 - (c) maintain and repair and generally control, manage or use any houses and buildings situated on any such land as is referred to in paragraph (b); and
- (ca) at the request of the Secretary, and on terms and conditions agreed between Homes Victoria and the Secretary –
 - (i) develop any land which is vested in the Secretary or in respect of which the Secretary has a leasehold estate;
 - (ii) generally control, manage or use any land which is vested in or leased to or subject to any mortgage or security in favour of the Secretary;
 - (iii) maintain and repair and generally control, manage or use any houses and buildings situated on land referred to in subparagraph (ii); and
- (cb) at the request of a registered agency, and on terms and conditions agreed between Homes Victoria and the registered agency –
 - (i) develop any land which is vested in the agency or in

⁸ Housing Act, s 14(1)(g).

respect of which the agency has a leasehold estate;

- (ii) generally control, manage or use any land which is vested in or leased to or subject to any mortgage or security in favour of the agency;
- (iii) maintain and repair and generally control, manage or use any houses and buildings situated on land referred to in subparagraph (ii); and
- (d) with the consent of the Governor in Council and at the request and on behalf of, or in association with, and at the expense of the Commonwealth or the State of Victoria or any public department or authority of the Commonwealth or the State of Victoria or any municipal council –
 - (i) develop any land whether or not it is vested in Homes Victoria;
 - (ii) generally control, manage or use any such land; and
 - (iii) maintain and repair and generally control, manage or use any houses and buildings situated on any such land.
- (2) In subsection (1) the words *for all purposes ancillary to those purposes* include the provision of all necessary community services and amenities.

20 Some relevant definitions are found in s 4(1) of the Housing Act:

building includes a structure or a part of a structure;

development in relation to land, means –

- (a) the construction or demolition of a building on the land;
- (b) the carrying out of works in, on, over or under the land;
- (c) the making of a change in the use of the land;
- (d) the division of the land into two or more parts each capable of being separately occupied, used or disposed of or the resubdivision of land into different parts each capable of being separately occupied, used or disposed of;
- (e) the redevelopment of the land;

land includes buildings and other structures, land covered with water and any interest (including any leasehold interest), easement or right in or over land;

...

The Decision

- 21 Mr Berih initially sought judicial review of Cabinet’s policy decision to approve the Redevelopment Program, as announced in the Housing Statement. In *Berih v State of Victoria (No 2)* (***Berih No 2***),⁹ I held that Cabinet’s policy decision was not justiciable, and that the claim as it was then formulated had no real prospect of success.¹⁰ Mr Berih subsequently reformulated his claim to focus on Homes Victoria’s Decision to implement the Redevelopment Program.
- 22 Against this background, and in light of the parties’ arguments, it is necessary to set out in some detail the evidence regarding how and when the Decision was made, and its relationship with decisions of Cabinet.
- 23 Mr Newport commenced in the role of Chief Executive Officer of Homes Victoria on 31 July 2023. On the same date, he took up the role of Deputy Secretary to the **Department** of Families, Fairness and Housing.¹¹ When he commenced in those roles, he was instructed by the Secretary to the Department to prepare the Redevelopment Program policy for consideration by Cabinet, for inclusion in the Housing Statement.¹²
- 24 In the following weeks, Mr Newport and Department staff assigned to Homes Victoria worked on a Cabinet submission recommending the Redevelopment Program.
- 25 The Cabinet submission, the documents provided to Cabinet committees about the Redevelopment Program, and the documents used by Homes Victoria to prepare the Cabinet submission have all been ruled to be immune from production on the ground of public interest immunity and under ss 130 and 131A of the *Evidence Act 2008* (Vic).¹³ Consequently, none of those documents was in evidence.
- 26 According to Mr Newport, on Monday 18 September 2023, a Cabinet committee approved financial aspects of various initiatives for inclusion in the Housing

⁹ [2024] VSC 230.

¹⁰ *Berih No 2* [2024] VSC 230, [41]–[51].

¹¹ Affidavit of Simon Newport sworn 30 September 2024 (**Second Newport affidavit**), [1].

¹² Second Newport affidavit, [27].

¹³ *Berih v Homes Victoria (No 3)* [2025] VSC 30 (***Berih No 3***).

Statement, including the Redevelopment Program, beginning with the Towers and the two towers in Carlton (the **funding decision**). That afternoon, Mr Newport was advised of the funding decision by the manager of his office, who regularly deals with the Cabinet office. He did not receive written notification of the funding decision, but was told that the Redevelopment Program had been approved for inclusion in the Housing Statement.¹⁴ The minute of the Cabinet committee's funding decision was not in evidence.

27 Upon being informed of the funding decision, Mr Newport decided to take steps to give effect to it by commencing the Redevelopment Program.¹⁵ This decision made on 18 September 2023 is the Decision under review in this proceeding. It was the necessary first step towards implementing the Redevelopment Program, a large and complex exercise that will involve many other decisions and will take decades to complete. The Decision was an exercise of Homes Victoria's power to develop land, vested in it under s 15(1)(a) of the Housing Act.

28 Mr Newport did not make a written record of the Decision. The Cabinet submission was in his mind when he made the Decision, and he took it into account.¹⁶ He made some notes in his notebook of things to be done when the Redevelopment Program was announced. These notes were called for, produced, and tendered.¹⁷ They are clearly not a record of the Decision or Mr Newport's reasons for making it.

29 On Wednesday 20 September 2023, Cabinet approved relevant respective Ministers progressing specific initiatives for inclusion in the Housing Statement, including the Redevelopment Program, beginning with the Towers and the two Carlton towers (the **policy decision**). On the same day, the then Premier, the Honourable Daniel Andrews, announced the Housing Statement and the Department of Premier and

¹⁴ Second Newport affidavit, [28]–[29], [31]; Transcript of Proceedings, *Berih v Homes Victoria* (Supreme Court of Victoria, S ECI 2024 00280, Richards J, 28–29 October 2024, 27–28 February 2025) 27:11–30:8; 86:27–31 (Newport XXN) (**Transcript**).

¹⁵ Second Newport affidavit, [32].

¹⁶ Transcript, 35:8–37:31 (Newport XXN).

¹⁷ **Exhibit P4** – Mr Newport's handwritten note of 18 September 2023.

Cabinet published the Housing Statement on a Victorian Government website.¹⁸

- 30 The Housing Statement began with a message from the Premier, and outlined a range of policies related to housing supply and affordability. In a section headed ‘More social housing’, the Housing Statement announced a plan to retire ‘ageing high-rise towers across Melbourne, to provide homes that are modern, comfortable and energy efficient’. The plan was outlined under the sub-heading ‘What we’ll do’:¹⁹

Launch Australia’s biggest ever urban renewal project

Melbourne’s high-rise public housing towers were built after World War II, between the 1950s and 1970s. They’re reaching the end of their useful lives, and no longer fit for modern living. Constructed at a time that pre-dates current building codes, the towers no longer meet the minimum standards Victorians expect – including many of Victoria’s Better Apartment Design Standards. The towers fail against noise, sustainability, waste and recycling, bedroom area dimensions, room depth, ventilation, private open space, accessibility and minimum amenity standards. Substantial investment would be needed to retrofit the towers. But even then, their design means that many tower homes would never be able to meet contemporary codes, nationwide energy rating schemes or accessibility needs for many households.

We’ll launch Australia’s biggest ever urban renewal project: retiring and redeveloping all of Melbourne’s 44 ageing high-rise public housing estates by 2051. Starting with towers in Flemington, North Melbourne and Carlton, we’ll bring forward a program of works to progressively retire each tower and redevelop each site.

Not only will the redevelopment mean households will move into a new home that meets every modern building standard – it’ll boost the overall number of social homes across these sites by 10 per cent, while also boosting the number of affordable and market homes across the sites. There are currently around 10,000 people living across the 44 towers. Once we’ve redeveloped them, we anticipate around 30,000 people will live across these sites.

- 31 The minute of Cabinet’s policy decision was not in evidence. It is not clear whether it was communicated to Mr Newport, or whether he learned of it when the Premier announced the Housing Statement. Mr Newport did not receive any formal direction from the Minister under the Housing Act in relation to the Decision,²⁰ or in relation to

¹⁸ Second Newport affidavit, [30].

¹⁹ Affidavit of Louisa Bassini affirmed 15 February 2024, Exhibit LB-1, 36 (**First Bassini affidavit**).

²⁰ Transcript, 86:12–18 (Newport XXN).

the Redevelopment Program generally.²¹

32 I have had difficulty reconciling the sequence of events with Mr Newport's evidence that, in making the Decision, he also considered he was discharging his obligation to implement a policy decision made by Cabinet.²² The cause of the difficulty is that Mr Newport made the Decision two days before Cabinet made the policy decision. The actual trigger for the Decision was learning that a Cabinet committee had approved funding for the Redevelopment Program recommended by Homes Victoria. Mr Newport was confirmed in his Decision by Cabinet's subsequent approval of the Redevelopment Program. In other words, the policy decision of Cabinet aligned with the Decision that Mr Newport had already made.

33 Mr Berih first learned that his home was to be demolished through the media on 20 September 2023, when watching the Premier's press conference on television. On 21 September 2023, Mr Berih attended a meeting at the Alfred Street tower hosted by Homes Victoria where the retirement of the tower was announced.

Ruling on objections to evidence

34 The fact that Mr Newport had taken the Cabinet submission and related documents into account when he made the Decision did not emerge until he was cross-examined on the first day of the trial. Homes Victoria had until then maintained that there were no documents relevant to the Decision, and produced nothing in response to a disclosure order made on 17 September 2024.

35 After Mr Newport gave evidence that he had taken the Cabinet submission into account when he made the Decision, Mr Berih called for its production. He also called for the production of some technical reports that had informed Homes Victoria in its preparation of the Cabinet submission. Homes Victoria objected to producing the documents on the ground of public interest immunity, and sought additional time to file evidence in support of its claim. I adjourned the trial and referred the question

²¹ Transcript, 87:1–6 (Newport XXN).

²² Second Newport affidavit, [35].

whether the Cabinet submission was immune from production to another judge of the Court. Justice Keogh subsequently heard the objection, and determined that the documents were immune from production.²³

36 When the trial resumed on 27 February 2025, Mr Berih objected to four paragraphs in Mr Newport's affidavit of 30 September 2024 and seven passages of his evidence during cross-examination and in answer to questions from me. In summary, the evidence concerned Mr Newport's assertions that:

- (a) the public housing towers were reaching the end of their useful lives and were no longer fit for modern living;
- (b) continued occupation of the towers with periodic minor maintenance and upgrades was not a viable option;
- (c) retrofitting the towers would not be feasible, would not have any meaningful lower impact on renters than the redevelopment option, and would not achieve the objective of the Redevelopment Program as effectively and to the same extent; and
- (d) there was no way to address the problems with the towers without causing significant disruption to the renters, and either option was going to cause significant disruption.

37 The objections were that the evidence was inadmissible opinion, hearsay without any identified basis, and unfairly prejudicial evidence that should be excluded under s 135 of the Evidence Act. Alternatively, Mr Berih sought a direction under s 136 of the Evidence Act, limiting the use to be made of the evidence.

38 After hearing argument, I ruled that four passages of evidence given in answer to questions from me should be excluded under s 135, but otherwise did not uphold the

²³ See *Berih No 3* [2025] VSC 30.

objections. I now give my reasons for that ruling.

Submissions

39 Mr Berih submitted that the opinions expressed in paragraphs 17, 18, 23, and 34 of Mr Newport's affidavit were inadmissible because:

(a) Mr Newport was not qualified to express the opinions, being neither an engineer nor an architect; and

(b) the underlying facts and reasoning were not exposed.

40 Mr Berih made the same submission about some evidence given by Mr Newport in cross-examination, and in answer to my request that he elaborate on the basis for the opinion that retrofitting the towers was not feasible and would have no less impact on renters than demolishing the towers and redeveloping the sites.

41 Mr Berih identified a good deal of unattributed hearsay in the relevant paragraphs, on which Mr Newport apparently based his opinions. He made the point that it was not possible to tell whether Mr Newport was expressing his own opinions, or repeating the opinions of other people.

42 In relation to s 135, Mr Berih submitted that:

(a) the probative value of the evidence was low, being unqualified opinions based on unstated facts and reasoning;

(b) there was a danger that the evidence might be unfairly prejudicial to him, because without access to the Cabinet submission and supporting documents, he was unable to test the basis for the opinions; and

(c) that danger substantially outweighed the probative value of the evidence.

43 Mr Berih referred to *Seven Network Ltd v News Ltd (No 8)*²⁴ in relation to the meaning

²⁴ (2005) 224 ALR 317 (*Seven Network*). Mr Berih also referred to *Yara Pilbara Fertilisers Pty Ltd v Oswal* [2016] VSC 440, [164].

of ‘unfairly prejudicial’ in s 135. He emphasised that a procedural disadvantage may mean that a particular use of evidence might be unfairly prejudicial to a party. In *Seven Network*, there was a danger that generalised opinion evidence that could not effectively be tested in cross-examination might be unfairly prejudicial to the respondents.²⁵ Mr Berih submitted that the same danger existed in this case, both in relation to the opinions expressed by Mr Newport and as to whether he gave proper consideration to human rights in making the Decision.

44 An additional basis on which Mr Berih submitted that the passages of oral evidence should be excluded under s 135 was that those passages contained opinion and hearsay evidence given by Mr Newport for the first time, to which Mr Berih had no prior opportunity to object.

45 In response, Homes Victoria submitted that it was too late to be objecting to Mr Newport’s evidence, when his affidavits had been read without objection and the answers were given in cross-examination. It said that the matters about which Mr Berih now complains were apparent at that time, regardless of whether the documents he took into account were immune from production. Homes Victoria submitted that it would be unfair to it to rule out critical evidence at this late stage, when it was too late for it to adduce other evidence to fill that gap.

46 In relation to the hearsay objection, Homes Victoria submitted that any hearsay was admissible for a non-hearsay purpose, being to establish Mr Newport’s state of mind. It added that, once the evidence was admitted for that purpose, it could be relied on for other purposes.

47 Homes Victoria argued that Mr Newport was well qualified to express the opinions in question, based on his training, study, and experience. It pointed to his extensive experience in administering public housing stock, including repairs and maintenance. In any event, it said that the opinions were admissible for a non-opinion purpose,

²⁵ *Seven Network*, [23]–[24].

related to Mr Newport's state of mind and whether he gave proper consideration to relevant human rights.

48 Homes Victoria submitted that there was no danger of unfair prejudice, because both sides were disadvantaged by the unavailability of the documents that informed Mr Newport's opinions. It emphasised that it could not have waived public interest immunity, and relied on the weighing exercise undertaken by Keogh J in determining that the Cabinet documents were immune from production.²⁶

49 Homes Victoria said that the evidence in question was of significant probative value, as evidence of the decision-maker about his consideration of human rights and to justify any limitation of those rights. It submitted that the probative value of the evidence outweighed any prejudice to Mr Berih due to the application of a long-established immunity.

50 Homes Victoria relied on the Court of Appeal's treatment of similar opinion evidence in *Thompson v Minogue*.²⁷ In that case, generalised opinion evidence based on unattributed hearsay was relied on to justify a random urine testing regime that limited a prisoner's right to dignity in detention under s 22(1) of the Charter. The Court of Appeal considered that the evidence warranted 'appropriate weight' and was sufficient to justify the limitation.²⁸ Homes Victoria suggested that this analysis indicated the nature of evidence that could be relied on by public authorities in relation to s 38(1) of the Charter and used by the Court in 'this very idiosyncratic form of judicial review'.²⁹

Consideration

51 For the most part, the objections could and should have been taken at the time Mr Newport's affidavit was read and when he gave his answers in cross-examination. The basis for the objections was apparent at that time. However, the evidence was

²⁶ *Berih No 3* [2025] VSC 30, [83]–[92].

²⁷ *Thompson v Minogue* (2021) 67 VR 301, [264]–[269].

²⁸ *Thompson v Minogue* (2021) 67 VR 301, [269]–[270].

²⁹ Transcript, 166:5–6.

received without objection on the first day of the trial. It was simply too late to raise these objections when the trial resumed. To uphold the objections would have resulted either in unfairness to Homes Victoria or further delay in completing the trial, neither of which would have facilitated the just, efficient, timely, and cost-effective resolution of the matters in dispute.³⁰

52 Further, I accepted that Mr Newport was qualified to express opinions about the issues with the public housing towers and the options available to address them. He has specialised knowledge of asset management in the public housing sector, based on his study and experience. In relation to study, he has a bachelor's degree in business, is a chartered accountant, holds a Certificate IV in building and construction, and has a graduate certificate in asset management. He has 12 years' experience in the private residential building sector and another 12 years' experience in public housing in New South Wales and Victoria.³¹ Mr Newport's qualifications and experience are more than sufficient to qualify him to express the opinions in issue.

53 It is the case that Mr Newport's opinions are based in large part on unattributed hearsay, and that key documents relevant to his opinion – including technical reports commissioned by Homes Victoria – were not available to Mr Berih. While that impaired Mr Berih's ability to test the basis for Mr Newport's opinions, it also disadvantaged Homes Victoria because it was unable to rely on the documents to substantiate the opinions. As Homes Victoria submitted, the disadvantage cut both ways.

54 Critically, the immunity of the Cabinet documents from production was not a forensic choice made by Homes Victoria. It was not entitled to waive public interest immunity over the Cabinet documents; determination of the claim was a matter for the Court.³² In the event, the Court determined that the public interest in disclosure was outweighed by the public interest in maintaining the confidentiality of Cabinet

³⁰ *Civil Procedure Act 2010* (Vic), ss 7(1), 8(1).

³¹ Second Newport affidavit, [5]–[6].

³² *Victoria v Seal Rocks Victoria (Australia) Pty Ltd* (2001) 3 VR 1, [16]–[18] (Ormiston JA).

deliberations.³³ In those circumstances, I was not persuaded that the unavailability of the documents created a danger of unfair prejudice to Mr Berih.

55 Different considerations applied to the answers given by Mr Newport in answer to my questions, to which timely objection was taken. In relation to that evidence, there was a danger of unfair prejudice to Mr Berih, who had no prior opportunity to consider or respond to the evidence. It was not evidence adduced by Homes Victoria, which indicated that it did not regard the evidence as having great probative value. I accepted that those answers should be excluded under s 135 of the Evidence Act.

56 I should add that I did not accept Homes Victoria's suggestion that the Evidence Act somehow applies with less rigour to evidence adduced by a public authority to justify limiting a human right in accordance with s 7(2) of the Charter. The Court of Appeal's consideration of the evidence in *Thompson v Minogue* concerned weight rather than admissibility, in circumstances where the decision-maker's affidavit had been admitted without objection. It remains the case that a public authority that has limited a human right bears the onus of justifying that limitation by adducing admissible evidence sufficient to satisfy the stringent standard of demonstrable justification under s 7(2).³⁴

Can the Decision be reviewed by the Court?

Submissions

57 In closing, Homes Victoria raised for the first time an argument that the Decision was not justiciable — that is, that it could not be reviewed by the Court — because it was, in substance, a challenge to Cabinet's decision. Homes Victoria put the argument as follows:

- (a) Mr Berih had called for the production of the documents that informed Cabinet's decision, and then argued that it was unfair for Homes Victoria to

³³ *Berih No 3* [2025] VSC 30, [92].

³⁴ *Thompson v Minogue* (2021) 67 VR 301, [71]–[77].

defend the proceeding in the absence of those documents.

- (b) Mr Newport was cross-examined about when, in the process of preparing the Cabinet submission, he formed a view on the question of redeveloping the towers.
- (c) It is difficult to distinguish between the matters on which Mr Newport acted and the matters on which Cabinet acted.
- (d) Mr Berih's case focused heavily on the effect on him and other renters of the Premier's announcement of Cabinet's decision, to demonstrate lack of proper consideration and substantive limitation of human rights.
- (e) In *Berih No 2*, the Court ruled that Cabinet's decision was not justiciable. The reasons for that conclusion apply equally to the Decision made by Homes Victoria – the Decision did not have legal consequences, it was a policy decision involving competing considerations that the Court was not in a position to evaluate, and was not based on considerations specific to the individuals affected. Further, the Decision did not involve an exercise of statutory power; rather it was an exercise of a statutory capacity that Homes Victoria held in common with other legal persons and subject to the general law. The Decision did not have a sufficient effect on rights to be amenable to judicial review.

58 Homes Victoria referred to *Shire of Beechworth v Attorney-General*,³⁵ which concerned a decision of the Governor in Council to revoke the appointment of the Beechworth Court House as a place for the holding of Magistrates' Courts. Justice Vincent held that the decision could not be separated from the Government's policy of rationalising court administration, and was not properly the subject of judicial review.

59 The ultimate argument for Homes Victoria was that, if the Decision were amenable to

³⁵ [1991] 1 VR 325 (*Beechworth*).

judicial review, it would undermine the rationale for the non-justiciability of Cabinet decisions. It submitted that was so because in every case that Cabinet makes a policy decision of this nature, it must be followed by a decision of some character by a public servant to implement the decision. If those decisions were amenable to judicial review on standard grounds, it would be possible to attack any Cabinet decision through that proxy.

60 For those reasons, Homes Victoria submitted that the proceeding must fall at the first hurdle, because it was an attempt to impugn Cabinet's decision through the proxy of Mr Newport.

61 Mr Berih had no notice of this submission before it was made on the final day of the trial. He said in reply that the submission was hugely significant as a matter of both constitutional and administrative law, which would, if seriously put, call for notice to be given of a constitutional matter under s 78B of the *Judiciary Act 1903* (Cth). Mr Berih pointed out that the submission had the effect of short circuiting the Minister's power of direction under the Housing Act. He said that if that were accepted, it could impermissibly trespass on the Court's constitutionally protected supervisory jurisdiction.

62 Mr Berih disclaimed any intention to reagitate the issue of the justiciability of Cabinet decisions.

Consideration

63 Initially, Mr Berih did seek to impugn Cabinet's decision to redevelop all of Melbourne's public housing towers, starting with towers in Flemington, North Melbourne, and Carlton. Following my decision in *Berih No 2*, Mr Berih reformulated his claim to seek judicial review remedies in respect of a different 'decision' – namely, the Decision of Homes Victoria to implement the Redevelopment Program, described at [4] and [27] to [28] above. Although at times Mr Berih's submissions focused on the impact of the Premier's unheralded announcement that the towers were to be demolished, I accept that he is not seeking to challenge a decision of Cabinet by a

sidewind.

- 64 It is worth repeating here what I said in *Berih No 2* about the relationship between Cabinet and Homes Victoria:³⁶

The Housing Act places Homes Victoria within the structure of the executive government of Victoria. The Minister for Housing may confer functions on Homes Victoria, and vary those functions, by notice published in the Government Gazette.³⁷ Homes Victoria is subject to Ministerial control and direction, both generally under s 10, and specifically under s 13 in relation to the exercise of its property-related powers.³⁸ Homes Victoria sits within the **Department** of Families, Fairness and Housing established under the Public Administration Act, and may delegate its powers to an employee of the Department.³⁹ In addition, the Chief Executive Officer, Homes Victoria holds that office subject to the Public Administration Act (other than Pt 3 dealing with public service employment).

Cabinet plays a central role in Victoria's executive government:⁴⁰

It is the chief decision-making organ of the government; it is a forum for political strategy and personal interaction between Ministers; it provides an opportunity to planning political strategy; it is a body for resolving disputes between Ministers and departments, and for co-ordinating the activities of government; it manages crises and budgets.

However, Cabinet keeps a 'low legal profile'.⁴¹ It is not mentioned in the *Constitution Act 1975* (Vic), where its formal legal expression is the Executive Council.⁴² I have been unable to identify any Victorian statute that gives Cabinet power to make a decision with legal effect. Typically, a statutory power conferred on the elected government is reposed in an individual Minister or the Governor in Council. Cabinet's power within the structure of executive government derives from the conventions of responsible government, in particular the collective responsibility of Cabinet to Parliament for the administration of the executive government, and the convention that the Governor acts on the advice of the Executive Council.⁴³

Section 15 of the Housing Act does not preclude Cabinet from making high-

³⁶ *Berih No 2* [2024] VSC 230, [41]–[45]. The 'Decision' referred to was the decision of Cabinet to retire and redevelop all 44 public housing towers, starting with towers in Flemington, North Melbourne, and Carlton.

³⁷ Housing Act, s 9(3A).

³⁸ See also Housing Act, s 19 for Ministerial control in relation to finance powers of Homes Victoria, s 32 for Ministerial control in relation to other powers of Homes Victoria.

³⁹ Housing Act, ss 4(1) (definition of 'Department'), 35.

⁴⁰ Greg Taylor, *The Constitution of Victoria* (The Federation Press, 2006), 144 (Taylor, *The Constitution of Victoria*).

⁴¹ Taylor, *The Constitution of Victoria*, 144.

⁴² *Constitution Act 1975* (Vic), ss 87A–87E.

⁴³ *FAI Insurances v Winneke* (1982) 151 CLR 342, 364–5 (Mason J); Taylor, *The Constitution of Victoria*, 144–5, 157.

level policy decisions about public housing in Victoria. The structure of the Housing Act, with its repeated emphasis on Ministerial control,⁴⁴ presupposes that Cabinet’s deliberations will inform the Minister’s direction and control of Homes Victoria. It is unexceptionable that a commitment by the Victorian Government to replace a significant component of Victoria’s public housing stock should be the subject of a Cabinet decision — indeed, it would be extraordinary if it were not. A decision of that magnitude and complexity is exactly the kind of decision that should be made by Cabinet in a responsible government.

There is nothing at all to suggest that, in making the Decision, Cabinet purported to exercise any power under the Housing Act. There is no mention of the Housing Act in the Housing Statement, and no indication that the Decision involved any exercise of statutory power or was intended to have legal effect. Rather, the Decision formed part of a high-level policy statement on the large and complex issue of housing supply and affordability.

- 65 As Homes Victoria submitted, responsible government is a fundamental feature of Victoria’s *Constitution Act 1975* (Vic). The essence of responsible government is that the government of the State is conducted by Ministers who enjoy the confidence of the people and are politically accountable to the people through the Parliament.⁴⁵ As explained by Gageler J in *Comcare v Banerji*, in relation to the Commonwealth Constitution:⁴⁶

The political accountability of Ministers, Mason J observed in *FAI Insurances Ltd v Winneke*, has two elements. Each is facilitated by a different aspect of the operation of s 64 of the *Constitution*. One element, corresponding to the requirement of the section that Ministers be members of the Federal Executive Council, is the “collective responsibility” of Ministers to the Parliament and to electors for the whole conduct of the Executive Government of the Commonwealth. The other element, corresponding to the requirement of the section that Ministers be appointed to administer departments established by the Governor-General on the advice of the Federal Executive Council, is the “individual responsibility of Ministers to Parliament for the administration of their departments”.

- 66 In *Banerji*, all of the Justices held that laws directed to maintaining an apolitical public service were consistent with the system of representative and responsible government prescribed by the Commonwealth Constitution.⁴⁷ It is not a controversial proposition that responsible government depends upon an apolitical and professional public

⁴⁴ Housing Act, ss 10, 13, 19, 32.

⁴⁵ *Comcare v Banerji* (2019) 267 CLR 373, [59] (Gageler J) (*Banerji*).

⁴⁶ *Banerji* (2019) 267 CLR 373, [60] (Gageler J) (citations omitted).

⁴⁷ *Banerji* (2019) 267 CLR 373, [31] (Kiefel CJ, Bell, Keane and Nettle JJ), [100] (Gageler J), [111], [155] (Gordon J), [190] (Edelman J).

service that faithfully implements government policy.⁴⁸ In Victoria, this is reflected in the objects of the Public Administration Act, which include ensuring the maintenance of an apolitical public sector.⁴⁹

67 It does not follow that decisions of Cabinet are implemented by Ministers and public servants in a legal vacuum. Another feature of responsible government is that Parliament enacts legislation that confers powers and discretions on Ministers, statutory office-holders, and other public entities. This legislation, against the background of the common law, gives legal effect to political power. As noted in *Berih No 2*, Cabinet is typically not the repository of any legal power or discretion.⁵⁰ Decisions of Cabinet are implemented by Ministers, statutory office-holders and bodies, and the public service in accordance with their statutory powers and the general law.

68 These lines of accountability and responsibility are set out in the Victorian Public Sector Commission's *Secretaries Guide for Informing and Advising Ministers*,⁵¹ as follows:

Cabinet is the Victorian Government's principal decision-making body. Cabinet considers questions of policy, administration and legislation. All Ministers are part of Cabinet and have collective decision-making responsibility for Cabinet decisions (See further the Victorian Cabinet Handbook, available at: <https://www.vic.gov.au/cabinet-handbook>).

Individual Ministers may give directions to departments to implement their decisions or the decisions of Cabinet and are responsible for administering and overseeing their portfolios.

The role of the VPS is to support the government of the day to deliver its agenda. In accordance with the *Public Administration Act 2004* (Vic) (PAA) and the Code of Conduct for Victorian Public Sector Employees (the Code), the VPS:

- is professional and apolitical
- provides frank and impartial advice to support government decision-making

⁴⁸ *Banerji* (2019) 267 CLR 373, [34] (Kiefel CJ, Bell, Keane and Nettle JJ).

⁴⁹ Public Administration Act, s 3.

⁵⁰ *Berih No 2* [2024] VSC 230, [47].

⁵¹ Second Newport affidavit, Exhibit SAN-2(1), 18–9.

- implements government decisions.

The line of accountability under the Victorian system of government links from Secretaries, to the Minister, to Parliament, to the community:

- Secretaries are accountable to the Minister for their departmental responsibilities
- the Minister is accountable to Parliament for the actions and outcomes of the department and their portfolio
- the Government is accountable to the people, in their capacity as the electorate for the Parliament.

The board of a public entity is also accountable to the Minister for the exercise of its functions. Secretaries support Ministers to oversee public entities to enable Ministers to account to Parliament for a public entity's exercise of its functions.

- 69 Cabinet is not mentioned in the Housing Act. It has no power to own, develop, or manage property under the Housing Act. Those powers are conferred by Parliament on Homes Victoria, which as a public entity constituted under the Housing Act is accountable to the Minister.⁵² The Minister's powers of direction are the mechanism for ensuring that Government housing policy is implemented by Homes Victoria.
- 70 In this case, the Minister gave no direction. In his capacity as Chief Executive Officer, Homes Victoria,⁵³ Mr Newport decided to implement the Redevelopment Program on learning that a Cabinet committee had approved funding for it. The Decision was made two days before Cabinet approved the Redevelopment Program as part of the Housing Statement. While the Decision was informed by the work that Homes Victoria had done in preparing the Cabinet submission, it was a separate and distinct decision from that made by Cabinet.⁵⁴
- 71 Critically, the Decision involved an exercise of statutory power by Homes Victoria under s 15 of the Housing Act. I examine the nature of that power later in this

⁵² Public Administration Act, s 5; Housing Act, s 9(2). Section 9(1) of the Housing Act provides that the Chief Executive Officer, Homes Victoria is in respect of that office subject to the Public Administration Act, other than pt 3 of that Act. In other words, the provisions of the Public Administration Act relating to public service employment do not apply to the Chief Executive Officer, Homes Victoria.

⁵³ As distinct from Mr Newport's concurrent role of Deputy Secretary to the Department of Families, Fairness and Housing, which is not the repository of powers under the Housing Act.

⁵⁴ Cf *Beechworth* [1991] 1 VR 325, 332.

judgment.⁵⁵ On the question of justiciability, it is sufficient to note that the power under s 15 had to be exercised by Homes Victoria by reference to the subject-matter, scope, and purpose of the Housing Act.⁵⁶ It is the exercise of statutory power by a statutory body that distinguishes the Decision from Cabinet's decision considered in *Berih No 2*.

72 The supervisory jurisdiction of the State Supreme Courts is the mechanism for determining and enforcing the limits on the exercise of Victoria's executive power.⁵⁷ There is nothing in the Housing Act to suggest that the exercise of Homes Victoria's powers, including its power in s 15(1)(a), is not amenable to the supervisory jurisdiction of this Court in the usual way.

73 Aside from all of that, there is no clarity about what Cabinet decided in relation to the Redevelopment Program. All of the material considered by Cabinet is protected by public interest immunity, as are the records of its deliberations. Unsurprisingly, the minutes recording the funding decision and the policy decision were not tendered by Homes Victoria, and I do not know the terms of either decision.⁵⁸ The Housing Statement approved by Cabinet contains only a high-level summary of the Redevelopment Program and, critically, does not identify which towers in Flemington and North Melbourne are to be the first to be demolished.⁵⁹ The proceeding is properly focused on the Decision made by Homes Victoria, and not on a related decision of Cabinet that is, necessarily, shrouded in secrecy.

74 For those reasons, I reject Homes Victoria's submission that the decision is not justiciable. The Decision may be judicially reviewed.

⁵⁵ See [104]–[112] below.

⁵⁶ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39–40 (Mason J).

⁵⁷ *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁵⁸ Cf *Criminal Bar Association of New Zealand Inc v A-G* [2013] NZAR 1409, where the Cabinet minutes and other Cabinet documents were before the Court and are set out in detail in the judgment at [8]–[22].

⁵⁹ See [30] above.

Was Homes Victoria obliged to give Group Members an opportunity to be heard?

75 Both parties referred to the High Court's statement of general principle in *Minister for Immigration and Border Protection v SZSSJ*,⁶⁰ that 'a statute conferring a power the exercise of which is apt to affect an interest of an individual is presumed to confer that power on condition that the power is exercised in a manner that affords procedural fairness to that individual'.⁶¹ From that point, their arguments diverged.

Mr Berih's submissions

76 Mr Berih argued that Homes Victoria's power to demolish the Towers is the power in s 15(1)(a) of the Housing Act. He said that the power to demolish a building necessarily affects the interests of the residents in the building: they will permanently lose their tenancy and their home. Mr Berih referred to *Burgess v Director of Housing*⁶² and said that, like the decision to issue a notice to vacate in that case, the decision to demolish the Towers sufficiently exposes tenants to the risk of losing their tenancy to be regarded as affecting their rights and interests. He pointed out that a rental provider that intends to demolish rented premises may give a renter notice to vacate under s 91ZY of the Residential Tenancies Act. As such, he submitted that procedural fairness is an implied condition on the exercise of the power in s 15(1)(a).

77 In Mr Berih's submission, the requirements of procedural fairness are not confined to decisions affecting legal rights and interests. He characterised Homes Victoria's focus on legal rights as 'public law semantics',⁶³ and said that it was hard to understand how a power to demolish a building could be said not to affect the rights of the people who live in it. Mr Berih submitted that Homes Victoria's reliance on authorities concerning non-statutory executive power was misplaced, because the Decision was an exercise of Homes Victoria's statutory power under s 15 of the Housing Act. A statutory power to develop land is not analogous to a bare capacity to enter into

⁶⁰ (2016) 259 CLR 180 (*SZSSJ*).

⁶¹ *SZSSJ* (2016) 259 CLR 180, [75].

⁶² [2014] VSC 648, [157] (*Burgess*).

⁶³ Transcript, 174:24-27.

contracts and own land.⁶⁴

78 The interests of Mr Berih that were affected by the Decision were identified as:

- (a) the loss of his home, which has been modified to accommodate his disability, without any assurance that he will be provided with an alternative home that meets his needs;
- (b) his security of tenure in his home;
- (c) his interest in maintaining the community that exists in the Alfred Street tower; and
- (d) his right of quiet enjoyment of his home.

79 Mr Berih emphasised that, as a tenant, he was in a specific bilateral legal relationship with Homes Victoria – as was every other Group Member. The obligation to afford procedural fairness in respect of the Decision was owed to a specific and readily identifiable group of people. On that basis, he distinguished this case from *Geelong Community for Good Life Inc v Environment Protection Authority*,⁶⁵ in which a decision to amend Shell’s licence was held not to affect the plaintiff organisation or any distinct body of persons of which it was a part.⁶⁶

80 Mr Berih also sought to distinguish this case from the recent decision of the Northern Territory Court of Appeal in *Badari v Minister for Territory Families and Urban Housing*,⁶⁷ in which the Minister’s determinations of rent payable by public housing tenants were held not to require procedural fairness. In *Badari*, the determinations extended to unidentified and unidentifiable persons including future tenants, and was made by the Minister by reference to public policy considerations. Here, the Decision affected an identifiable group of tenants and was made by Homes Victoria rather than

⁶⁴ Referring to *Johnson v Kent* (1975) 132 CLR 164, 169–170 (Barwick CJ); cf *Griffith University v Tang* (2005) 221 CLR 99, [82] (Gummow, Callinan and Heydon JJ) (*Griffith University*).

⁶⁵ (2008) 20 VR 338 (*Geelong Community*).

⁶⁶ *Geelong Community* (2008) 20 VR 338, [21]–[22].

⁶⁷ [2025] NTCA 1 (*Badari*).

by a Minister.

81 Mr Berih said that procedural fairness is not displaced by the scheme of the Housing Act, despite there being no procedure specified to hear tenants in respect of a decision under s 15(1)(a).⁶⁸ Section 6 of the Housing Act contains strong indications to the contrary, requiring Homes Victoria to exercise its powers so as to promote and achieve objects including seeking the participation of tenants in the management of public housing and promoting consultation on major housing policy issues with all persons involved in housing.⁶⁹

82 Mr Berih rejected Homes Victoria's characterisation of the Decision as merely an early step in a multi-stage decision-making process. He pointed to evidence that he said established that the Decision was a decision to do everything in Homes Victoria's power to cause the demolition of the Towers — including a letter sent to renters in the Towers in October 2023 advising them that they would be moving house.⁷⁰

83 As to the content of procedural fairness, Mr Berih referred to High Court authority to the effect that the procedure to be adopted must achieve fairness in all the circumstances of the case, having regard to the legal framework in which the decision is to be made.⁷¹ He identified four circumstances that were relevant in this case:

(a) First, the substantial impact of the Decision indicated that Group Members were entitled to a substantial opportunity to be heard before it was made.

(b) Second, the Paving The Way Forward (**PTWF**) Local Action Plans for the

⁶⁸ Cf *Twist v Randwick Municipal Council* (1976) 136 CLR 106.

⁶⁹ Housing Act, sub-ss 6(1)(g)-(h), (2), set out at [11]–[12] above.

⁷⁰ Affidavit of Louisa Bassini affirmed 30 August 2024, Exhibit LB-6 (**Second Bassini affidavit**). Mr Berih also relied on Transcript, 29:17–21, 53:2–7, 54:15–19, 56:27–57:1 (Newport XXN); Second Newport affidavit, [18].

⁷¹ Referring to *Kioa v West* (1985) 159 CLR 550, 627 (Brennan J) (**Kioa**); *O'Rourke v Miller* (1985) 156 CLR 342, 353 (Gibbs CJ, Mason and Dawson JJ agreeing); *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, [156] (Hayne, Crennan, Kiefel and Bell JJ); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1; *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, [53] (Gageler and Gordon JJ) (**WZARH**); *Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, [31]–[35] (Gleeson CJ and Hayne J), [129], [143] (McHugh J), [189]–[193] (Kirby J).

Flemington and North Melbourne estates, authorised and published by the Victorian Government in 2022, gave a commitment that residents would be involved in the key decisions that affect their home, neighbourhood, and services.⁷² Meaningful involvement required an opportunity to be heard before the Decision to demolish the Towers was made, not a program to communicate information afterwards.

- (c) Third, the second report of the Social Housing Renewal Standing Advisory Committee (**SHRSAC Report 2**), delivered to the Minister for Planning in 2017, noted the Department's position that the towers in the Flemington public housing estate had recently been upgraded and that there was no current intention to replace them. The Committee agreed that a separate development plan would be required for any proposal to redevelop the towers, with community involvement in its preparation.⁷³
- (d) Fourth, the residents of the Towers have a diverse range of backgrounds and include vulnerable members of the community, so that the requirements of procedural fairness are more, not less, stringent.

84 In those circumstances, Homes Victoria was required to consult meaningfully with residents of the Towers and allow them an opportunity to be heard on any proposal to retire and redevelop the Towers *before* making the Decision. It should have consulted Group Members about the options being considered, the feasibility of alternative approaches such as retrofitting, the effect that demolition would have on individual renters and the community, how redevelopment could best meet their needs, and how the project should be managed to protect their interests.

85 Mr Berih also relied on the objects of the Housing Act – to promote security of tenure, to seek the participation of tenants in the management of public housing, and to promote consultation on major housing policy issues with all persons involved in

⁷² Second Bassini affidavit, Exhibits LB-02, LB-03.

⁷³ Second Bassini affidavit, Exhibit LB-21, 11–2.

housing.⁷⁴ He said that these objects were clear indications, not only that Parliament intended procedural fairness to be given, but also of the content of the obligation.

86 Homes Victoria engaged in no consultation at all before making the Decision. Instead, it commenced a communications program to inform residents of the decision it had already made.

87 Mr Berih said that had Homes Victoria consulted with residents of the Towers, there was a realistic possibility that it would not have made the Decision — or at least not at that time. In particular, had Homes Victoria been informed by residents of the drastic and irrevocable effect that the Decision will have on the communities in the Towers, there is a realistic possibility that it would first have considered the feasibility of retrofitting the Towers with upgraded services.

88 Mr Berih rejected the alternative submission of Homes Victoria that the requirements of procedural fairness were satisfied with respect to the Decision, because any renter who does not agree to relocate to another home will have an opportunity to be heard at the Victoria Civil and Administrative Tribunal (VCAT) before any possession order is made requiring them to leave their home. He said that the VCAT process could not replace genuine consultation by Homes Victoria, because by the time a renter reaches VCAT their security of tenure has been damaged and their community has been affected.

Homes Victoria's submissions

89 Homes Victoria submitted that its ability to make the Decision was not conditioned by an obligation to afford procedural fairness. It identified four features of the Decision that it said supported the contention that it was not subject to a requirement to afford procedural fairness.

90 *First*, Homes Victoria said that the power to develop land in s 15(1)(a) of the Housing Act is properly characterised as a bare capacity to (among other things) demolish a

⁷⁴ Referring to Housing Act, sub-ss 6(1)(f)–(h).

building. An exercise of the power does not, without more, affect tenants' rights or have legal effect.⁷⁵ Section 15(1)(a) does not of itself empower Homes Victoria to demolish a building; it can only lawfully do that once the building is vacant and all required planning and other approvals have been obtained. The Decision was no more than a decision to commence the Redevelopment Program. As a mere exercise of the capacity to develop land in s 15(1)(a), the Decision did not affect the legal right of renters to occupy their homes in accordance with their rental agreements.⁷⁶

91 *Second*, Homes Victoria submitted that the Decision was an early step to commence a multi-stage development process over an extended period. In these circumstances, the requirements of procedural fairness are ordinarily satisfied if the decision-making process viewed in its entirety entails procedural fairness.⁷⁷

92 It was relevant that Homes Victoria's power to develop land under s 15(1)(a) was not exhausted once Mr Newport had made the Decision; in legal terms, he was not *functus officio*. Continued implementation of the Redevelopment Program is contingent on further authorisation from the Minister and Cabinet at various stages, and the Decision might change if new circumstances arise.

93 Further, Homes Victoria pointed out that the Towers can only lawfully be demolished if they are not let to anyone, and Homes Victoria can only obtain vacant possession in accordance with the Residential Tenancies Act. Only VCAT can make a possession order under s 322 of that Act, after a process in which the renter may be heard on a broad range of issues. In other words, Homes Victoria submitted, the point at which a renter is entitled to be heard is the point at which they are actually being asked to leave.

94 *Third*, Homes Victoria said that the nature of the Decision – to implement a policy

⁷⁵ Referring to *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, [135] (Gageler J) (*Plaintiff M68*).

⁷⁶ Referring to *Griffith University* (2005) 221 CLR 99, [82] (Gummow, Callinan and Heydon JJ).

⁷⁷ Referring to *South Australia v O'Shea* (1987) 163 CLR 378, 389 (Mason CJ) (*O'Shea*); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 578 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Melbourne Water Corporation v Caligiuri* (2020) 60 VR 462.

decision of Cabinet, rather than to do justice to a particular individual – points against the existence of a duty to afford procedural fairness.⁷⁸ Policy decisions of this kind, involving political judgments, are not generally conditioned on procedural fairness.⁷⁹ Homes Victoria relied on the reasoning in *Badari*, and emphasised the need to have regard to the circumstances in which the Decision was made instead of focusing solely on the statute.⁸⁰

95 Moreover, the scope of the obligation to afford procedural fairness depends on the interests affected; a person is only entitled to be heard in relation to the interest that may be affected by a decision.⁸¹ Even if the Decision had affected tenants’ legal rights or interests, they would only have been entitled to be heard in relation to those interests, and not in relation to broader considerations such as the feasibility of retrofitting the Towers. The content of the duty to afford procedural fairness would have been nothing, because of the level of generality at which the Decision was made and the opportunities for renters to be heard about their individual circumstances later in the process.

96 *Fourth*, Homes Victoria submitted that the objects in s 6 of the Housing Act relied on by Mr Berih do not support the presumption of procedural fairness applying to the Decision. It referred to *Geelong Community*, in which a similar argument with respect to the principle of accountability in the *Environment Protection Act 1970* (Vic) was rejected.⁸²

97 Homes Victoria’s next contention was that, in any event, the requirements of procedural fairness were satisfied because the Decision was part of a multi-stage decision-making process that, viewed in its entirety, provides a fair opportunity for

⁷⁸ Referring to *O’Shea* (1987) 163 CLR 378; *McGuinness v New South Wales* (2009) 73 NSWLR 104, 120.

⁷⁹ Referring to *Nicholson-Brown v Jennings* (2007) 162 FCR 337, [62] (*Nicholson-Brown*); *Beechworth* [1991] 1 VR 325; *Badari v Minister for Territory Families and Urban Housing* [2022] NTSC 83, [46]–[48]; *Badari* [2025] NTCA 1, [128].

⁸⁰ Referring to *Badari* [2025] NTCA 1, [123].

⁸¹ Referring to *Disorganized Developments Pty Ltd v South Australia* (2023) 410 ALR 508, [45] (Kiefel CJ, Gageler, Gleeson and Jagot JJ) (*Disorganized Developments*); *Annetts v McCann* (1990) 170 CLR 596, 601 (Mason CJ, Deane and McHugh JJ) (*Annetts*).

⁸² Referring to *Geelong Community* (2008) 20 VR 338, [34].

renters to be heard.⁸³ In particular:

- (a) Renters have had an opportunity, following release of the Housing Statement, to make representations to Homes Victoria advocating for a change of policy position. If persuaded by those representations, Mr Newport could brief the Minister and Cabinet to recommend that Cabinet's policy position be altered. Homes Victoria pointed out that, since the Decision, representations made on behalf of renters have achieved a written confirmation that residents who are relocated to alternative housing 'will have a right of return to the site upon completion, based on their ongoing eligibility and needs'.⁸⁴
- (b) Any renter who does not agree to relocate to alternative accommodation has an opportunity to have VCAT consider their individual circumstances before deciding whether to grant a possession order. Homes Victoria referred to several decisions that it said illustrated the breadth of considerations that VCAT may consider when deciding whether it is reasonable and proportionate to grant a possession order.⁸⁵

98 Homes Victoria submitted that Mr Berih's reliance on the PTWF Local Action Plans and the SHRSAC Report 2 was misconceived. It said that neither document created an expectation that renters would be consulted before the Decision was made.

99 Finally in relation to this ground, Homes Victoria argued that Mr Berih had not discharged his onus of showing that an opportunity to be heard could realistically have made any difference to the Decision.⁸⁶ Mr Newport's clear evidence was that taking no action about the state of the Towers was not an option, retrofitting the Towers was not feasible, and both retrofitting and redeveloping would involve relocating renters. He was aware of, and considered, the significant disruption that

⁸³ Referring to *Nicholson-Brown* (2007) 162 FCR 337, [57]–[59], [62], [67].

⁸⁴ Second Bassini affidavit, Exhibit LB-41.

⁸⁵ *Hanson v Director of Housing* [2022] VSC 710 (*Hanson*); *Homes Victoria v Kelly (Residential Tenancies)* [2023] VCAT 807; *BYJ v RTE (Residential Tenancies)* [2024] VCAT 778.

⁸⁶ Referring to *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 418 ALR 152, [10], [14] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ) (*LPDT*).

the Redevelopment Program would cause existing renters, ‘by disrupting their home life, their connections to local supports and services, and their links to their communities in the towers and the surrounding area’.⁸⁷ The matters put to Mr Newport in cross-examination did not affect his reasons for making the Decision and could not realistically have made any difference.

Consideration

100 It is logical to consider the issues relating to procedural fairness in the following order:

- (a) Was Homes Victoria obliged to observe procedural fairness before making the Decision?
- (b) What was the content of any obligation to observe procedural fairness?
- (c) Could a hearing have made a difference to the Decision?

Was Homes Victoria obliged to observe procedural fairness?

101 As a general rule, a person is entitled to be heard before a decision that affects them is made. The entitlement to a hearing is one of the rules of procedural fairness, also known as natural justice.

102 In legal terms, there is a strong presumption that the exercise of a statutory power that may adversely affect legally recognised rights or interests is conditioned on the observance of procedural fairness.⁸⁸ That is, it is presumed that a person whose rights or interests may be affected by the decision must be given a hearing by the decision-maker, before the decision is made. The presumption operates unless clearly displaced by the relevant statute, and requires the provision of procedural fairness to individuals whose rights or interests are directly affected.⁸⁹

⁸⁷ Second Newport affidavit, [34].

⁸⁸ *Disorganized Developments* (2023) 410 ALR 508, [33] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [49] (Steward J).

⁸⁹ *Disorganized Developments* (2023) 410 ALR 508, [33] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [49] (Steward J).

103 Although the presumption is a broad one, it does not apply to statutory powers that affect a person in their capacity as a member of the public or a section of the public, as distinct from their individual capacity.⁹⁰ A power that singles out a particular person and affects their interests directly must be exercised fairly, while a power that indirectly or indiscriminately affects the rights and interests of a section of the public is generally not conditioned on the observance of procedural fairness.⁹¹ Drawing the distinction can be difficult, and requires close attention to the statutory power in question and the rights and interests that may be affected by its exercise. It may be relevant that the power is to be exercised by reference to broad questions of public interest, or political considerations, although that categorisation is not determinative.⁹²

104 The starting point in the analysis is therefore the power in s 15(1)(a) of the Housing Act.

105 Section 15 is set out at [19] above. It is located in pt III of the Housing Act, which gives Homes Victoria various powers as to property. The other powers in pt III are as follows:

- (a) Section 14 confers powers to acquire and dispose of land, including powers to purchase or compulsorily acquire land,⁹³ sell land vested in Homes Victoria,⁹⁴ and lease land vested in Homes Victoria or in which it has a leasehold interest.⁹⁵
- (b) Section 16 provides power to create easements on land vested in Homes Victoria,⁹⁶ and to recommend that the Governor in Council close streets and

⁹⁰ *Disorganized Developments* (2023) 410 ALR 508, [34] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [60]–[62] (Steward J).

⁹¹ *Kioa* (1985) 159 CLR 550, 584 (Mason J), 619–20 (Brennan J); *Botany Bay City Council v Minister for Transport and Regional Development* (1996) 66 FCR 537, 553–5; *Nicholson-Brown* (2007) 162 FCR 337, [62]; *Geelong Community* (2008) 20 VR 338, [22]; *Castle v Director-General, State Emergency Services* [2008] NSWCA 231, [6]–[9] (Basten JA) (*Castle*).

⁹² *O’Shea* (1987) 163 CLR 378, 386 (Mason CJ); *Castle* [2008] NSWCA 231, [7]–[8] (Basten JA).

⁹³ Housing Act, s 14(1)(a).

⁹⁴ Housing Act, s 14(1)(e).

⁹⁵ Housing Act, sub-ss 14(1)(g)–(h).

⁹⁶ Housing Act, sub-ss 16(1)(a), (2).

extinguish easements and restrictive covenants on land developed by Homes Victoria.⁹⁷

- (c) Section 17 enables Homes Victoria to accept donations, gifts, devises, and bequests, either absolutely or subject to a trust not substantially different from the objects of the Housing Act.
- (d) Section 18 allows Homes Victoria to enter into agreements for the sale or hire of a movable unit – that is, a house capable of being transferred from place to place.

106 A number of the powers in pt III are expressed to be subject to another Act or to the provisions with respect to property in sch 2. In particular:

- (a) the power to compulsorily acquire land is subject to the *Land Acquisition and Compensation Act 1986* (Vic) (**LAC Act**);⁹⁸
- (b) the power to lease land to another person is subject to the Residential Tenancies Act;⁹⁹
- (c) a recommendation to close a street or extinguish an easement or restrictive covenant may only be made by Homes Victoria after following the procedure in sch 2 item 8; and
- (d) Part 7 of the Residential Tenancies Act applies where Homes Victoria requires a person to vacate a moveable unit in which they are accommodated, after a hiring agreement has been determined.¹⁰⁰

107 Homes Victoria is subject to the direction and control of the Minister in exercising all of the powers, discretions, and functions in pt III.¹⁰¹ The Minister's power to direct

⁹⁷ Housing Act, s 16(1)(b).

⁹⁸ Housing Act, s 14(2), sch 2 item 1.

⁹⁹ Housing Act, sub-ss 14(1)(g)–(h).

¹⁰⁰ Housing Act, s 18(3).

¹⁰¹ Housing Act, s 13.

Homes Victoria in relation to property is in addition to the Minister's general direction and control of Homes Victoria under s 10 of the Housing Act.

- 108 Both Homes Victoria and the Minister are obliged by s 6(2) to exercise their powers under the Housing Act 'so as by design and intent to promote and achieve' the objects set out in s 6(1).
- 109 Powers as to finance are given to Homes Victoria in pt IV of the Housing Act, and other general powers are conferred by pt V. Both pts IV and V contain specific provision for Ministerial direction and control.¹⁰²
- 110 The following matters emerge from that survey of the powers conferred on Homes Victoria under the Housing Act:
- (a) The power in s 15(1)(a) is not in terms a power to demolish a home. It is a general power to develop land vested in or leased to Homes Victoria. By reason of the broad definition of 'development',¹⁰³ the power extends to the demolition of a building on the land.
 - (b) The power may be exercised on an ongoing basis. When Homes Victoria decides to develop particular land, the decision does not exhaust its power under s 15(1)(a) in relation to that land. That is, it is not *functus officio* at any point in the process of developing the land.
 - (c) The power to develop land in s 15(1)(a) is only one of the powers to develop and manage land given by s 15, which in turn forms part of the broad suite of powers as to property under pt III of the Housing Act. None of the powers is expressed in terms that require consideration of the individual circumstances of people who may be affected by their exercise. All of them must be exercised 'for the purposes of this Act' and with design and intent to promote and achieve

¹⁰² Housing Act, ss 19, 32.

¹⁰³ Housing Act, s 4(1) (definition of 'development') – see [20] above.

the objects of the Housing Act.

- (d) The objects of the Housing Act are multidimensional. They direct attention to a wide range of policy considerations, which may conflict. The Housing Act leaves it to Homes Victoria to determine how best to achieve its objects, and what weight to give to competing considerations. The objects of seeking tenant participation and promoting consultation must be balanced with the other objects of the Housing Act. They do not equate to an obligation to observe procedural fairness before exercising the power in s 15(1)(a).
- (e) The presence of specific and general powers of Ministerial control and direction in ss 10 and 13 reinforces the conclusion that the power in s 15(1)(a) is to be exercised by reference to policy and political considerations.
- (f) The terms of s 15(1)(a) do not identify the persons or classes of persons who may be affected by the exercise of the power. Because the power is expressed in such general terms, it may be exercised so as to affect a single person, without affecting anyone's rights or interests, or — as here — in a way that affects a large but identifiable group of existing renters and an unidentifiable group of potential future renters. Whether the exercise of the power affects legally recognised rights or interests turns on the nature and circumstances of the decision, rather than the nature of the power.
- (g) On the other hand, where the exercise of a power in pt III may affect the legal rights of individual tenants or owners of land, specific provision is made for the process by which that is to occur. The Residential Tenancies Act applies where Homes Victoria leases land to another person, the LAC Act applies to the compulsory acquisition of land, and the procedure prescribed in sch 2 of the Housing Act must be followed before an easement or restrictive covenant can be extinguished.

111 All of these features of the power in s 15(1)(a) lead me to conclude that its exercise is

not conditioned on the observance of procedural fairness. Although an exercise of the power may affect individual interests, any effect will be indirect and due to the person's relationship with the land in question. Development of particular land by Homes Victoria will indiscriminately affect the rights and interests of any person with an interest in the land, regardless of their individual circumstances.

112 I was not assisted by Homes Victoria's submission that the power in s 15 is a 'bare capacity'. The submission drew on authority concerning non-statutory executive power,¹⁰⁴ which has no application to the exercise of a statutory power by a statutory entity. Mr Newport's power to make the Decision was conferred on him by s 15(1)(a) of the Housing Act, in his capacity as the Chief Executive Officer, Homes Victoria. He did not make the Decision in his concurrent capacity as Deputy Secretary of the Department, nor as a member of the Victorian public service. He made it in his capacity as the person constituting Homes Victoria.

113 Even if Homes Victoria was required to observe procedural fairness before making the Decision, the right to be heard only extended to those whose 'legally recognised rights or interests' might be adversely affected.¹⁰⁵ The next question is therefore whether the Decision affected any legally recognised interest of Mr Berih.

114 Considering Mr Berih's claimed interests in turn:¹⁰⁶

- (a) The Decision did not, of itself, result in Mr Berih losing his home. He remains living in his flat under a rental agreement with Homes Victoria, and may only be required to leave if VCAT makes a possession order under pt 7 div 1 of the Residential Tenancies Act.
- (b) It was arguable that the Decision diminished Mr Berih's security of tenure in his home. Section 91ZY of the Residential Tenancies Act enables Homes

¹⁰⁴ E.g., *Plaintiff M68* (2016) 257 CLR 42, [129]–[136] (Gageler J); *Hampton v Commissioner of Australian Federal Police* [2024] FCA 1079, [152]–[177].

¹⁰⁵ *Disorganized Developments* (2023) 410 ALR 508, [33].

¹⁰⁶ See [78] above.

Victoria to give Mr Berih notice to vacate his flat if it intends to demolish the premises, and it has obtained all necessary permits and consents to do so. The Decision carries with it an intent to demolish the Alfred Street tower, and creates one of the conditions for giving notice to vacate under s 91ZY. In *Burgess*, service of a notice to vacate had a sufficient effect on the tenant's security of tenure to give rise to a right to be heard.¹⁰⁷ However, a similar argument was rejected by the Court of Appeal in *Keasey v Director of Housing*.¹⁰⁸ In light of the reasoning in *Keasey*, and the fact that VCAT may now only make a possession order if satisfied that it is reasonable and proportionate to do so, I do not consider that the Decision sufficiently affected Mr Berih's security of tenure to entitle him to be heard beforehand.

- (c) I accept that Mr Berih cherishes the community that exists around the Alfred Street tower, and will lose something he values if that community is dispersed. However, I am not persuaded that his interest in preserving that community is a legally recognised interest for procedural fairness purposes. Mr Berih did not point to any authority that might support that conclusion.
- (d) I do not consider that the Decision adversely affected Mr Berih's quiet enjoyment of his home under his rental agreement. Homes Victoria's communication of the Decision to renters did not involve entry into, or disturbing Mr Berih in, his home. At most, Homes Victoria staff knocked on his door, and left a calling card for him if he did not answer. Information booths were set up in communal spaces in the Towers and community forums were conducted off-site.

115 For those reasons, I do not consider that the Decision affected a legally recognised interest of Mr Berih.

¹⁰⁷ *Burgess* [2014] VSC 648, [156]–[157].

¹⁰⁸ (2022) 66 VR 45, [29]–[30] (*Keasey*).

Content of any obligation to observe procedural fairness

- 116 Where the exercise of a power is conditioned on the observance of procedural fairness, the content of the obligation may vary, depending on the circumstances in which the power has been exercised and the interests that may be affected.¹⁰⁹ If, contrary to the conclusions I have reached, the power in s 15(1)(a) was conditioned on observing procedural fairness, and the Decision adversely affected a legally recognised interest of Mr Berih's, it would still be necessary to determine the content of the obligation to observe procedural fairness in the circumstances of the Decision.
- 117 As Homes Victoria submitted, a right to be heard is limited by the interest that is apt to be adversely affected by the exercise of the power.¹¹⁰ At their highest, Mr Berih's interests are remaining in his home and preserving the community around the Alfred Street tower. A reasonable opportunity to be heard in relation to those interests would have involved a chance for Mr Berih to make representations about the effect that demolition and redevelopment would have on him and his community, and how his interests could best be protected during the redevelopment process. It could also have involved hearing Mr Berih's views about continuing the existing state of affairs at the Alfred Street tower, as an alternative to either renovating or demolishing the tower.
- 118 However, I do not see that Mr Berih's interests would have entitled him to make submissions about the feasibility of renovating and retrofitting the Alfred Street tower, or all three Towers, as an alternative to demolition and redevelopment. These were technical matters beyond his knowledge. The same may be said about the policy issues that Homes Victoria had to resolve, by reference to the objects of the Housing Act. Those objects extend well beyond the interests of current renters, to ensuring that every person in Victoria has adequate and appropriate housing at a price within their means, providing well maintained public housing of suitable quality, and promoting

¹⁰⁹ *Disorganized Developments* (2023) 410 ALR 508, [43]–[45] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); *Badari* [2025] NTCA 1, [125]–[126].

¹¹⁰ *Annetts* (1990) 170 CLR 596, 601 (Mason CJ, Deane and McHugh JJ); *Disorganized Developments* (2023) 410 ALR 508, [45] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

orderly development of land and cost effectiveness in the provision of housing.¹¹¹

119 Even where a statute requires consultation in respect of the exercise of a general power, the requirement ‘is far removed in context and scope from the situations in which the common law has recognised a duty of procedural fairness’.¹¹² Here, the Housing Act does not require Homes Victoria to consult with anyone before exercising its powers to manage land. The objects of the Housing Act to seek tenant participation and promote consultation with groups involved in housing do not go that far. I am unsure how those objects could inform the content of an obligation to observe procedural fairness, given their generality.

120 I have not overlooked the PTWF Local Action Plans for the Flemington and North Melbourne estates, which were developed in the aftermath of the lockdown of the Flemington and North Melbourne towers during the COVID-19 pandemic. The plans were published in 2022, and included a commitment to involve residents in key decisions that affect their homes and neighbourhoods. Mr Berih and other renters might reasonably have expected Homes Victoria to honour that commitment before making the Decision, using the ‘empowered renter decision-making models’ developed under the plans.¹¹³ They might reasonably feel that Homes Victoria broke faith with them by not doing so.

121 However, the PTWF Local Action Plans were not legally binding on Homes Victoria or the Victorian Government. While I accept that they may have created legitimate expectations in renters to be involved in key decisions about their homes, that would not provide a basis for determining the content of an obligation to observe procedural fairness.¹¹⁴

¹¹¹ Housing Act, ss 6(1)(a)(i), (iii), (c).

¹¹² *R (on the application of Moseley) v Haringey London Borough Council* [2014] WLR 3947, [38] (Lord Reed, Lady Hale DP and Lord Clarke agreeing). See also *Wilderness Society Inc v Turnbull, Minister for the Environment and Water Resources* (2007) 166 FCR 154, [85]–[86], [88] (Branson and Finn JJ), [94] (Tamberlin J).

¹¹³ Second Bassini affidavit, Exhibit LB-02, 29, Exhibit LB-03, 29.

¹¹⁴ *WZARH* (2015) 256 CLR 326, [30] (Kiefel, Bell and Keane JJ).

122 I am reinforced in my conclusions by the recent judgment of the Northern Territory Court of Appeal in *Badari*. That case concerned the Minister’s power under s 23 of the *Housing Act 1982* (NT) to determine the rent to be paid for public housing dwellings. The appellants were all public housing tenants in remote communities in the Northern Territory, who were affected by determinations to increase the rent payable for their dwellings. The Court of Appeal upheld the trial judge’s conclusion that, having regard to the nature of the interests that might be affected by the exercise of the power, and the relevant legislative framework, the nature and extent of the obligation to afford procedural fairness did not require the Minister to hear the appellants before making a determination.¹¹⁵ This was because the persons affected by an exercise of the power were numerous and difficult to identify, extending beyond existing tenants to an unidentifiable group of possible future tenants.¹¹⁶ In addition, any determination of rent levels was ‘overlaid by public finance and political considerations’ and made by reference to public policy rather than considerations personal to the appellants.¹¹⁷ The same considerations are present in this case.

Could a hearing have made a difference to the Decision?

123 A failure to observe procedural fairness, where that is required, will only amount to a jurisdictional error if the failure was material to the decision. A plaintiff must demonstrate that there is a realistic possibility that the decision that was in fact made could have been different if they had been given an opportunity to be heard. The inquiry is wholly backward-looking, by reference to the decision that was made and how it was made.¹¹⁸

124 Mr Berih gave evidence of the matters he would have put forward for consideration, had he been given the opportunity:¹¹⁹

Had I had the opportunity to talk to the government before it made the decision to demolish the towers I would have advocated for the renovation of the

¹¹⁵ *Badari* [2025] NTCA 1, [123], [125].

¹¹⁶ *Badari* [2025] NTCA 1, [127].

¹¹⁷ *Badari* [2025] NTCA 1, [128]–[129].

¹¹⁸ *LPDT* (2024) 418 ALR 152, [7], [9]–[16] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

¹¹⁹ Affidavit of Barry Berih affirmed 23 August 2024, [59]–[60], [63] (**Berih affidavit**).

towers, not for a knock down. It is true that the towers around me need to be renovated. They may look ugly to some people, fine. You can fix that if you want. They are not ugly to us (ie, the residents in the towers). They are our home. What they look like does not matter to us. The love we have built around the towers is what matters.

I do not want the demolition of the towers to happen to me or my community.

...

If the government came to us to discuss a proposal to demolish the towers, we could have shown them the community of residents and the communities within that community (like my Eritrean community) we have built up in these towers, and what this residential community and these other communities mean to us all, how important these communities are for each individual, and why our tower should remain. That is what PTWF was supposed to be for. We could have taken decision makers through all of the spaces I have explained in this affidavit and the ties and networks that are around them. I could have explained why our lives would be so much worse if we were forced to relocate our homes to different places around Melbourne. Without these spaces the community cannot exist. They would not have made the decision if they knew what we have, and what it means for us.

- 125 Mr Newport readily accepted that, if Homes Victoria had asked residents of the Towers to explain the effects on them of demolishing their homes, it might have learned things it did not already know. He recognised that empathy only goes so far, and is not a substitute for lived experience.¹²⁰ However, he did not accept – indeed, it was not put to him – that the Decision could have been different as a result of greater understanding of the impacts on renters, or on certain groups of renters with shared background and experience.
- 126 Key reasons for the Decision were that taking no action about the state of the Towers was not an option, retrofitting the Towers was not feasible, and both retrofitting and redeveloping would involve relocating renters.¹²¹ Mr Newport was aware of, and considered, the significant disruption that the Redevelopment Program would cause existing renters, ‘by disrupting their home life, their connections to local supports and services, and their links to their communities in the towers and the surrounding area’.¹²² I am not persuaded that a better understanding of these impacts could

¹²⁰ Transcript, 75:29–80:5 (Newport XXN).

¹²¹ Second Newport affidavit, [17]–[18], [23], [34].

¹²² Second Newport affidavit, [34].

realistically have changed the Decision. In particular, it would not have affected Mr Newport's assessment that any of the options available to address the problems with the Towers would involve relocating residents.

127 A further and equally important reason for the Decision is that the Redevelopment Program will substantially increase the amount of housing on the sites of the Towers. This purpose realistically can only be achieved by demolishing the Towers and redeveloping the sites. I am not satisfied that anything that Mr Berih or other Group Members might have said could have changed that reality.

128 For those reasons also, the procedural fairness ground is not made out.

Did s 38(1) of the Charter apply to the Decision?

129 Division 4 of pt 3 of the Charter sets out the obligations of public authorities. Section 38(1) provides:

Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

130 Section 38(1) imposes on public authorities both a procedural obligation to give proper consideration to relevant human rights in making a decision, and a substantive obligation not to act incompatibly with a human right.¹²³

131 Homes Victoria is unquestionably a 'public authority' for the purposes of the Charter.¹²⁴

132 Section 38(2) of the Charter provides:

Subsection (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.

¹²³ See generally *Thompson v Minogue* (2021) 67 VR 301, [79]–[93] (procedural limb), [94]–[101] (substantive limb).

¹²⁴ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 4(1). The definition of 'public authority' includes 'an entity established by a statutory provision that has functions of a public nature': s 4(1)(b).

Example

Where the public authority is acting to give effect to a statutory provision that is incompatible with a human right.

- 133 Homes Victoria contended that Mr Newport was legally bound to make the Decision, in light of Cabinet’s decision and his position in Victoria’s system of responsible government. As he could not reasonably have acted differently or made a different decision, Homes Victoria argued that s 38(1) did not apply to the Decision.¹²⁵
- 134 This contention had the same foundation as the argument that the Decision was not justiciable. For the reasons I have already given, the contention is not made out on the evidence.¹²⁶ In brief summary:
- (a) Mr Newport made the Decision on learning that a Cabinet committee had approved funding for the Redevelopment Program, two days before Cabinet approved the Redevelopment Program as part of the Housing Statement.
 - (b) There was no direct evidence of what Cabinet decided.
 - (c) The Minister did not give any direction to Homes Victoria in respect of the Redevelopment Program.
 - (d) While the Decision was informed by the work that Homes Victoria had done in preparing the Cabinet submission, it was a separate and distinct decision from that made by Cabinet.
- 135 I also do not consider the contention to be legally sound. As discussed, responsible government does not involve the implementation of Cabinet decisions in a legal vacuum.¹²⁷ Cabinet is not the repository of any power under the Housing Act, and Homes Victoria is not accountable to Cabinet. Rather, it is subject to the direction and control of the Minister, who is responsible to Parliament for the administration of the Housing Act. In this case, the Decision was made by Homes Victoria in the exercise

¹²⁵ Referring to *MB v Children’s Court of Victoria* (2023) 72 VR 357, [38].

¹²⁶ See [22]–[32] and [69]–[72] above.

¹²⁷ See [64]–[68] above.

of its power to develop land in s 15(1) of the Housing Act, and not at the direction of the Minister.

136 For those reasons, I conclude that s 38(1) of the Charter applies to the Decision.

Did Homes Victoria give proper consideration to human rights?

137 Section 38(1) of the Charter requires a public authority, in making a decision, to give proper consideration to a relevant human right. To achieve this, a decision-maker must:

- (a) understand in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision;
- (b) seriously turn their mind to the possible impact of the decision on a person's human rights and the implications for the affected person;
- (c) identify the countervailing interests or obligations; and
- (d) balance competing private and public interests as part of the exercise of justification.¹²⁸

138 There is no formula for giving proper consideration to relevant human rights and it is not a sophisticated legal exercise.¹²⁹ What is required of a public authority is a 'broad and general assessment of whether the impact that its conduct will have upon a relevant human right is appropriate in all the circumstances'.¹³⁰ 'Proper' consideration of human rights must be of substance, and not tokenistic.¹³¹

139 The obligation to give proper consideration to a relevant human right arises where a

¹²⁸ *HJ v Independent Broad-Based Anti-Corruption Commission* (2021) 64 VR 270, [155].

¹²⁹ *Thompson v Minogue* (2021) 67 VR 301, [87].

¹³⁰ *Thompson v Minogue* (2021) 67 VR 301, [89].

¹³¹ *Thompson v Minogue* (2021) 67 VR 301, [91].

potential decision engages the right — that is, that it may apparently limit the right.¹³²

Mr Berih's submissions

140 Mr Berih contended that the Decision engaged and limited his and Group Members' rights:

- (a) not to have their family or home unlawfully or arbitrarily interfered with, under s 13(a) of the Charter;
- (b) to protection of their families, under s 17(1); and
- (c) not to be deprived of their property other than in accordance with law, under s 20.

141 Mr Berih placed greatest reliance on the s 13(a) right. He acknowledged that he could not establish unlawfulness for the purposes of the ss 13(a) and 20 rights, unless he succeeded on another ground — either by making out his procedural fairness ground, or demonstrating that another right was limited by the Decision. He accepted that the right to protection of family in s 17(1) added little to the right to family and home in s 13(a).

142 Mr Berih submitted that Homes Victoria failed to turn its mind to two specific impacts of the Decision on his right to home in s 13(a). First, he said that Homes Victoria failed to consider the impact of the Decision being made arbitrarily — that is, unilaterally and without consultation. Second, he said that Mr Newport had not turned his mind to the impact of the Redevelopment Program being announced by the Premier in a media conference, as part of the Housing Statement. Mr Berih described in his affidavit his reaction to learning, without any warning, that his home was to be demolished:¹³³

I felt panic and anger. The government was doing this to us again: they have made a decision on the community's future without even asking us what we

¹³² *Antunovic v Dawson* (2010) 30 VR 355, [70]; *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647, [102] (*De Bruyn*).

¹³³ Berih affidavit, [56].

wanted. I spent the rest of the day answering calls from people in the community who were calling me to ask what was going on and what I knew about it.

143 In addition, Mr Berih submitted that Mr Newport had not sufficiently taken into account the significant impact that the Redevelopment Program would have on Group Members' right to home. He said that the evidence showed that Mr Newport only took into account a limited set of considerations, and did not consider the substantive right of Group Members to live in their homes. Mr Berih relied on the following evidence in support of that proposition:

- (a) Mr Newport's evidence to the effect that he did not consider the merits of demolishing the Towers afresh after Cabinet had made its decision, together with his evidence that he was obliged to implement Government policy;¹³⁴
- (b) the note made by Mr Newport on 18 September 2023 after learning of the funding decision;¹³⁵
- (c) Mr Newport's failure to identify any Charter rights among the relevant considerations he took into account in making the Decision, in response to a series of questions in cross-examination, in contrast with his evidence that he took human rights into account in relation to the relocation process;¹³⁶
- (d) the absence of any evidence of legal advice in relation to the Charter implications of the Decision;¹³⁷ and
- (e) the speed with which Mr Newport made the Decision after being told of the funding decision, and the fact that he did not refer to any documents in making it.¹³⁸

¹³⁴ Transcript, 50:27–52:3, 83:25–84:1 (Newport XXN).

¹³⁵ Exhibit P4.

¹³⁶ Transcript, 39:16–41:28 (Newport XXN).

¹³⁷ Transcript, 31:28–33:15 (Newport XXN).

¹³⁸ Transcript, 46:8–16 (Newport XXN).

144 As to Mr Newport’s evidence that, when he made the Decision, he had in his mind the human rights analysis in the Cabinet submission, Mr Berih submitted I should find that evidence was not credible. He based that submission on the evidence referred to in the previous paragraph.

Homes Victoria’s submissions

145 Homes Victoria submitted that none of the rights relied on by Mr Berih was engaged by the Decision because none of them was limited by it. It acknowledged that some authorities draw a distinction between the ‘engagement’ of rights and their ‘limitation’,¹³⁹ but said that the better view was that engagement and limitation are one and the same.¹⁴⁰

146 Homes Victoria referred to the test for proper consideration of human rights,¹⁴¹ and said that the essence of the test is the recognition of the competing rights and interests at stake and the weighing of them against each other before arriving at a decision.¹⁴² It emphasised that a public authority need not formally identify the ‘correct’ rights or explain their content by reference to legal principles or authorities.¹⁴³

147 Homes Victoria submitted that the obligation to give proper consideration to human rights in making the Decision was shaped by the following matters:

- (a) Mr Newport was deciding to implement a decision made by Cabinet. In that context, he did not have to revisit the entire foundation of the Redevelopment Program or create a written record of the Decision that would duplicate the

¹³⁹ Referring to *Thompson v Minogue* (2021) 67 VR 301, [96]; *Baker v DPP (Vic)* (2017) 270 A Crim R 318, [56]–[58] (Tate JA, Maxwell P and Beach JA agreeing).

¹⁴⁰ Referring to *Thompson v Minogue* (2021) 67 VR 301, [57]; *Kracke v Mental Health Review Board* (2009) 29 VAR 1, [67]; *Antunovic v Dawson* (2010) 30 VR 355, [70]; *PJB v Melbourne Health* (2011) 39 VR 373, [36]; *De Bruyn* (2016) 48 VR 647, [102]–[103]; *Certain Children v Minister for Families and Children* (2016) 51 VR 473, [143]; *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441, [220] (*Certain Children (No 2)*).

¹⁴¹ Set out at [137]–[138] above.

¹⁴² Referring to *Castles v Secretary of the Department of Justice* (2010) 28 VR 141, [185]–[186] (*Castles*); *Giotopoulos v Director of Housing (Vic)* (2011) 34 VAR 60, [90] (*Giotopoulos*); *Bare v Independent Broad-Based Anti-Corruption Commission* (2015) 48 VR 129, [281], [284]–[285], [291] (Tate JA); *JL v Mental Health Tribunal* (2021) 67 VR 426, [107]; *Thompson v Minogue* (2021) 67 VR 301, [188]–[200].

¹⁴³ Referring to *Castles* (2010) 28 VR 141, [185]; *Thompson v Minogue* (2021) 67 VR 301, [81].

Cabinet records.

- (b) The Decision did not have any effect on the public or private legal rights of renters in the Towers.
- (c) The Decision was inherently preliminary and high-level, with a series of further steps needed before renters could be required to leave their homes or the Towers could be demolished.

148 In those circumstances, Homes Victoria said that Mr Newport had given proper consideration to Group Members' rights under ss 13(a), 17(1), and 20 of the Charter. It summarised his evidence as follows:¹⁴⁴

- (a) Mr Newport understood that the Redevelopment Program would have a significant impact on the Group Members' rights because it would involve them leaving their homes, disrupting their home life and their connections to local supports, services, and communities.
- (b) He knew that steps had already been taken to minimise the impact on the Group Members' rights as far as possible through the sequencing of the Redevelopment Program, and that further steps would be needed to minimise the impact of the implementation process.
- (c) Mr Newport believed the redevelopment was necessary in light of the problems with housing supply and affordability in Victoria. He also had a detailed knowledge of the issues with the condition of the Towers and the risks they posed to the comfort and safety of existing renters. He considered that there was no way to address those problems without causing significant disruption to the renters. He believed that the redevelopment would ultimately promote the interests of many of those renters by providing them with access to safe and fit-for-purpose homes.

¹⁴⁴ Referring to Second Newport affidavit, [16]–[25], [34].

- 149 Mr Newport's evidence was that, in performing his statutory functions in relation to public housing, his paramount concern is the needs and interests of current and future renters, about which Homes Victoria receives information from a range of sources.¹⁴⁵ There are many issues with Melbourne's public housing towers, and in Mr Newport's view they are no longer fit for modern living.¹⁴⁶ The issues with the towers pose risks to the comfort and safety of renters, which Homes Victoria must address; continued occupation with only minor works is not a viable option.¹⁴⁷ The objective of the Redevelopment Program is to address the issues with the towers, promoting the interests of future renters on the sites, including current renters who choose to return.¹⁴⁸ It will also increase the supply of housing on the sites, including a 10% increase in the number of social houses.¹⁴⁹
- 150 On that basis, Mr Newport was satisfied that the Redevelopment Program was justified and that the impact on renters, while significant, was acceptable.

Consideration

- 151 I doubt the correctness of Homes Victoria's submission that there is no difference between the engagement of a human right and its limitation. The preferable view may be that they are distinct concepts that serve different purposes.
- 152 The concept of 'engagement' of a human right protected by the Charter is used to identify when, in making a decision, a public authority must give proper consideration to a relevant human right.¹⁵⁰ At that time, the decision is not yet made and its outcome is uncertain.
- 153 The purpose of requiring proper consideration of human rights in decision-making is 'to ensure that human rights are observed in administrative practice and the development of policy within the public sector without the need for recourse to the

¹⁴⁵ Second Newport affidavit, [14].

¹⁴⁶ Second Newport affidavit, [17].

¹⁴⁷ Second Newport affidavit, [18].

¹⁴⁸ Second Newport affidavit, [19].

¹⁴⁹ Second Newport affidavit, [20].

¹⁵⁰ *De Bruyn* (2016) 48 VR 647, [102]; *Certain Children (No 2)* (2017) 52 VR 441, [220].

courts'.¹⁵¹ Logically, it is not possible to say whether a decision limits human rights before it has been made. It follows that identifying whether human rights are engaged by a possible decision is a forward-looking exercise. If it is apparent to the decision-maker that the decision might limit a human right, the decision-maker should give proper consideration to that right before making the decision.

154 By contrast, the concept of 'limitation' is used to determine whether a public authority is acting, or has acted, incompatibly with a human right. If so, it becomes necessary to consider whether the limit can be justified under s 7(2) of the Charter.

155 However, it is not necessary to determine the question, for two reasons. The first is that I am satisfied that the evidence establishes that Mr Newport gave proper consideration to relevant human rights in making the Decision. The second is that I have concluded that the Decision arbitrarily interfered with Group Members' homes, limiting the right to home in s 13(a) of the Charter.¹⁵²

156 Mr Newport described the impact on renters as follows:¹⁵³

The redevelopment of the towers will have a significant impact on renters. Many renters have strong connections to their tower and the surrounding area: they rely on local services; they go to school, study or work locally; their family and friends and other members of their community live in their tower or nearby. For those renters, retaining their links to their communities in the towers and the local area is vital. Because redevelopment will mean the relocation of renters to alternative accommodation, it will necessarily involve some disruption and dislocation to renters. Our renters in the towers include families with children, older people, people living with disability, and specific migrant communities. Members of those cohorts may find relocation more disruptive than other renters (because, for example, they are more reliant on local services or have stronger connections to their community in the tower). However, these needs and connections are front of mind in how Homes Victoria supports renters being relocated.

157 Because of Mr Newport's involvement in preparing the Redevelopment Program policy, he was aware of those impacts on renters when he made the Decision. He

¹⁵¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1293 (Rob Hulls, Attorney-General). See also *Castles* (2010) 28 VR 141, [185]; *Certain Children (No 2)* (2017) 52 VR 441, [195].

¹⁵² See [186]–[216] below.

¹⁵³ Second Newport affidavit, [23](d).

believed that the objective of the Redevelopment Program was important, and that taking no action was not an option, given the condition of the towers and housing supply problems in Victoria more broadly. He said:¹⁵⁴

I knew that relocation would have a significant impact on the renters and their human rights, by disrupting their home life, their connections to local supports and services, and their links to their communities in the towers and the surrounding area. I also knew that steps had been taken to minimise that impact as far as possible through the sequencing of the program, and that I and others would continue to take steps to consider and minimise that impact during the implementation process and before any renters were actually required to move out of their towers, as I discuss further below. Given the problems with retrofitting, I considered that there was no way to address the problems with the towers without causing significant disruption to the renters – either option was going to cause a significant disruption. I also considered that the program would ultimately benefit future renters on the sites, including those current renters who choose to return, by delivering more and better homes for them to live in. On that basis, I considered that the program was justified and that the impact on the renters, while significant, was acceptable.

158 In my view, this amounted to proper consideration of the human rights of Group Members. Mr Newport understood in general terms that implementing the Redevelopment Program would interfere with renters' homes, and was aware that relocation would have a greater impact on some cohorts of renters – including families with children. He seriously turned his mind to those impacts and the implications for renters, while identifying a number of countervailing interests, including the benefit to future renters of having more and better housing on the sites. He considered retrofitting as an alternative, but concluded that it was not feasible and would not have a materially different impact on renters. Balancing the competing interests, Mr Newport considered that the significant impact on renters was acceptable and the Redevelopment Program was justified. He repeated this evidence in cross-examination.¹⁵⁵

159 I reject Mr Berih's submission that this aspect of Mr Newport's evidence was not credible. Mr Newport impressed me as an honest witness who was doing his best to explain the Decision, while also trying to preserve the confidentiality of Cabinet's

¹⁵⁴ Second Newport affidavit, [34].

¹⁵⁵ Transcript, 40:22–45:4 (Newport XXN).

deliberations. This awkward position accounted for some non-responsive answers by Mr Newport during cross-examination. Eventually, it emerged that Mr Newport and other Homes Victoria staff had specifically addressed the human rights impacts of the Redevelopment Program in preparing the Cabinet submission, and that Mr Newport took that work into account when he made the Decision.¹⁵⁶ The fact that the Cabinet submission is subject to public interest immunity and therefore not in evidence is not a reason to doubt Mr Newport's evidence about his consideration of human rights.

160 It is the case that Mr Newport's consideration of human rights was at a general level, and did not include reflection on the impact on renters of the Decision being made without prior notice or consultation. However, the authorities concerning proper consideration require only a broad and general assessment of the impact of a decision, and the assessment made by Mr Newport was sufficient to meet that standard.¹⁵⁷

161 For those reasons, the second ground is not made out.

Did the Decision limit human rights?

162 Section 38(1) of the Charter also prohibits a public authority from acting in a way that is incompatible with a human right. A public authority breaches s 38(1) if it acts so as to limit a human right, and the limitation is not lawful, reasonable, or justifiable in accordance with s 7(2) of the Charter.¹⁵⁸ The onus of establishing that a human right has been limited rests on the plaintiff, while the onus of justifying any limitation rests on the public authority.¹⁵⁹

163 Part 2 of the Charter sets out the human rights that Parliament specifically seeks to protect and promote. These rights 'should be construed in the broadest possible way'.¹⁶⁰

¹⁵⁶ Transcript, 35:14–37:31 (Newport XXN).

¹⁵⁷ See [137]–[138] above.

¹⁵⁸ *Thompson v Minogue* (2021) 67 VR 301, [96]–[97].

¹⁵⁹ *Thompson v Minogue* (2021) 67 VR 301, [47]–[48].

¹⁶⁰ *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, [80]. See also *DPP (Vic) v Ali (No 2)* [2010] VSC 503, [29]; *PJB v Melbourne Health* (2011) 39 VR 373, [36]; *De Bruyn* (2016) 48 VR 647, [126].

164 Mr Berih contends that the Decision limited Group Members' rights in ss 13(a), 17(1), and 20. By the end of the trial, it was clear that Mr Berih's Charter claims rested on the right not to have his family and home arbitrarily interfered with, under s 13(a) of the Charter. I therefore mention the other two rights only briefly.

165 Section 17 concerns protection of families and children. In relation to families, s 17(1) provides:

Families are the fundamental group unit of society and are entitled to be protected by society and the State.

166 No evidence or argument was directed to the right to protection of families in s 17(1), and it is unclear how this right was said to have been limited by the Decision. Evidence that some families feel that alternative community housing available in Victoria Street, Flemington is too small, and will not accommodate their existing furniture, did not reach that threshold.

167 Section 20 provides:

Property rights

A person must not be deprived of that person's property other than in accordance with law.

168 The claim based on the right to property in s 20 could only succeed if one of the other grounds was made out, and so added nothing to the claim. In addition, at this stage no renter has been deprived of property — their rental agreements remain in place, and they can only be evicted from their homes in accordance with the Residential Tenancies Act.

169 Section 13 provides, relevantly:

Privacy and reputation

A person has the right —

- (a) not to have that person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and

...

- 170 Section 13(a) contains an internal limitation, so that the right is only limited by an interference that is unlawful or arbitrary.
- 171 An ‘unlawful’ interference is one that infringes an applicable law.¹⁶¹ The procedural fairness ground has not been made out, and no other unlawfulness was alleged.
- 172 An ‘arbitrary’ interference is ‘one which is capricious, or has resulted from conduct which is unpredictable, unjust or unreasonable in the sense of not being proportionate to the legitimate aim sought’.¹⁶²
- 173 The right not to have one’s home unlawfully or arbitrarily interfered with has frequently been invoked in residential tenancies disputes between the Director of Housing (now Homes Victoria) and public housing tenants.¹⁶³ It is clear that Mr Berih’s flat in the Alfred Street tower is his home for the purposes of s 13(a). Similarly, there is no issue that the premises in the Towers rented by other Group Members are their homes for the purposes of s 13(a). The question is whether the Decision amounted to an arbitrary interference with their homes.¹⁶⁴

Mr Berih’s submissions

- 174 Mr Berih submitted that there could be no serious dispute that demolishing the Towers would constitute an ‘interference’ with his and other Group Members’ homes. He referred to his own evidence about the impact of the Decision on him, including the loss of the connections and supports he has established and the break-up of the Eritrean community that is so important to him.¹⁶⁵ He also referred to the expert opinion of Professor Libby Porter, professor of urban planning and director of the Centre for Urban Research at RMIT University. In her report, Professor Porter identified multiple and intersecting forms of disadvantage experienced by the residents of the Towers, their heavy reliance on the social bonds and community

¹⁶¹ *Thompson v Minogue* (2021) 67 VR 301, [49].

¹⁶² *Thompson v Minogue* (2021) 67 VR 301, [55].

¹⁶³ E.g., *Director of Housing v Sudi* (2010) 33 VAR 139, [32] (*Sudi*); *Giotopoulos* (2011) 34 VAR 60, [88].

¹⁶⁴ As to the right to family in s 13(a), see [217] below.

¹⁶⁵ Berih affidavit, [62].

services established in the Towers to combat that disadvantage, and the likely disproportionate impact on them of dislocation from their communities.¹⁶⁶

175 In Mr Berih’s submission, the Decision was ‘arbitrary’ in the relevant sense, as a decision that was unjust, unpredictable, or capricious. He argued that the Decision had this character because it was made without prior notice or consultation, in circumstances where:

- (a) the Department’s previous position, recorded in the 2017 SHRSAC Report 2, was that the towers in the Flemington public housing estate had recently been upgraded and that there was no current intention to replace them; and
- (b) Homes Victoria had given a commitment to the communities in the Flemington and North Melbourne estates, in the PTWF Local Action Plans, that residents would be involved in the key decisions that affect their home, neighbourhood, and services.

176 Mr Berih pointed out that s 13(a) of the Charter is modelled on art 17(1) of the International Covenant on Civil and Political Rights (**ICCPR**). He referred to two international human rights authorities on art 17(1):

- (a) The first was the concluding observations of the United Nations Human Rights Committee (**HRC**) concerning a periodic report submitted by Kenya in 2004. The HRC was concerned about reports of forcible evictions of thousands of inhabitants from informal settlements, in Nairobi and other parts of Kenya, without prior consultation or adequate prior notification. It said that the practice arbitrarily interfered with the right under art 17 of the ICCPR, and stated that Kenya should ‘ensure that evictions from settlements do not occur unless those affected have been consulted and appropriate resettlement

¹⁶⁶ **Exhibit P3** – Expert report of Professor Libby Porter (undated) filed on 2 September 2024.

arrangements have been made'.¹⁶⁷

- (b) The second was a general comment made in 1997 by the United Nations Committee on Economic, Social and Cultural Rights, on the practice of forced evictions and the right to adequate housing in art 11.1 of the Convention on Economic, Social and Cultural Rights. The comment stated that 'States parties must ensure, prior to carrying out any evictions, and particularly those involving large groups, that all feasible alternatives are explored in consultation with the affected persons, with a view to avoiding, or at least minimizing, the need to use force'.¹⁶⁸

177 Mr Berih highlighted the fundamental importance of housing, in itself and for the fulfilment of other human rights of the residents of the Towers. He submitted that, for a tenant of public housing, 'their home is much more than a property interest in temporary possession', it is 'a place of belonging, comfort and security'.¹⁶⁹

178 When Mr Berih learned, without prior notice or consultation, that his home was to be demolished, he felt panic and anger that the Government was again making a decision on the community's future without even asking what they wanted.¹⁷⁰ Mr Berih submitted that this impact illustrated the capriciousness of the Decision, which was magnified by the community's memory of being locked down without warning during the COVID-19 pandemic. He acknowledged the distinction between the Premier's announcement of the Housing Statement and the Decision, but said that Homes Victoria had taken no steps to mitigate the lack of consultation and could not hide behind the Premier's capriciousness.

¹⁶⁷ Human Rights Committee, *Concluding Observations of the Human Rights Committee: Kenya*, 83rd sess, UN Doc CCPR/CO/83/KEN (29 April 2005), 6.

¹⁶⁸ Committee on Economic, Social and Cultural Rights, *General Comment No 7: The right to adequate housing (Art.11.1): forced evictions*, UN ESCOR, Supp No 2, 16th sess, Annex IV, UN Doc E/1998/22 (20 May 1997), 116.

¹⁶⁹ Citing Justice Kevin Bell, 'Protecting Public Housing Tenants in Australia from Forced Eviction: the Fundamental Importance of the Human Right to Adequate Housing and Home' (2013) 39(1) *Monash University Law Review* 1, 6.

¹⁷⁰ Berih affidavit, [56].

Homes Victoria's submissions

179 Homes Victoria argued that the Decision did not limit Group Members' rights to family and home because:

- (a) first, it did not affect their legal rights to their homes under their rental agreements; and
- (b) second, any interference was neither unlawful nor arbitrary.

180 In support of the first argument, Homes Victoria relied on the reasoning in *Keasey*. The Court of Appeal held that the Director's decision to commence an application in VCAT under s 548 of the Residential Tenancies Act was not a 'decision' for the purposes of the *Administrative Law Act* 1978 (Vic). One of the reasons for that conclusion was that the mere making of the application to VCAT did not have the potential to limit the tenant's rights under the Charter.¹⁷¹

181 Homes Victoria said that this reasoning applied with even greater force in this case, because the Decision is much further removed from any impact on Group Members' rights to family and home. It said that the Decision was inherently preliminary and high-level, and that a series of further decisions would have to be made by Mr Newport and others before Group Members' rights were affected to the relevant degree. In contrast with the facts in *Director of Housing v Sudi*,¹⁷² the Decision did not evict or seek to evict anyone. Further, Homes Victoria said that the substantial amendments to the Residential Tenancies Act since *Sudi* was decided have diminished the impact of an application for a possession order, as VCAT must now be satisfied that it would be reasonable and proportionate to make the order.¹⁷³

182 To reinforce the point, Homes Victoria contrasted Mr Berih's position with that of the hundreds of renters who, following engagement with Homes Victoria, have voluntarily moved from their home in one of the Towers to another property. It

¹⁷¹ *Keasey* (2022) 66 VR 45, [35].

¹⁷² (2010) 33 VAR 139.

¹⁷³ Referring to *Residential Tenancies Act* 1997 (Vic), s 330.

argued that it could not be said that the Decision had interfered with any of those renters' right to family and home — they had moved voluntarily, without any steps being taken by Homes Victoria to evict them.¹⁷⁴

183 As to the second argument, Homes Victoria said that Mr Berih had not established unlawfulness on any other ground. It contended that the Decision did not involve an arbitrary interference with Group Members' families and homes because it had clear and rational purposes, and any interference did not go beyond what was reasonably necessary to achieve those purposes.¹⁷⁵ Homes Victoria emphasised that the Decision was only one decision in an extended and multi-stage process, and did not of itself affect Group Members' legal rights to or enjoyment of their homes. It pointed to Mr Newport's evidence about the opportunities for further consideration of Group Members' human rights as the Redevelopment Program unfolds.¹⁷⁶ Ultimately, Group Members can only be evicted if VCAT is satisfied that it is reasonable and proportionate in all the circumstances to make a possession order.¹⁷⁷

184 In response to Mr Berih's argument that the Decision was arbitrary because it was made without prior notice to or consultation with Group Members, Homes Victoria said that the argument misunderstood the function and content of the SHRSAC Report 2. It said that the PTWF Local Action Plans took the case no further, because the PTWF was not a binding constraint on Homes Victoria's decision-making. Homes Victoria characterised the statement in the Local Action Plans about involving residents in key decisions as a 'broader goal', which was not a specific undertaking that Homes Victoria or the Department would consult renters on all future decisions about the Towers.

¹⁷⁴ Referring to *Berger-Krall v Slovenia* (European Court of Human Rights, Chamber, Application No 14717/04, 12 June 2014), [254]–[260]; *Liepājnieks v Latvia* (European Court of Human Rights, Chamber, Application No 37586/06, 2 November 2010), [88]–[89], [109]. Cf *Larkos v Cyprus* (European Court of Human Rights, Grand Chamber, Application No 29515/95, 18 February 1999), [28].

¹⁷⁵ Referring to *Thompson v Minogue* (2021) 67 VR 301, [227].

¹⁷⁶ Referring to Second Newport affidavit, [32], [39]–[42], [44]–[46], [48]–[50], Exhibit SAN-2(4), Exhibit SAN-2(5).

¹⁷⁷ Referring to Residential Tenancies Act, s 330; *Hanson* [2022] VSC 710, [44]–[65].

185 Homes Victoria sought to distinguish the international human rights documents relied on by Mr Berih. It said that the Decision is not equivalent to the evictions considered in those documents. It reiterated that no steps would be taken to evict Group Members until all reasonable efforts have been made to achieve relocation by agreement, and then only in accordance with the Residential Tenancies Act. Homes Victoria referred to authorities concerning art 8 of the European Convention on Human Rights,¹⁷⁸ which is in similar terms to s 13(a) of the Charter.¹⁷⁹ It said that those authorities establish that art 8(1) imposes no requirement of prior notice and consultation before a public authority takes steps to remove a person from their home, provided the person has an opportunity to challenge the proportionality of their removal before an independent tribunal. It submitted that was the case here.

Consideration

186 As I concluded in relation to the procedural fairness ground, the Decision did not, of itself, result in Mr Berih losing his home. His rental agreement with Homes Victoria remains in place, and he has all the rights of a tenant under the Residential Tenancies Act. VCAT may not make a possession order in respect of his home unless it is satisfied that the order would be reasonable and proportionate in the circumstances.

187 However, the right to home in s 13(a) is to be construed in the broadest possible way and the protection conferred by the right is not confined to narrow legal interests – or even to interests that are legally recognised for procedural fairness purposes. Whether an act of a public authority interferes with a person’s home is ultimately a

¹⁷⁸ Formally the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) (**ECHR**).

¹⁷⁹ *Manchester City Council v Pinnock (No 2)* [2011] 2 AC 104, [45] (Lord Neuberger for the Court); *R (JL) v Secretary of State for Defence* [2013] EWCA Civ 449, [38]–[39] (Briggs LJ, Sullivan LJ agreeing at 57, Arden LJ agreeing at 58); *R (N) v Lewisham London Borough Council*; *R (H) v Newham London Borough Council* [2015] AC 1259, [62] (Lord Hodge, Lord Wilson, Lord Clarke and Lord Toulson agreeing, Lord Carnwath agreeing at [76], Lord Neuberger agreeing at [100]). Article 8 of the ECHR provides: ‘(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

question of fact, not law.¹⁸⁰

188 For public housing tenants, their home is ‘much more than a property interest in temporary possession’. Justice Bell of this Court, writing extrajudicially, explained that there are other dimensions of the concept of ‘home’ in human rights:¹⁸¹

There is a powerful emotional dimension to the idea of home. A quality of human beings is that we put down roots in, and develop a strong sense of attachment to, our home. Grief – as genuine and sincere as any other grief – is a recognised psychological reaction to the trauma of losing a home.

So, however much we can agree that a home is shelter, a dwelling and a place to inhabit, it is much more than that. It is the primary location of individual physical existence which is indispensable for human flourishing in every respect, including participation in work and education and in cultural, social and religious life.

189 The Decision commenced a process intended to demolish the Towers and redevelop the sites. It has had an adverse impact on the homes of Mr Berih and other Group Members, in at least two ways.

190 First, the Decision has diminished Group Members’ security of tenure in their homes. As well as creating one of the conditions for a notice to vacate under s 91ZY of the Residential Tenancies Act, the Decision has resulted in every renter being told that they will have to move home. As Mr Newport explained, the initial implementation of the Decision focused on informing all renters that the Towers were to be ‘retired’ and arranging for them to speak with Homes Victoria staff about the relocation process.¹⁸²

191 Second, and relatedly, the Decision has begun to disperse the community that exists around the Towers. One year into the Redevelopment Program, 286 of the 484 households in the Towers, or 59% of households, had either moved or were matched to a home and were waiting to move there.¹⁸³ Facing the eventual demolition of the

¹⁸⁰ *Sudi* (2010) 33 VAR 139, [32], citing *Harrow London Borough Council v Qazi* [2004] 1 AC 983, [27].

¹⁸¹ Justice Kevin Bell, ‘Protecting Public Housing Tenants in Australia from Forced Eviction: the Fundamental Importance of the Human Right to Adequate Housing and Home’ (2013) 39(1) *Monash University Law Review* 1, 6.

¹⁸² Affidavit of Simon Newport sworn 5 March 2024, [10]–[16]; Second Newport affidavit, [39]–[41].

¹⁸³ Second Newport affidavit, [45]; Exhibit P5 – Weekly report dated 21 September 2024.

Towers, it is unsurprising that many renters have chosen to relocate without waiting to be evicted from their homes.

- 192 Mr Berih described in his evidence what the breakup of the community means to him:¹⁸⁴

If Alfred Tower is demolished, I will lose all of my connections and supports that I have established and I will have to start again somewhere else. The Eritrean community will be broken up and we will not have the mosque close to all of our homes as a place for our Eritrean Muslim community to gather. This is true for everyone, all of the community network and support that I have set out in this affidavit will be destroyed. We will all be broken up. It will be a disaster. I am scared for what will happen to my friends.

- 193 Mr Berih's personal experience was confirmed by the expert opinion of Professor Porter, who explained the importance of community to the residents of the Towers:¹⁸⁵

Public housing residents of large estates in Australia often display high levels of importance and reliance on their community within the estate and its immediate surrounds. This is in part because large estates, particularly high-rise towers, are spatially distinct neighbourhoods with a high level of informal types of social bonds that form over time. Also, many residents in Victoria have lived in public housing for a long time, nearly half of public housing households have lived in public housing for more than 10 years. Approximately 60% of residents at the Towers in question have lived there for more than six years (State of Victoria, Australia, Department of Families, Fairness and Housing, 2022a, 2022b).

For people experiencing multiple forms of disadvantage and living in close proximity for a long time, caring for each other and providing social and physical support informally is essential to making life in difficult circumstances work. Studies with public housing residents facing redevelopment in Sydney found that "social connections among public housing tenants in the area were unusually strong and enduring" (Morris, 2022) see also (Meegan and Mitchell, 2001; Morris, 2017a; Ruming and Melo Zurita, 2020). This sense of community stretches across and between public housing estates, and indeed is a notable phenomenon among public housing residents generally where people feel a strong sense of bond just by identifying as a public housing resident.

This high level of informal social bonds is often expressed as pride and sense of community by public housing tenants. My discussions and observations with residents frequently reference sense of community, pride and strong local social connections in relation to their public housing community. Public housing tenants express strong connections to communities and speak with passion and pride about their communities, both in their immediate locality

¹⁸⁴ Berih affidavit, [62].

¹⁸⁵ Exhibit P3, [12]–[14], [18].

and as a ‘public housing community’. This is so even in the face of the strong stigma that public housing residents experience particularly in Australia. This manifests particularly strongly when public housing communities are threatened with redevelopment and displacement. Tenants in our study (Porter et al., 2023) expressed a desire to move as a community or be relocated in a way that keeps them proximate to existing neighbours.

...

The evidence both internationally and in Australia and Melbourne specifically demonstrates that public housing estates are communities with highly sophisticated systems of mutual aid, community support, thick social bonds and community-organised services. The hard lockdowns of the towers in North Melbourne and Flemington in 2020 again provide important insight on this important point. At that time, it was the community-based response from local grassroots organisations that stepped in to provide appropriate and adequate support in the face of wide-spread government failure in relation to necessary food and supplies, medication, information and social support. Similarly, in Millers Point in Sydney, Morris found a high level of social bonds and locally organised support systems where residents described their community as a ‘village’ and ‘the friendliest place I’ve ever lived’ (Morris, 2017b, 2017a). This is a characteristic particularly of estates where residents have lived for long periods enabling thick social bonds to develop and deepen over time.

- 194 In Professor Porter’s opinion, based on previous public housing renewal programs and the current distribution of available, affordable, and public housing, the most likely outcome of relocation will be a wide geographic dispersal of residents. Previous experience suggests that residents are likely to be moved to new homes at significant distances from their current neighbourhood and community.¹⁸⁶
- 195 This evidence was received without objection and Professor Porter was not cross-examined. I accept it without reservation as compelling evidence of the importance of the communities that develop in public housing estates, such as those in which the Towers are located.
- 196 Mr Berih’s home, and that of every other Group Member, is located within a high-rise tower dedicated to public housing. The physical location of these homes within a larger structure is an aspect of the home enjoyed by Mr Berih and other Group Members, and provides the environment in which the community has developed. The

¹⁸⁶

Exhibit P3, [23]–[26].

thick social bonds described by Professor Porter are part and parcel of the homes located in the Towers. The Decision to demolish the Towers necessarily entails the dispersal of the community and the breaking of those social bonds, and interferes with an intrinsic part of Mr Berih's home and the homes of other Group Members.

197 Mr Newport recognised this impact in his consideration of the human rights engaged by the Decision. He understood the strong connections that renters have to their tower and the surrounding area, and how vital it is for renters to retain links to their communities in the Towers and the local area.¹⁸⁷

198 Despite this evidence that the Decision adversely affects Group Members' enjoyment of their homes, Homes Victoria contended that it did not amount to an interference with their right to home in s 13(a) of the Charter. That contention was based on the Court of Appeal's decision in *Keasey*.

199 As mentioned, the question for determination in *Keasey* was whether the decision of the Director of Housing to commence an application for an order terminating a tenancy was a 'decision' for the purposes of the Administrative Law Act. Section 2 of the Administrative Law Act defines 'decision' to mean:

a decision operating in law to determine a question affecting the rights of any person or to grant, deny, terminate, suspend or alter a privilege or licence and includes a refusal or failure to perform a duty or to exercise a power to make such a decision;

...

200 The Court of Appeal held that the decision to commence the application was not a 'decision' to which the Administrative Law Act applied. Such a decision has a degree of finality about it, has some legal force, and is determinative of a question affecting rights.¹⁸⁸ The Director's decision did not have those characteristics, primarily because the power to determine the application was vested in VCAT, not the Director.¹⁸⁹

¹⁸⁷ Second Newport affidavit, [23](d), quoted at [156] above.

¹⁸⁸ *Keasey* (2022) 66 VR 45, [23].

¹⁸⁹ *Keasey* (2022) 66 VR 45, [29]–[30].

201 In relation to the Charter arguments put by the applicant, the Court of Appeal said:¹⁹⁰

The applicant's arguments on the Charter were not developed at first instance or in her written case in this Court. The applicant now says, without elaboration and without reference to authority, that because the decision to make an application to VCAT is subject to s 38 of the Charter it must affect rights and be a decision for the purpose of s 2 of the ALA. That argument is problematic on a number of levels and cannot be accepted. First, the obligation imposed on a public authority to 'act' compatibly with Charter rights is not, in its terms, confined to a decision. In order to identify an obligation to give reasons for a decision, it is still necessary to satisfy the s 2 ALA definition. Second, the procedural obligation in s 38(1) of the Charter to consider human rights applies to any 'decision'. The question here is whether there was a decision of a certain kind, namely one that determined a question affecting rights. The contention that the public authority, in this case the Director, was required to consider human rights and therefore has made a decision under s 2 of the ALA assumes that there must be a 'decision' that determines a question affecting rights every time there is a consideration of rights. The applicant simply assumes that every decision requiring consideration of the Charter is a decision that determines a question affecting rights. That is not so.

The mere making of the application under s 548 of the RTA did not have the potential to limit the applicant's rights under the Charter. The applicant pointed to s 13 of the Charter, which provides that the applicant has the right not to have her home unlawfully or arbitrarily interfered with and s 20, which provides that the applicant must not be deprived of her property other than in accordance with law. The mere making of the application to VCAT in this case could not deprive her of property, nor could it unlawfully or arbitrarily interfere with her rights under the tenancy agreement. Self-evidently, in making an application under s 548 the Director will have to consider whether there is a proper basis for the application, including whether there is a basis for VCAT to be satisfied that it is reasonable and proportionate to make the orders sought. But, in doing so, the Director does not determine these matters and is not making a decision that is captured by s 2 of the ALA.

202 This case is different from *Keasey* in several ways. First, the Charter arguments in this case were developed by reference to both evidence and authority. Second, the evidence in this case is that the Decision, and its implementation, is in fact interfering with Group Members' right to home. Third, the interference established by the evidence is not limited to Group Members' rights under their rental agreements; the protection provided by s 13(a) of the Charter is broader than mere legal or property interests.

¹⁹⁰ *Keasey* (2022) 66 VR 45, [34]–[35].

203 As the Court of Appeal pointed out in *Keasey*, the obligation on a public authority under s 38(1) of the Charter to act compatibly with human rights is not confined to a decision. Conduct of a public authority may limit a human right regardless of whether it is a ‘decision’ for the purposes of the Administrative Law Act. It may be accepted that the Decision at issue in this case is not a decision to which the Administrative Law Act applies, consistent with my conclusions on the procedural fairness ground. However, it does not follow that the Decision is not conduct of Homes Victoria to which s 38(1) applies.

204 My analysis is consistent with the approach taken by John Dixon J in *Certain Children v Minister for Families and Children (No 2)*,¹⁹¹ where it was argued that the Governor in Council’s decisions to establish a youth justice centre in a unit of an adult prison, and to grant a weapons exemption authorising the use of OC spray in the unit, were not of themselves acts that directly affected the plaintiffs’ human rights.¹⁹² A series of other decisions had to be made before individual children could be transferred to the unit, or OC spray could be used there, each of which was subject to s 38(1) of the Charter. The argument was rejected,¹⁹³ on the basis that a ‘potential effect on the rights of a class of persons is sufficient for a Charter right to be engaged by an act (including a proposal to act) of a public authority’.¹⁹⁴ Applying that approach in this case, the Decision has a potential effect on the rights of renters in the Towers, and so may interfere with their right to home in s 13(a), even though they still have the protections of their rental agreements and the Residential Tenancies Act.

205 For those reasons, I conclude that the Decision interferes with Mr Berih’s home, and the homes of other Group Members.

206 However, that is not enough to establish a limitation of their right to home under s 13(a) of the Charter — the interference must also be unlawful or arbitrary. Mr Berih

¹⁹¹ (2017) 52 VR 441.

¹⁹² *Certain Children (No 2)* (2017) 52 VR 441, [183]–[186].

¹⁹³ *Certain Children (No 2)* (2017) 52 VR 441, [190]–[198], [273]–[275].

¹⁹⁴ *Certain Children (No 2)* (2017) 52 VR 441, [190].

contended that the interference was arbitrary, because it was capricious and resulted from conduct that was unpredictable.

207 Homes Victoria made the Decision without prior notice to renters, and without engaging in any consultation with them. The first that Mr Berih and other renters heard of the Decision was when Homes Victoria staff began communicating it to them on 20 September 2023. The communications program outlined by Mr Newport involved doorknocking, information booths in the Towers, letters and text messages with information about the relocation process, and community forums.¹⁹⁵ This flurry of activity came out of the blue for Mr Berih and other Group Members. From the residents' perspective, the Decision was capricious and the result of unpredictable conduct.

208 The unpredictability of the Decision was amplified by the fact that the Redevelopment Program had not previously been mentioned at a PTWF meeting.¹⁹⁶ The PTWF initiative was developed by the Department in 2021, in the wake of the hard lockdowns of the Flemington and North Melbourne public housing towers during the COVID-19 pandemic. Those lockdowns occurred without warning or consultation with residents.¹⁹⁷

209 According to the Department's website:¹⁹⁸

The Paving the Way Forward (PTWF) initiative is intended to find better ways of working alongside residents at the Flemington and North Melbourne public housing estates.

In 2021, the Department of Families, Fairness and Housing (the department) set up the Paving the Way Forward (PTWF) initiative. The intent is to find better ways of working alongside residents at the Flemington and North Melbourne public housing estates. Through a partnership approach with residents and the department, they have sought to come together to:

- solve local issues

¹⁹⁵ Second Newport affidavit, [39].

¹⁹⁶ Berih affidavit, [57].

¹⁹⁷ Berih affidavit, [26]–[27], [48].

¹⁹⁸ Second Bassini affidavit, Exhibit LB-04.

- build on local strengths
- positively change the way government and residents interact
- take learnings to inform housing policy and approaches

210 Following community feedback in 2021–2, PTWF Local Action Plans were developed for both the Flemington and North Melbourne estates. They included the commitment, already referred to, to involve residents in key decisions that impact their home, neighbourhood, and services. Resident action groups were established on both estates, and were involved in designing the empowered resident decision-making models for Homes Victoria. Mr Newport identified PTWF as ‘another way for renters to have input into decision-making by Homes Victoria’.¹⁹⁹

211 Mr Berih has been very involved in PTWF, attending regular PTWF meetings chaired by a person from Homes Victoria’s community engagement team. He felt that the initiative had been good for both tenants and Homes Victoria, and had resulted in some concrete improvements for residents.²⁰⁰ According to Mr Berih, Homes Victoria staff involved in developing PTWF had built up a lot of trust with residents, ‘at a time when trust was next to zero because of what they did to us ... with the lockdowns’.²⁰¹

212 It seems that PTWF was a genuine commitment by Homes Victoria and the Department to involve residents of the Flemington and North Melbourne towers in decisions that affect them. It was not an empty promise, or mere window-dressing. Homes Victoria staff and residents of the Towers invested time and effort in the initiative, to rebuild trust after the hard lockdowns in 2020. By September 2023, PTWF had advanced beyond the trial stage at the Flemington and North Melbourne estates. Formal meetings were taking place on a regular basis, with tangible results.

213 In those circumstances, residents of the Towers might reasonably have expected Homes Victoria to seek their input through the PTWF ‘empowered resident decision-making model’ before making a decision to demolish the Towers. It did not do so,

¹⁹⁹ Second Newport affidavit, [14].

²⁰⁰ Berih affidavit, [50]–[52].

²⁰¹ Berih affidavit, [49].

and there was no evidence that explained this failure. Mr Berih was entitled to feel that Homes Victoria had broken faith with the community when it made the Decision without seeking community input.

214 It was not to the point that the PTWF Local Action Plans were not legally binding on Homes Victoria, and did not contain a specific undertaking to consult renters on all future decisions. Homes Victoria had engaged in a process over several years to rebuild trust with the communities of the Flemington and North Melbourne estates through the PTWF initiative. It then, capriciously and unpredictably, let those communities down by making the Decision without notice or consultation.

215 I was not really assisted by the authorities referred to by Mr Berih and Homes Victoria on the question of arbitrariness. The international human rights documents relied on by Mr Berih concerned forced evictions of large groups, in circumstances that are far removed from the relocation process being undertaken by Homes Victoria in this case. On the other hand, the European authorities referred to by Homes Victoria all involved an attempt to evict a specific tenant or family from their home, in circumstances not comparable to this case. Further, those authorities all concerned the proportionality of a particular decision, and not whether it was arbitrary in the sense of being capricious or unpredictable.

216 On the evidence in this case, I am satisfied that the Decision arbitrarily interfered with, and therefore limited, Mr Berih's and other Group Members' right to home under s 13(a) of the Charter.

217 There was scant evidence about the effect of the Decision on Mr Berih's family life, or that of other Group Members. While I accept that, for many Group Members, their home is where their family life takes place, I am unable to find that the Decision limited their right to family under s 13(a).

Is any limitation of human rights justified?

218 The human rights protected by the Charter are not absolute, but may be subjected to lawful, reasonable, and justified limits. A public authority that has limited a human right does not act incompatibly with the right if the limitation is justified in accordance with s 7(2). The public authority will not have acted contrary to s 38(1) if the limitation is justified.

219 Section 7(2) of the Charter provides:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

220 The onus of establishing that the limitation is justified rests with the public authority.²⁰²

221 The Court's task is 'to determine whether the impugned conduct of the public authority is unlawful because it did not comply with its human rights obligations under the Charter'.²⁰³ This involves an objective assessment of the conduct of the public authority on the evidence before the Court, which is not limited to the evidence relied on by the public authority.²⁰⁴ The task is 'neither judicial review nor merits review, but the determination of a question of mixed law and fact'.²⁰⁵

²⁰² *Thompson v Minogue* (2021) 67 VR 301, [74].

²⁰³ *Thompson v Minogue* (2021) 67 VR 301, [98].

²⁰⁴ *Thompson v Minogue* (2021) 67 VR 301, [97]–[99].

²⁰⁵ *Thompson v Minogue* (2021) 67 VR 301, [99].

Homes Victoria's submissions

- 222 Homes Victoria submitted that the Decision was lawful, being an exercise of Homes Victoria's statutory capacities under ss 9(2) and 15 of the Housing Act, and not otherwise contrary to law.
- 223 It accepted that Group Members' rights under s 13(a) are of fundamental importance, but said that they must be viewed in light of the competing rights that are also relevant to the Redevelopment Program. Those competing rights include Group Members' own rights to life and personal safety and security, which are affected by the Towers currently being unfit for modern living. Also relevant are the rights of other Victorians who may be struggling to find housing in the current housing shortage.
- 224 Homes Victoria said that the Redevelopment Program serves the critically important objectives of addressing the issues with the Towers, growing social, affordable, and general housing, and providing people with access to safe and fit-for-purpose homes. It submitted that there was a clear connection between the Redevelopment Program and those purposes.
- 225 Acknowledging the significant impact of the Redevelopment Program on the rights of Group Members, Homes Victoria pointed to the steps it is taking to minimise that impact. In particular, it is sequencing the relocation process so as to minimise the impact on renters.
- 226 Critically, Homes Victoria submitted that there are no less restrictive measures reasonably available to achieve the purposes of the Redevelopment Program as effectively and to the same extent. It referred to Mr Newport's explanation of the problems with the proposal to renovate and retrofit the Towers, which demonstrated that proposal would not be feasible and would not have any meaningful lower impact on renters. Homes Victoria submitted that weight should be given to Mr Newport's assessment of the competing considerations, given his experience and expertise.²⁰⁶

²⁰⁶ While acknowledging that there is no longer any preconception of deference to or latitude for a decision-maker: see *Thompson v Minogue* (2021) 67 VR 301, [100].

227 Homes Victoria said that the evidence of Professor Brendan McNiven did not go any further than saying that there were many options to extend the life of the Towers through maintenance, repair, or retrofitting, not all of which would be feasible. In the absence of evidence of any feasibility study, Homes Victoria said that Mr Newport's evidence that renovation and retrofitting was not feasible should be accepted. It cautioned against requiring Mr Newport to prove a negative – that is, to prove that there were no less restrictive means reasonably available to achieve the aims of the Redevelopment Program.²⁰⁷

Mr Berih's submissions

228 In response, Mr Berih relied on the reports of Professor McNiven as to the feasibility of retrofitting the Towers. He said that those reports established that retrofitting was a less restrictive means reasonably available to achieve the objectives of the Redevelopment Program.

229 Mr Berih argued that little weight should be given to Mr Newport's opinion that retrofitting was not feasible, including because he was not an independent expert engaged to give an objective opinion. He said that there was no rational or reliable evidence that Mr Newport considered a specific retrofitting option, or that it was the best retrofitting option available. Mr Berih said that the evidence of Mr Newport did not meet the stringent standard of justification under s 7(2) of the Charter.²⁰⁸

Consideration

230 The limitation of the right to home in s 13(a) was 'under law' for the purposes of s 7(2). The Decision was a lawful exercise of Homes Victoria's power to develop land under s 15(1)(a) of the Housing Act.

231 It is logical to start answering the question whether the limitation was demonstrably justified in the terms of s 7(2) by setting out the justification given for the Decision by Homes Victoria.

²⁰⁷ Referring to *Thompson v Minogue* (2021) 67 VR 301, [75]–[77].

²⁰⁸ Referring to *Thompson v Minogue* (2021) 67 VR 301, [72]–[74].

232 In November 2023, Mr Newport wrote to Mr Berih’s solicitors with the following summary of the considerations that underpinned the Decision:²⁰⁹

As the *Housing Statement* and media release indicate, this is a multi-year redevelopment. It is also a renter-focused redevelopment. The Department of Families, Fairness and Housing (**Department**) recognises that the towers are reaching the end of their useful lives and are no longer fit for modern living. The towers no longer meet the building and living standards we expect to provide renters, and in recent years, repairs have become more common and complex to maintain the quality, comfort and standards our renters deserve.

The rights and interests of our renters were at the forefront of the policy decision to retire and redevelop the ageing towers. This included considering future disruptions to established renter communities and their networks. It was acknowledged that this would be intensely felt by some residents, including older persons with close community connections and supports, as well as families with young children who are in school. The Department will be doing its best to mitigate these impacts as much as possible. Household-level discussions to understand needs and preferences are essential and will inform how we plan with households for alternate housing options in the neighbourhoods of their interest.

On balance, the redevelopment is a proportionate and necessary approach that will provide renters with better quality housing and deliver an increase to social housing. The redevelopment will meet every modern building standard, including for noise, sustainability, waste and recycling, bedroom area dimensions, room depth, ventilation, private open space, accessibility and minimum amenity standards.

In making the policy decision to retire and redevelop the ageing towers, consideration was also given to alternative options for repairing and retrofitting the towers. The design of the towers was assessed as an insurmountable obstacle to satisfying many contemporary codes, nationwide energy rating schemes and accessibility needs. The redeveloped contemporary buildings will provide an enhanced quality of life for residents, including significantly improved thermal performance and energy efficiency requirements that will reduce the cost of living for residents, as well as improved accessibility for people with disabilities. The redevelopment will ultimately promote the rights of residents in the long-term through improved well-being and better homes.

233 Mr Newport elaborated on this explanation in his evidence at trial:²¹⁰

The towers were built between 1958 and 1975. Over the past 22 years, the Department has conducted ongoing works to maintain and replace essential services in the towers, such as lifts, boilers and fire systems. Despite those works, the towers are reaching the end of their useful lives and, in my view,

²⁰⁹ Second Bassini affidavit, Exhibit LB-12.

²¹⁰ Second Newport affidavit, [17]–[20].

are no longer fit for modern living. The issues with the towers include:

- a. Noise: The walls and floors between homes are not constructed to meet contemporary standards regarding noise attenuation meaning residents experience more noise entering their apartment from outside the building and from neighbouring apartments.
- b. Thermal performance: The majority of the towers are constructed from large, uninsulated concrete panels. It is difficult to manage and purge heat due to small window openings, the absence of external window shading, and the absence of mechanical cooling. This makes the apartments difficult to keep cool in warm weather and to keep warm in cool weather leading to less comfort and higher heating and cooling costs for residents.
- c. Sustainability: In addition to the issues with thermal performance, the towers are not designed to make the optimal use of renewable energy generation such as through photovoltaic cells or solar hot water.
- d. Structural performance: Contemporary building standards require new buildings to be designed and constructed to withstand a certain level of ground shaking (for example, from earth tremors or earthquakes). Similarly, remediation works must be done on existing buildings that do not meet those standards. Most of the towers do not meet contemporary design and construction standards, because they were built using a large panel construction method of precast walls and floor slabs.
- e. Waste and recycling: Waste and recycling facilities in the towers do not meet contemporary standards. For example, the garbage chutes are too narrow for some types of modern waste (such as online shopping packaging and pizza boxes), which results in frequent blockages. Modern recycling is not feasible, meaning the waste ends up in landfill.
- f. Fire protection: Whilst certified for occupation, and noting that the fire protection systems have been upgraded in the towers over the years, the towers do not contain the full range of fire protection measures required in modern buildings, such as fire-isolated stairwells and high ceilings to give people better protection from smoke inhalation and more time to evacuate. This means that in the event of a fire the towers are not as safe for residents as buildings constructed to contemporary standards.
- g. Physical condition: The physical condition of the towers is deteriorating. As noted above, most of the towers are constructed from concrete panels, some of which have started to degrade due to the passage of time. There are widespread issues with ageing sheet roofing, sewer stacks and reticulated water pipes, causing water and sewage leaks that require relocation of renters whilst repairs and clean ups are completed. This is despite the hard work of dedicated asset teams who are on site at various towers, monitoring performance of the assets, especially mechanical services to ensure necessary spare parts are available. At times, asset teams have to recycle parts, rather than

getting new ones, due to the age and design of the systems.

- h. Accessibility: The layout of homes and commons areas in the towers does not meet accessibility requirements in line with the *Disability Discrimination Act 1992* (Cth). For example, corridors, doorways, lift door openings and bathrooms can be too narrow to be accessible by a person using a powered wheelchair or mobility scooter.
- i. Dwelling amenity: Homes in the towers do not meet contemporary standards for dwelling amenity, such as minimum bedroom dimensions, room depth, natural ventilation, and access to private open space (such as balconies). This makes apartments in the towers less comfortable for residents than if they were constructed to contemporary standards. The absence of individual laundry facilities is an ongoing pain point for many renters.

Given the issues identified above, the status quo (that is, continued occupation of the towers with minor maintenance and upgrades on a periodic basis) is not a viable option. The issues with the towers pose risks to the comfort and safety of our renters, which it is incumbent on Homes Victoria to address.

The objective of the Redevelopment Program is to address the issues with the towers, grow social, affordable and general housing and through that, provide people with access to safe and fit-for-purpose homes. The Redevelopment Program thus promotes the interests of future renters on the sites, including those current renters who choose to return. The program will do that by demolishing the existing towers and replacing them with new homes that meet every modern building standard.

Critically, given the housing shortage, the Redevelopment Program will also substantially increase the supply of housing on the sites, thereby helping address the broader problem of housing affordability. Across all sites, the program will deliver around 7,400 additional homes, with an increase in the number of social houses by 10 per cent. The number of people living on the sites is expected to increase from 10,000 to 30,000. In relation to the Relevant Towers, the redevelopment option will deliver around 1,300 additional homes on the sites. Given the scale and nature of the program, its delivery timeline is long. Homes Victoria plans to complete the redevelopment of the Relevant Towers by around 2031 and the redevelopment of all towers by 2051.

234 In relation to the option of retrofitting the Towers, Mr Newport said:²¹¹

The retrofitting option would not be feasible, would not have any meaningful lower impact on the renters in the towers than the redevelopment option, and would not achieve the objective of the Redevelopment Program as effectively and to the same extent as the redevelopment option.

- a. Condition of the towers: The redevelopment option will deliver new homes that meet every modern building standard. By comparison, the retrofitting option would necessarily leave some issues unremedied or

²¹¹ Second Newport affidavit, [23].

only partially remedied. For example, due to the physical structure of the towers, it is not possible to change ceiling height, room depth, bedroom dimensions, or doorway or corridor width, or to add private open space, to address the issues identified above.

- b. Value for money: Given the extent of the remedial work required, the retrofitting option would be likely to cost at least as much as, if not more than, the redevelopment option. By way of example, the works required to address the structural performance issues alone would be likely to cost between \$73 million and \$103 million per tower. This estimate includes the cost of building fabric and services and structural remediation. It does not include specific seismic strengthening works, Building Code of Australia compliance, escalation costs and tenancy managements as the renters would need to be relocated for the works to occur. The retrofitting option would also cost more into the future, because based on my experience, older homes cost between twice and up to 10 times more than newer homes to maintain.
- c. Housing supply: As discussed above, the redevelopment option will increase the overall amount of housing across all sites and in relation to the Relevant Towers and market housing. The retrofitting option would not deliver that increase in housing supply.
- d. Impact on renters: The redevelopment of the towers will have a significant impact on renters. Many renters have strong connections to their tower and the surrounding area: they rely on local services; they go to school, study or work locally; their family and friends and other members of their community live in their tower or nearby. For those renters, retaining their links to their communities in the towers and the local area is vital. Because redevelopment will mean the relocation of renters to alternative accommodation, it will necessarily involve some disruption and dislocation to renters. Our renters in the towers include families with children, older people, people living with disability, and specific migrant communities. Members of those cohorts may find relocation more disruptive than other renters (because, for example, they are more reliant on local services or have stronger connections to their community in the tower). However, these needs and connections are front of mind in how Homes Victoria supports renters being relocated.
- e. The retrofitting option would not be materially different from the redevelopment option in its impact on renters. Retrofitting would require substantial works on the towers, which could not be done while the renters remain in their homes. Even on the retrofitting option, it would be necessary to relocate the renters to alternative housing for an extensive period, at least for a number of years and potentially as long as or longer than the redevelopment option would take to deliver.

235 Mr Newport described how he balanced the competing considerations as follows:²¹²

²¹² Second Newport affidavit, [34].

In making the Implementation Decision, I was aware of the matters identified at paragraphs 16 to 25 above because of my involvement in the preparation of the Redevelopment Program policy. I believed that the objective of the program was critically important and that taking no action was not an option, in light of the condition of the towers and the problems with the broader housing supply in Victoria. I knew that relocation would have a significant impact on the renters and their human rights, by disrupting their home life, their connections to local supports and services, and their links to their communities in the towers and the surrounding area. I also knew that steps had been taken to minimise that impact as far as possible through the sequencing of the program, and that I and others would continue to take steps to consider and minimise that impact during the implementation process and before any renters were actually required to move out of their towers, as I discuss further below. Given the problems with retrofitting, I considered that there was no way to address the problems with the towers without causing significant disruption to the renters — either option was going to cause a significant disruption. I also considered that the program would ultimately benefit future renters on the sites, including those current renters who choose to return, by delivering more and better homes for them to live in. On that basis, I considered that the program was justified and that the impact on the renters, while significant, was acceptable.

236 It became apparent during Mr Newport's evidence that the opinions expressed in these paragraphs were underpinned by the work that Homes Victoria had done on the Cabinet submission recommending the Redevelopment Program, including some technical reports relevant to the feasibility of renovating or retrofitting the Towers. Those reports, and other documents prepared for the purposes of the Cabinet submission, were all subject to public interest immunity and were not part of the evidence at trial. However, the evidence revealed their existence and some part of their influence on the Decision.

237 Mr Newport was, in my assessment, a truthful witness. I have no reason to doubt that the explanation he put forward in his affidavit accurately reflected the factual basis for the Decision and the competing considerations he took into account in reaching it. I consider him to be appropriately experienced and qualified to express opinions about the management of ageing housing stock, including as to the feasibility of retrofitting the Towers.

238 I turn now to consider the justification given by Mr Newport against the factors set out in s 7(2) of the Charter.

The nature of the right

- 239 While all of the human rights protected by the Charter are important, it is implicit in s 7(2)(a) that some rights are more important than others.²¹³ Some human rights are regarded in international human rights law as absolute. In particular, the ICCPR contains a number of rights that States parties may not limit in any circumstances.²¹⁴
- 240 Those absolute rights do not include the right to home protected by s 13(a) of the Charter.²¹⁵

The importance of the purpose of the limitation

- 241 The Decision had two main purposes. One purpose was to address the many issues with the Towers that render them unfit for modern living. A second, equally significant purpose was to increase the supply of housing on the sites where the Towers now stand. Both of these purposes are unquestionably important to the achievement of the objects of the Housing Act and in their own right.

The nature and extent of the limitation

- 242 I have described already the nature and extent of the limitation of Group Members' right to home caused by the Decision.²¹⁶ It has diminished their security of tenure in their homes and is dispersing the community around the Towers that is an intrinsic part of their homes.
- 243 In this case, the nature and extent of the limitation is separate from the reason why the limitation was arbitrary. In considering justification under s 7(2), the focus is necessarily on the impact on Group Members of the Decision to demolish the Towers

²¹³ Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Thomson Reuters, 2nd ed, 2019) 66.

²¹⁴ Ibid, 66–7; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 4(2) (ICCPR). The absolute or non-derogable rights in the ICCPR are the right to life (art 6); the right not to be subjected to torture or to cruel, inhuman, or degrading treatment or punishment, or medical or scientific experimentation without free consent (art 7); protection from slavery and servitude (art 8); the right not to be imprisoned for inability to fulfil a contractual obligation (art 11); protection from retrospective criminal guilt (art 15); the right to recognition as a person before the law (art 16); and the right to freedom of thought, conscience, and religion (art 18, subject to art 18(3)).

²¹⁵ The equivalent right in the ICCPR is in art 17(1).

²¹⁶ See [189]–[197] above.

and redevelop the sites — and not on the lack of notice and consultation about the Decision. While consulting renters about the proposed Redevelopment Program may have softened the blow they experienced on learning of the Decision, I am not convinced that it would have resulted in a different decision. In particular, no amount of input from renters could have substantially increased the amount of housing provided on the sites if the Towers were to remain standing.

244 While this may be cold comfort at present, Homes Victoria is taking steps to mitigate the impact of the Decision on Mr Berih and other Group Members. Importantly, it recommended that the Redevelopment Program start with the Towers because there is alternative housing nearby at Victoria Street, Flemington and Abbotsford Street, North Melbourne.²¹⁷ This will reduce the disruption of relocation for at least some renters, and provides some prospect of maintaining the thick social bonds between residents of the Towers after they have moved elsewhere.

245 In addition, consultation about the relocation process has elicited a written commitment from Homes Victoria to a right of return. In correspondence to Inner Melbourne Community Legal dated 30 May 2024, Homes Victoria advised that ‘all former residents who have been relocated to alternate housing will have a right of return to the site upon completion, based on their ongoing eligibility and needs’.²¹⁸ Homes Victoria drew attention to this commitment in the course of argument, as an example of the detail of the Redevelopment Program about which there is ongoing consultation.²¹⁹ Group Members can reasonably expect Homes Victoria to honour this commitment.

246 These matters indicate that Homes Victoria is aware of the adverse impact of dislocation on renters, and is taking steps to ameliorate that impact. If these steps are successful, the loss of community and other harmful effects predicted by Professor Porter may not occur, or at least not to the same extent as with the previous public

²¹⁷ Second Newport affidavit, [24]–[25].

²¹⁸ Second Bassini affidavit, Exhibit LB-41.

²¹⁹ Transcript, 365:17–67:8.

housing renewal programs referred to in her report.

The relationship between the limitation and its purpose

247 The limitation is rationally connected to the achievement of both of the purposes of the Decision. The implementation of the Decision will, in Mr Newport's words, deliver more and better homes for both current and future renters to live in.²²⁰

Any less restrictive means reasonably available to achieve the purpose

248 Mr Berih relied on the expert report of Professor McNiven to demonstrate that there were less restrictive means reasonably available to achieve the purposes of the limitation.

249 Professor McNiven is an enterprise professor of architectural engineering in the Faculty of Architecture, Building and Planning at the University of Melbourne. Before taking up that position in 2018, he had 20 years of experience as a structural engineer consulting in the architectural buildings sector. His report and supplementary report were received into evidence. In relation to the OFFICE report appended to the supplementary report, I made a direction under s 136 of the Evidence Act limiting its use to non-hearsay, non-opinion purposes. Professor McNiven was not cross-examined.

250 Professor McNiven was asked to respond to the assertion in the Housing Statement that the Towers were reaching the end of their useful lives, and to explain the options open to Homes Victoria to prolong the useful lives of the Towers. His opinion was:²²¹

The assertion that the towers are 'reaching the end of their useful lives' can only be made after a feasibility assessment process examining the remedial options available has been carried out. This process should include as a minimum the assessment of the existing condition, assessment of the remedial options available to remedy any deficiencies found, and assessment of the feasibility of these options (with regard to cost, carbon, buildability and other factors), refer paragraph 9 below for further detail. My understanding is that this process has not been carried out in full. On the basis of this understanding I disagree with the assertion.

²²⁰ Second Newport affidavit, [34].

²²¹ **Exhibit P1** – Expert report of Professor Brendan McNiven dated 28 August 2024, [2]–[5].

Elaboration on ‘useful life’: Different elements of buildings are designed with different nominal design life expectations. Structure for example is nominally designed for a fifty year design life, internal fitout, building services and other non-structural elements are generally designed for lesser design life expectations (10 to 25 years). The instance of any particular element reaching its originally envisaged design life does not mean that element is no longer of use. An element’s useful service life and consequentially building’s overall useful service life, may be extended through maintenance, repair, or retrofit.

There will be many options available to Homes Victoria to extend the useful life of the towers through maintenance, repair or retrofit. Not all of these will be feasible to implement however. The decision to retain and retrofit a building (or portions thereof), or to demolish and rebuild it should be made on the basis of the feasibility assessment mentioned above, and elaborated on below in paragraph 9.

It is very common in cities for buildings that have exceeded their originally envisaged design lives to be restored to useful serviceable conditions.

251 In Professor McNiven’s opinion, the options for rectification of the asserted failings in the Towers would be as many and varied as the failings found. The feasibility of any technical solution would have to be assessed, following a three step process:²²²

The following key steps should be included in any feasibility assessment as a minimum:

- a) An existing condition assessment including site testing and a desktop analysis ascertaining serviceability against current design standards, guidelines, and codes of practice. The more extensive the level of assessment carried out, the higher the level of confidence that will result in the decision making between whether to retain and retrofit or to demolish and rebuild.
- b) A design exercise to develop remedial or retrofit solutions to rectify the failings found in the existing condition assessment above (through design workshopping).
- c) Assessment of the feasibility and practicality of the implementation of the remedial solutions identified above. Factors to consider should include amongst others financial cost, environmental cost, buildability, health and safety, wider costs and benefits (social, ecological etc).

The above process should be carried out by a multi-disciplinary team (with experience in retrofit), examining as many aspects of the building as practical.

252 Professor McNiven was aware that various consultants had been contacted by Homes Victoria to provide advice on the assessment of the Towers, but was not aware of the

²²² Exhibit P1, [9]–[10].

nature of the advice sought, nor whether it was in fact commissioned. He was also unaware of any feasibility studies released by Homes Victoria or another government department on the possibilities of retrofitting the Towers.²²³

253 Professor McNiven gave a number of examples of buildings that had been successfully retrofitted, with significant cost savings and environmental benefits.²²⁴ He also referred to some non-government studies that had been carried out on the possibility of retrofitting Melbourne's public housing towers. Many of these had been prepared for presentation during the 'Public Housing Towers Re-Imagined' event hosted by the Architects Institute of Australia during Melbourne Design Week in May 2024.²²⁵

254 In his supplementary report, Professor McNiven provided comment on paragraphs 17 to 23 of Mr Newport's affidavit. He said that it did not constitute a feasibility analysis for potential retrofit of the Towers. It did no more than identify the issues to be addressed, which is only the first step in a feasibility assessment. It did not explore the rectification options available to address the failings, so that their feasibility and practicality could then be assessed.²²⁶ Professor McNiven said further that a feasibility assessment required some level of understanding of the technical issues involved, and the technical solutions available to address them.²²⁷ He appended a report prepared by OFFICE as an example of a proper feasibility study for a retain, repair, reinvest strategy for the Flemington estate.²²⁸

255 The essence of Professor McNiven's opinion evidence was that:

- (a) It may be possible to extend the life of the Towers through maintenance, repair, and retrofitting. There will be many options available to do this, although not all options will be feasible.

²²³ Exhibit P1, [42].

²²⁴ Exhibit P1, [28]–[34].

²²⁵ Exhibit P1, [43]–[45].

²²⁶ **Exhibit P2** – Supplementary report of Professor Brendan McNiven dated 11 October 2024, [2]–[3], [5].

²²⁷ Exhibit P2, [7]–[9].

²²⁸ Exhibit P2, Appendix B.

- (b) The decision to retain and retrofit a building (or portions thereof), or to demolish and rebuild it, should be made on the basis of a multidisciplinary feasibility assessment that examines the existing condition of the building, identifies design solutions to rectify the failings found, and assesses the feasibility and practicability of those solutions.
- (c) He was not aware of any feasibility studies released by Homes Victoria or another Victorian Government department on the possibilities of retrofitting the Towers. He did not consider Mr Newport's evidence to be a satisfactory feasibility study.

256 In response, Mr Newport said that Professor McNiven's first report did not contain any properly informed proposal that would achieve the objectives of the Housing Statement. In particular, the report did not refer to any examples of buildings with the same characteristics as the Towers being retrofitted to address the issues identified by Mr Newport.²²⁹ Mr Newport explained why he considered that retrofitting the Towers would not be feasible, would not have any meaningful lower impact on the renters in the Towers than redevelopment, and would not achieve the objective of the Redevelopment Program as effectively and to the same extent as redeveloping the Towers.²³⁰

257 As mentioned, it emerged during Mr Newport's evidence that Homes Victoria had obtained technical reports that informed the Cabinet submission recommending the Redevelopment Program. He specifically referred to a report prepared by Cushman & Wakefield concerned with technical aspects of a cross-section of the 44 public housing towers, the measures required to retrofit, repair, and maintain them, and the options available.²³¹ He also referred to a report by Beca concerning the structure of the buildings and non-compliance with seismic standards that were introduced in

²²⁹ Second Newport affidavit, [22]. See [233] above for Mr Newport's evidence about the issues with the existing condition of the Towers.

²³⁰ Second Newport affidavit, [23], set out at [234] above.

²³¹ Transcript, 18:2-17, 19:2-16 (Newport XXN).

1994.²³² Mr Berih called for production of these documents, but they were ruled to be immune from production.²³³

258 In light of Mr Newport's evidence, I am satisfied that Homes Victoria did obtain a feasibility assessment as to whether it would be possible to retrofit the 44 public housing towers. Of course, the assessment is not in evidence, and I am unable to make any finding as to whether it covered the matters that Professor McNiven considered essential. However, Mr Newport was in my view an honest witness, and I have no reason to believe that he misrepresented the advice he had received about the feasibility of retrofitting. I accept Mr Newport's evidence that retrofitting the Towers would not be feasible, for the reasons given in his evidence set out at [234] above.

259 Even if there was a feasible option to retrofit the Towers to extend their useful lives, the evidence is clear that this would still require relocation of the residents of the Towers for an extended period. As Mr Newport explained, retrofitting would require substantial works on the Towers, which could not be done while people continued to live in their homes. The impact of retrofitting on Group Members would be similar: they would have to leave their existing homes to enable work to be undertaken, and be scattered to available alternative housing for an extended period. It is not possible to predict the long-term impact of this option on the community, beyond saying that it is unlikely that it would ever be the same.

260 In addition, retrofitting the Towers would not in any way achieve the second purpose of the Redevelopment Program – to increase the supply of housing on the sites. Mr Newport's unchallenged evidence is that, across all sites, the Redevelopment Program will deliver around 7,400 more homes, including a 10% increase in social housing. The number of people living on the sites is expected to triple, from 10,000 to 30,000. Specifically in relation to the Towers, the Redevelopment Program will

²³² Transcript, 18:18–29, 22:2–7 (Newport XXN).

²³³ *Berih No 3* [2025] VSC 30, [92]–[93], see also [29] for a full list of the documents that were ruled to be immune from production.

provide 1,300 additional homes on those sites.

261 As a result, I am not satisfied that there is a less restrictive means reasonably available to achieve the purposes of the Redevelopment Program.

Is the limitation reasonable and justified?

262 Having regard to all of these matters, I am satisfied that the limitation of Group Members' right to home under s 13(a) is reasonable and has been demonstrably justified. Homes Victoria must do something to address the ongoing deterioration of the Towers. The Redevelopment Program is rationally directed to achieving that purpose. While the implementation of the Decision will diminish Group Members' security of tenure and disperse their community, the alternative option of retrofitting the Towers would have a similar effect. The implementation of the Redevelopment Program will substantially increase the amount of housing on the sites, to the benefit of a much wider group than the current renters in the Towers.

Should any remedy be granted?

263 None of Mr Berih's grounds has been established, and so no remedy can be granted.

Disposition

264 The proceeding must be dismissed.

265 I will hear the parties on the question of costs.

CERTIFICATE

I certify that this and the 87 preceding pages are a true copy of the reasons for judgment of Justice Richards of the Supreme Court of Victoria delivered on 4 April 2025.

DATED this fourth day of April 2025.



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Associate