

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

Not Restricted

S ECI 2024 00280

BARRY BERIH Plaintiff

v

STATE OF VICTORIA First Defendant

and

HARRIET SHING Second Defendant

and

HOMES VICTORIA Third Defendant

JUDGE: Richards J
WHERE HELD: Melbourne
DATE OF HEARING: 23 April 2024
DATE OF JUDGMENT: 10 May 2024
CASE MAY BE CITED AS: Berih v State of Victoria (No 2)
MEDIUM NEUTRAL CITATION: [2024] VSC 230

PRACTICE AND PROCEDURE – Application for summary dismissal – Challenge to Cabinet decision to demolish public housing towers and redevelop sites – Whether claim has real prospect of success – No real prospect of success as currently framed – Application allowed – Plaintiff granted leave to reformulate claim – *Housing Act 1983* (Vic) s 15 – *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 38(1), 39(1) – *Civil Procedure Act 2010* (Vic) ss 62, 63.

PRACTICE AND PROCEDURE – Representative proceedings – Application for declassing order – Whether all the relief sought can be obtained by means of a proceeding other than a representative proceeding – Not necessary to decide at present – *Supreme Court Act 1986* (Vic) Pt 4A, s 33N(1).

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Mr L Howard

Inner Melbourne
Community Legal

For the Defendants

Mr L Brown SC, Crown Counsel
for Victoria with
Mr J Maxwell

Victorian Government
Solicitor

HER HONOUR:

- 1 Barry Berih lives in the public housing tower at 33 Alfred Street, North Melbourne, which has been his home for about 25 years. He first moved there with his family, as a child of five. He is now 30 years old and lives in a flat in the Alfred Street tower with his brother, under a rental agreement with **Homes Victoria**. Mr Berih has a mild disability, and the flat has been modified to accommodate his needs. He relies on nearby health services, regularly attends the North Melbourne Community Centre, and worships at the local mosque with other members of his Eritrean community.
- 2 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 of these public housing towers are now owned and managed by Homes Victoria, pursuant to the *Housing Act 1983 (Vic)*. Homes Victoria is subject to the direction and control of the **Minister** for Housing, who is currently the Honourable Harriet Shing.
- 3 On 20 September 2023, the Victorian Government published a document titled *Victoria's Housing Statement: The decade ahead 2024-2034*. The Housing Statement began with a message from the then Premier of Victoria, the Honourable Daniel Andrews, 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':¹

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

¹ Victorian Government, Department of Premier and Cabinet, *Victoria's Housing Statement: The decade ahead 2024-2034* (20 September 2023), 36, exhibited to the affidavit of Louisa Una Bassini dated 15 February 2024.

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 highrise 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.

- 4 Immediately following the release of the Housing Statement, Homes Victoria began informing renters in three public housing towers of the plan to retire these towers and offering support to move house. The three towers are the Alfred Street tower and the towers located at 120 Racecourse Road, Flemington and 12 Holland Court, Flemington (together, the **Towers**).
- 5 Mr Berih first learned that his home was to be demolished through the media, when watching a press conference given by the Premier 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.
- 6 In the weeks that followed the announcement, Homes Victoria staff doorknocked every dwelling in the Towers to inform residents of the decision and the associated relocation process. They provided renters with information about the options available to relocate to other social housing during the works on the Towers. Homes Victoria set up information booths in communal spaces at the Towers, and sent letters and text messages to all renters in the Towers. It also convened community forums at the North Melbourne Community Centre on 26 October 2023 and at Flemington Djerring Hub on 30 October 2023, to provide information to renters and other interested members of the public about the decision and the relocation process.
- 7 On 24 January 2024, Mr Berih commenced this proceeding as a representative

proceeding pursuant to 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 defendants to the proceeding are the State of Victoria, the Minister, and Homes Victoria. Mr Berih seeks judicial review remedies in respect of the decision to demolish the Towers, on three grounds:

- (a) First, he claims that in making the decision, Cabinet effectively usurped the power to develop and manage land that is exclusively vested in Homes Victoria by s 15 of the Housing Act, and that the decision is therefore affected by jurisdictional error.
- (b) Second, he contends that in making the decision, Cabinet 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 in making the decision, Cabinet acted incompatibly with Group Members' human rights, specifically their right under s 13 of the Charter not to have their home and family unlawfully or arbitrarily interfered with, and their right under s 20 not to be deprived of their property other than in accordance with law.

8 Mr Berih applied for interlocutory injunctions restraining the defendants from demolishing the Towers, undertaking preparatory works to that end, and advising the tenants of the Towers that they will be demolished. The application was refused by Keogh J on 3 April 2024.² However, Homes Victoria has undertaken to give 14 days' notice before executing a contract to demolish the Towers or applying for a demolition permit. In addition, the trial of the proceeding has been expedited and is listed for a two day hearing commencing 22 July 2024.

9 On 26 March 2024, the defendants filed a summons seeking orders that the proceeding be summarily dismissed. The summons also seeks an order that the proceeding be

² *Berih v State of Victoria* [2024] VSC 156.

‘declassified’ – that is, that it no longer continue as a proceeding under Pt 4A of the Supreme Court Act. I heard the defendants’ summons on 23 April 2024.

10 For the reasons that follow, I have concluded that Mr Berih’s claim in its current form has no real prospect of success, and must be summarily dismissed. I will give Mr Berih leave to reformulate his claim, and defer ruling on the defendants’ declassing application until after they have had an opportunity to consider the reformulated claim.

Summary dismissal – relevant provisions and principles

11 The defendants sought summary dismissal of the proceeding pursuant to ss 62 and 63 of the *Civil Procedure Act 2010* (Vic).³

12 Section 62 of the Civil Procedure Act enables a defendant in a civil proceeding to apply for summary judgment in the proceeding on the ground that the plaintiff’s claim, or part of that claim, has no real prospect of success. Under s 63, the Court may give summary judgment if satisfied that a claim has no real prospect of success. If the claim has a ‘real’ as opposed to a ‘fanciful’ chance of success, it should be permitted to proceed to a trial on the merits.⁴ In determining an application for summary dismissal, the Court takes the pleaded allegations at their highest and assumes that the pleaded case can be proved at trial.⁵

13 The power to give summary judgment is subject to s 64 of the Civil Procedure Act, which allows the Court to let a civil proceeding go to trial despite there being no real prospect of success. There are two circumstances in which the Court has that discretion:⁶

(a) first, where it is not in the interests of justice to summarily dispose of the

³ The application was made in accordance with r 22.16 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic).

⁴ *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* (2013) 42 VR 27, [35] (Warren CJ and Nettle JA; Neave JA agreeing).

⁵ *Boroughs NY Pty Ltd v Victoria* [2021] VSC 785, [14].

⁶ *Civil Procedure Act 2010* (Vic), s 64.

proceeding; or

- (b) second, where the dispute is of such a nature that only a full hearing on the merits is appropriate.

The Decision

14 In his general indorsement of claim, Mr Berih identified the decision the subject of the proceeding as follows:

The Decision

7. On 20 September 2023, the State published a document, ‘Victoria’s Housing Statement’ (**Statement**), signed by Premier Daniel Andrews. The Statement gave notice of a decision in the following terms:

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 (**Decision**).

8. The Decision was made without any notice or consultation with the Group Members.
9. The Decision constituted:
- (a) the management and/or development of the Towers vested in Homes Victoria for the purposes of sections 15(a) and (b) of the Housing Act; and
 - (b) the anticipatory termination of the rental agreements held by the Group Members, or alternatively, the anticipatory breach of an essential term of the rental agreements, being the entitlement each of them have to reside in their apartments in one of the Towers.
10. On 28 November 2023 (and following an inordinate delay in response to a request for information), Homes Victoria advised Inner Melbourne Community Legal (acting for Mr Berih and other Group Members) that the Decision was not made by it, but made by the Cabinet of the State.

15 I use ‘Decision’ in this judgment as it is identified in the indorsement – the decision to progressively retire each of Melbourne’s 44 public housing towers and redevelop each site, starting with towers in Flemington, North Melbourne and Carlton.

16 The advice referred to in [10] of the indorsement was provided in a letter from Simon Newport, the Chief Executive Officer of Homes Victoria, dated 27 November 2023. Mr Newport was replying to a letter from Mr Berih’s solicitors dated 23 October 2023, in which they requested a copy of the human rights assessment undertaken as part of the decision to ‘retire’ Mr Berih’s home and relocate him and his family, and all documents relevant to Homes Victoria’s decision making. Mr Newport replied:

Given that the *Housing Statement* was a result of a decision of Cabinet, it is not appropriate to provide you with the underlying documents that you seek. However, we can provide the following summary of the considerations that underpinned the policy decision to retire and redevelop the ageing towers.

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.

17 In a letter dated 9 January 2024, the Victorian Government Solicitor’s Office conveyed its instructions that ‘the decision to retire and redevelop the 44 high-rise public housing towers was made by Cabinet’. It said that this was a policy decision that had ramifications for, but was separate to, decisions of Homes Victoria as a residential rental provider affecting the rights of individual renters. The letter reiterated that it was inappropriate to provide documents forming part of Cabinet’s decision-making process, because such documents are subject to strict confidentiality obligations and would ordinarily be the subject of public interest immunity claims in any legal proceedings.

18 According to the Executive Director of the Cabinet Office in the Department of Premier and Cabinet:⁷

(a) on 18 September 2023, a Cabinet subcommittee approved financial aspects of various initiatives for inclusion in the Housing Statement, including the redevelopment of Melbourne’s 44 public housing towers, starting with towers in North Melbourne and Flemington and two red-brick towers at the estate on Elgin Street, Carlton (the **Initiative**); and

(b) on 20 September 2023, Cabinet approved relevant respective Ministers progressing specific initiatives for inclusion in the Housing Statement, including the Minister for Housing progressing the Initiative.

19 In an affidavit filed in this proceeding,⁸ Mr Newport said that on 18 September 2023, Cabinet decided to approve the policies in the Housing Statement. He said that those policies included the policy decision to retire and redevelop Melbourne’s 44 public housing towers by 2051.⁹

⁷ Affidavit of Sarah Alexandra McKellar-White dated 26 March 2024, [4].

⁸ Affidavit of Simon Andrew Newport dated 5 March 2024 (**Newport affidavit**). The Newport affidavit was relied on by the defendants to oppose Mr Berih’s application for interlocutory injunctions, but was relied on by Mr Berih in opposing the summary dismissal application.

⁹ Newport affidavit, [7]–[8].

Does the jurisdictional error ground have a real prospect of success?

The jurisdictional error ground

20 Mr Berih's claim that the Decision was affected by jurisdictional error is set out in his indorsement as follows:

Jurisdictional error

11. The Decision made by Cabinet was the exercise of the power exclusively vested in Homes Victoria pursuant to sections 15(a) and (b) of the Housing Act.
12. The Decision made by Cabinet was not made by the Minister for the purposes of setting the direction or setting a control for Homes Victoria pursuant to section 10(1) of the Housing Act.
13. In those premises the Decision is affected by jurisdictional error.

21 Mr Berih submitted that it is clear from the evidence that it was Cabinet, rather than Homes Victoria, that decided to retire the Towers. He relied on a section of the Housing Statement that gave notice of the Decision, Mr Newport's affidavit at [7] to [9], and the correspondence quoted at [16] and [17] above.

22 Mr Berih's argument on jurisdictional error is that under s 15(1) of the Housing Act it is Homes Victoria, not Cabinet, that has the power to 'develop' the land and buildings vested in it, which includes the power to demolish those buildings. Cabinet's decision to retire the Towers is therefore a usurpation of Homes Victoria's power under s 15 of the Housing Act and beyond any power reposed in Cabinet.

Relevant provisions – Housing Act

23 Homes Victoria is a body corporate established by s 9(2) of the Housing Act, constituted by the Chief Executive Officer of Homes Victoria and their successors in office.¹⁰ 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.¹¹

¹⁰ *Housing Act 1983* (Vic), ss 4(1) (definition of 'Homes Victoria'), 9.

¹¹ Housing Act, s 9(1)(a). Part 3 of the *Public Administration Act 2004* (Vic) deals with public service employment.

24 The functions of Homes Victoria are those conferred by the Housing Act, together with any functions conferred by the Minister.¹²

25 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.

26 Part III of the Housing Act gives Homes Victoria various powers in relation to property, which are subject to Ministerial control. Section 13 provides:

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.

27 Relevantly, s 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

¹² Housing Act, ss 9(3), (3A).

in paragraph (b); and

...

- (2) In subsection (1) the words *for all purposes ancillary to those purposes* include the provision of all necessary community services and amenities.

28 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;

...

Defendants' submissions

29 The defendants submitted that the jurisdictional error ground has no real prospect of success, for several reasons.

30 *First*, they said that s 15(1) of the Housing Act did not preclude Cabinet from making the Decision in the exercise of its non-statutory capacity to determine general policy according to the general public interest,¹³ consistent with Cabinet's position as 'the body responsible for the creation of state policy at the highest level'.¹⁴ The Decision formed part of the Housing Statement, which the defendants described as a 'comprehensive, long-term plan to tackle a social and economic problem of profound

¹³ Referring to *South Australia v O'Shea* (1987) 163 CLR 378, 411 (Brennan J) (*O'Shea*).

¹⁴ Referring to *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 615 (Mason CJ, Brennan, Deane, Dawson, Gaudron, and McHugh JJ).

scale, complexity and significance, being housing supply and affordability'.¹⁵ They referred in some detail to the Housing Statement in support of their contention that both the Housing Statement and the Decision were inherently high-level and preliminary, and left the detailed implementation for others to work out.

31 The defendants pointed out that there was no reference in the Housing Statement to any exercise of statutory powers, and that it did not purport to exercise any power under s 15 of the Housing Act. They said that there was no indication in the Housing Statement that it had any effect on the legal rights or interests of any person.

32 By reference to relevant provisions of the Housing Act, the defendants submitted that Homes Victoria is embedded within the executive government of Victoria, and sits below Cabinet and the Minister for Housing in the hierarchy of that government. Cabinet is 'the meeting of ministers of the Crown in a central collective body',¹⁶ and the supreme policy-making body in the system of representative and responsible government. It is therefore to be expected that in exercising its powers, Homes Victoria will have regard to relevant policy as determined by Cabinet and the Minister.¹⁷ The defendants argued that, far from limiting Cabinet's role, the Housing Act presupposes that Cabinet and the Minister will set housing policy and that Homes Victoria will carry that policy into effect.

33 On that basis, the defendants submitted that the Decision was wholly consistent with the scheme of the Housing Act, including the vesting of powers in Homes Victoria under s 15(1).

34 *Second*, the defendants argued that, as a policy decision of Cabinet, the Decision is non-justiciable. They said that the decision was a quintessential policy decision of the kind that courts are ill-equipped to evaluate, was not an exercise of statutory power, and

¹⁵ **Defendants' submissions** in support of application for declassing order and summary judgment dated 26 March 2024, [30](1).

¹⁶ Referring to Bradley Selway, *The Constitution of South Australia* (The Federation Press, 1997) 77.

¹⁷ Referring to *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177, *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54.

did not affect any legal rights or interests.

35 In support of this argument, the defendants relied on the following authorities:

- (a) *Australian Education City Pty Ltd v Victorian Planning Authority*,¹⁸ in which this Court held that a decision of Cabinet to terminate a tender process for a large-scale property development was non-justiciable.
- (b) *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd*,¹⁹ where the Full Court of the Federal Court of Australia held that a decision of Cabinet to nominate certain land for inclusion on the World Heritage List was non-justiciable.
- (c) *Acquista Investments Pty Ltd v Urban Renewal Authority*,²⁰ in which the Full Court of the Supreme Court of South Australia held that a decision of Cabinet to sell a large area of public land was non-justiciable.

36 The defendants sought to distinguish this case from cases in which the courts have reviewed decisions involving Cabinet or the Executive Council, such as *South Australia v O'Shea*²¹ and *FAI Insurances Ltd v Winneke*.²² They argued that those cases involved a decision made by someone other than Cabinet, albeit acting on the advice of Cabinet or the Executive Council. In both cases the decisions involved the exercise of a statutory power, were based on considerations peculiar to an affected individual, and directly affected that person's legal rights and interests.

Mr Berih's submissions

37 Mr Berih said that the precise nature and terms of the Decision had been withheld from him and the Court, due to a public interest immunity claim that is yet to be ruled upon. However, he said that it was clear from the available evidence that the Decision

¹⁸ *Australian Education City Pty Ltd v Victorian Planning Authority* (2020) 66 VR 597 (*Australian Education City*).

¹⁹ *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 (*Peko-Wallsend*).

²⁰ *Acquista Investments Pty Ltd v Urban Renewal Authority* (2015) 123 SASR 147 (*Acquista*).

²¹ (1987) 163 CLR 378.

²² *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 (*FAI Insurances*).

included a decision to act immediately to demolish the Towers. He referred in particular to the evidence of the actions taken by Homes Victoria after the Decision was made by Cabinet. As outlined in Mr Newport's affidavit, Homes Victoria commenced an implementation program to communicate the decision to tenants in the Towers, which included doorknocking, leaving calling cards, installing physical information booths in communal spaces, and sending letters and text messages.

38 Mr Berih argued that it was not to the point that the Decision was made together with a suite of other policy-based decisions included in the Housing Statement, or even that it was included alongside the policy that all 44 public housing towers are to be demolished by 2051. He emphasised that the Decision that is the subject of this proceeding is the decision to move immediately to demolish the three Towers.

39 As to the defendants' justiciability argument, Mr Berih responded that 'there is no general principle that decisions which are made in the public interest and/or which are politically controversial are immune from judicial review'.²³ He relied on Mason CJ's reasoning in *O'Shea*, that Cabinet's status as a political institution primarily concerned with political, economic, and social concerns does not deny the existence of a duty to act fairly in a matter that turns on considerations particular to an individual.²⁴ He also referred to statements in *Peko-Wallsend* to the effect that if legislation ever did designate Cabinet as a decision-maker, its decisions may be amenable to judicial review.²⁵

40 While Mr Berih accepted that Cabinet is usually entrusted with matters of policy inapt for judicial review, he said that the Decision here was not a matter of high-level policy but rather a concrete decision to demolish the Towers. He said that packaging the Decision together with statements of policy in the Housing Statement did not convert it into a policy decision.

²³ Referring to *Century Metals & Mining NL v Yeomans* (1989) 40 FCR 564, 587 (*Century Metals*).

²⁴ *O'Shea*, 387-8 (Mason CJ).

²⁵ *Peko-Wallsend*, 279-80 (Bowen CJ), 280 (Sheppard J), 301 (Wilcox J).

Consideration

41 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.²⁶ 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.²⁷ 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.²⁸ 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).

42 Cabinet plays a central role in Victoria's executive government:²⁹

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.

43 However, Cabinet keeps a 'low legal profile'.³⁰ It is not mentioned in the *Constitution Act 1975* (Vic), where its formal legal expression is the Executive Council.³¹ 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

²⁶ Housing Act, s 9(3A).

²⁷ 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.

²⁸ Housing Act, ss 4(1) (definition of 'Department'), 35.

²⁹ Greg Taylor, *The Constitution of Victoria* (The Federation Press, 2006), 144.

³⁰ *Ibid.*

³¹ *Constitution Act 1975* (Vic), ss 87A–87E.

convention that the Governor acts on the advice of the Executive Council.³²

44 Section 15 of the Housing Act does not preclude Cabinet from making high-level policy decisions about public housing in Victoria. The structure of the Housing Act, with its repeated emphasis on Ministerial control,³³ 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.

45 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.

46 I accept the submission of the defendants that the Decision is not justiciable. The Decision, being Cabinet’s decision to retire and redevelop Melbourne’s 44 public high-rise towers, commencing with towers in Flemington, North Melbourne, and Carlton, did not involve the exercise of any statutory power and did not, of itself, have any legal consequence. It was a policy decision involving competing political, social, financial, economic, and land use planning considerations that the Court is not in a position to evaluate.³⁴ It was at least as complex and multifactorial as the Cabinet decisions held to be immune from review in *Peko-Wallsend*, *Acquista*, and *Australian Education City* – possibly more so. The fact that the Decision is likely to influence the

³² *FAI Insurances*, 364–5 (Mason J); Taylor, *The Constitution of Victoria*, 144–5, 157.

³³ Housing Act, ss 10, 13, 19, 32.

³⁴ *Peko-Wallsend*, 279 (Bowen CJ), 280–1 (Sheppard J), 298–304 (Wilcox J); *Acquista*, [84], [91]–[103] (Vanstone and Lovell JJ); *Australian Education City*, [74]–[82].

decisions of other decision-makers, including *Homes Victoria*, does not mean that the Decision is itself amenable to judicial review.³⁵

47 My conclusion that the Decision is not justiciable is not based only on its status as a decision of Cabinet. Mr Berih is correct to point out that, at least in theory, decisions of Cabinet are not immune from review simply because of the identity of the decision-maker.³⁶ The point is a theoretical one because, as far as I am aware, no Victorian statute identifies Cabinet as the repository of a power to make decisions with legal consequences. The decisions under consideration in *FAI Insurances* and *O'Shea* were not decisions of Cabinet as such, but decisions of the Governor in Council in the exercise of an identified statutory power. What made them reviewable was that they were decisions with legal consequences, based on considerations peculiar to the individuals affected by the decisions, as distinct from broad policy decisions based on political, economic, and social concerns.

48 Mr Berih is also correct in his submission that there is no general principle that politically controversial decisions are immune from judicial review. As the Full Court of the Federal Court held in *Century Metals & Mining NL v Yeomans*,³⁷ whether a particular decision is reviewable depends on the nature and subject matter of the decision.³⁸ The Decision made by Cabinet here has none of the hallmarks of reviewability discussed in *Century Metals*.³⁹

49 While I have concluded that the Decision is not amenable to judicial review, that is not necessarily the end of the matter. The conduct of *Homes Victoria* since the Housing Statement was announced strongly suggests that it has made its own decision to implement the Decision and to exercise its powers under s 15 of the Housing Act in relation to the Towers. Immediately after the announcement on 20 September 2023,

³⁵ *Victoria v Construction, Forestry, Mining and Energy Union* (2013) 218 FCR 172, [19]-[21] (Kenny J), [151]-[153] (Buchanan and Griffiths JJ).

³⁶ *Peko-Wallsend*, 279-80 (Bowen CJ), 280 (Sheppard J), 301 (Wilcox J).

³⁷ (1989) 40 FCR 564.

³⁸ *Century Metals*, 587-8.

³⁹ *Century Metals*, 587-8, citing *Council of Civil Services Union v Minister for the Civil Service* [1985] AC 374, 408.

Homes Victoria began to inform renters in each of the three Towers, including Mr Berih, that their tower would be retired, that they would be supported to relocate to a new home, and that their neighbourhood would be upgraded. It is apparent from Mr Newport's affidavit that Homes Victoria and the Department have already undertaken significant work to relocate renters from the Towers to alternative homes on a voluntary basis. It is hard to see why Homes Victoria would have embarked on that process if it had not made a firm decision to demolish the Towers and redevelop the sites.

50 Homes Victoria's letter of 27 November 2023 does not suggest otherwise. While the letter notes that the Housing Statement was a result of a Cabinet decision, it goes on to state the Department's view that 'the towers are reaching the end of their useful lives and are no longer fit for modern living' and Homes Victoria's assessment that, 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'.

51 I have concluded that the jurisdictional error ground as it is currently formulated has no real prospect of success, and so that part of Mr Berih's claim is summarily dismissed.

Do the Charter grounds have a real prospect of success?

The Charter grounds

52 Mr Berih contends that Cabinet is an entity whose functions include functions of a public nature, and hence is a public authority within the meaning of s 4(c) of the Charter. He alleges that the Decision engaged the following human rights of Group Members:

- (a) the right not to have their home and family unlawfully or arbitrarily interfered with;⁴⁰

⁴⁰ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 13(a).

- (b) the protection of families;⁴¹
- (c) the protection of children in their best interests;⁴²
- (d) the right not to be deprived of property other than in accordance with law;⁴³
and
- (e) the right to security.⁴⁴

53 Mr Berih claims that the Decision was contrary to both the substantive and the procedural limbs of s 38(1) of the Charter, as follows:

Action incompatible with the Group Members' Human Rights

- 16. The Decision was action that unlawfully interfered with the Group Members' homes and families (s 13(1) and as coloured by the Human Rights referred to in 15(b) to (e) above). The Group Members refer to and repeat paragraphs 11 to 13 above.
- 17. Further or alternatively, the Decision was action that arbitrarily interfered with the Group Members' homes and families (s 13(1) and as coloured by the Human Rights referred to in 15(b) to (e) above). The Group Members refer to and repeat paragraph 8 above.
- 18. Further or alternatively, the Decision was action that deprived the Group Members with a proprietary interest in connection with their rental agreement (s 20 as coloured by the Human Rights referred to in 15(a) to (c) and (e) above), being the interest in notice and consultation prior to the Decision being made.
- 19. The deprivation was not in accordance with law. The Group Members refer to paragraphs 8, 11-13, and 16-18 above, and to 21-23 below.
- 20. In those premises, the Decision was not demonstrably justified.

The failure to give proper consideration to the Group Members' Human Rights

- 21. The Decision did not consider, or alternatively, improperly considered, the Group Members' Human Rights referred to in paragraph 15 above.
- 22. Proper consideration required notice and consultation with the Group Members. The Group Members refer to and repeat paragraph 8 above.

⁴¹ Charter, s 17(1).

⁴² Charter, s 17(2).

⁴³ Charter, s 20.

⁴⁴ Charter, s 21(1).

23. In those premises, the Decision was not demonstrably justified.

Relevant provisions – the Charter

54 The Parliament of Victoria enacted the Charter, ‘recognising that all people are born free and equal in dignity and rights’.⁴⁵ The fundamental principles of the Charter include that ‘human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom’.⁴⁶ The Charter’s main purpose is to protect and promote human rights, including by setting out the human rights that Parliament specifically seeks to protect and promote, and imposing an obligation on all public authorities to act in a way that is compatible with human rights.⁴⁷

55 Section 4 of the Charter provides a comprehensive definition of ‘public authority’. A public authority includes ‘an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority’ and ‘a Minister’.⁴⁸

56 Section 6(2)(c) applies the Charter to public authorities, to the extent that they have functions under Div 4 of Pt 3 of the Charter. Section 6(4) provides that the Charter binds the Crown in the right of Victoria.

57 Part 2 of the Charter sets out the human rights that Parliament specifically seeks to protect and promote. For present purposes it is enough to note that these rights include the right of a person:

- (a) not to have the person’s privacy, family, home, or correspondence unlawfully or arbitrarily interfered with, in s 13(a); and
- (b) not to be deprived of that person’s property other than in accordance with law, in s 20.

⁴⁵ Charter, Preamble.

⁴⁶ Charter, Preamble.

⁴⁷ Charter, ss 1(2)(a), (c).

⁴⁸ Charter, ss 4(1)(c), (f).

58 Section 7(2) provides that 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 the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relationship between the limitation and its purpose; and any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

59 Division 4 of Pt 3 sets out the obligations of public authorities under the Charter. 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.

60 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.⁴⁹

61 Section 39 concerns legal proceedings. Section 39(1) provides:

If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

Defendants' submissions

62 The defendants contended that the Charter grounds had no real prospect of success because:

- (a) Cabinet is not a 'public authority' for the purposes of the Charter;
- (b) The Decision did not limit the Group Members' rights for the purposes of s 38(1) of the Charter;
- (c) The Decision is not justiciable, and so s 39(1) does not permit Mr Berih to seek

⁴⁹ See generally *Thompson v Minogue* (2021) 76 VR 301, [79]–[93] (procedural limb), [94]–[101] (substantive limb) (*Thompson v Minogue*).

relief in respect of the Decision on the ground of Charter unlawfulness;

- (d) The documents considered by Cabinet in making the Decision will almost certainly be immune from production on the ground of public interest immunity, and so Mr Berih will be unable to discharge his onus of establishing that Cabinet did not give proper consideration to relevant human rights; and
- (e) The Decision cannot plausibly be characterised as arbitrary, in the sense of being capricious, unpredictable, unjust, or unreasonable.⁵⁰

63 Given my conclusion that the Decision is not amenable to judicial review, I need only consider the argument based on s 39(1) of the Charter.

64 The defendants submitted that s 39(1) has an operation that is ‘conditional and supplementary’.⁵¹ The condition is that the person is able to seek, independently of the Charter, any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful. If that condition is satisfied, s 39(1) enables the person to seek ‘that relief or remedy’ on a supplementary ground of unlawfulness due to the Charter.

65 The defendants said that Mr Berih is unable to seek relief in respect of the Decision because it is not amenable to judicial review. That submission was not affected by the jurisdictional error ground set out in the indorsement, which the defendants characterised as ‘utterly misconceived’.⁵² It follows, the defendants submitted, that Mr Berih is unable to seek relief in respect of the Decision on the ground of Charter unlawfulness.

66 Further, the defendants urged me to infer that the jurisdictional error ground was brought solely for the purpose of attracting jurisdiction to seek relief on Charter grounds under s 39(1). They argued that the ground was so hopeless that it was

⁵⁰ Referring to *Thompson v Minogue*, [54]–[55].

⁵¹ Referring to *Director of Housing (Vic) v Sudi* (2011) 33 VR 559, [96] (Maxwell P).

⁵² Defendants’ submissions, [41](2).

‘colourable’ – that is, spurious and not raised in good faith – with the result that s 39(1) of the Charter was not enlivened.⁵³

Mr Berih’s submissions

67 Mr Berih submitted that declaratory relief on jurisdictional error grounds was available to him and other Group Members, and so they could seek the same relief on Charter grounds. He reiterated that questions of fact and inference should not be determined on a summary judgment application. He further submitted that I should take the most favourable view of the law concerning s 39(1) of the Charter, on which the authorities do not speak with one voice.

68 Mr Berih denied that the jurisdictional error ground was advanced for the improper purpose of fabricating jurisdiction for his Charter grounds.

Consideration

69 It is not yet settled whether s 39(1) of the Charter supports a judicial review proceeding based only on Charter grounds, or whether a plaintiff must also identify an arguable non-Charter ground of review. For the purposes of this summary dismissal application, the parties agreed that I should adopt the broader, ‘abstract availability’ approach that a person who has standing to seek remedies in relation to a decision that is amenable to judicial review may seek those remedies on Charter grounds alone.⁵⁴

70 Taking that more liberal approach to s 39(1), it is still necessary for Mr Berih to be able to identify a decision in relation to which he has standing to seek the remedies of certiorari, declarations, and an injunction. As his claim is currently formulated, he has not identified a decision of that kind. Mr Berih may not seek any judicial review remedy in respect of the Decision because, for the reasons I have given, it is not

⁵³ Referring to *Kheir v Robertson* [2019] VSC 422, [100]–[101], *McKechnie v Commissioner for Corrections Victoria* [2024] VSC 114, [38]–[47].

⁵⁴ Transcript, 23 April 2024, 41:10–17, 81:25–82:11. For a discussion of the ‘abstract availability’ and ‘factual availability’ approaches, see *Bare v IBAC* (2015) 48 VR 129, [394] (Tate JA), citing Mark Moshinsky QC, ‘Bringing Legal Proceedings Against Public Authorities for Breach of the Charter of Human Rights and Responsibilities’ (2014) 2 *Judicial College of Victoria Journal* 91, 96.

amenable to judicial review. He does not have standing to seek review of the Decision for non-Charter unlawfulness, because the Decision itself is not justiciable.

71 It follows that Mr Berih may not seek the remedies of certiorari, declarations, and an injunction in respect of the Decision on grounds of unlawfulness arising because of the Charter. It is not necessary to consider the defendants' submissions that the jurisdictional error ground was colourable, or any of their other arguments concerning the Charter grounds.

Declassing application

72 The defendants also sought an order pursuant to s 33N(1) of the Supreme Court Act that the proceeding no longer continue as a group proceeding under Pt 4A of that Act. They contended that all of the relief sought by Mr Berih and the Group Members could be obtained more efficiently and effectively in a conventional judicial review proceeding brought by Mr Berih alone. They argued that there was no utility in the relief being sought on behalf of persons other than the plaintiff.

73 In circumstances where I have determined that the proceeding in its present form has no real prospect of success, I think it preferable not to rule on the declassing application for the time being. The parties agreed that it was not necessary to decide that application in order to rule on the summary judgment application.⁵⁵ As discussed below, Mr Berih will have an opportunity to reformulate his claim. If he does so, the defendants can then consider whether to press their application to declass the proceeding.

74 One matter for the defendants' consideration will be the nature and breadth of the remedies sought by Mr Berih. At present, the remedies he seeks go well beyond an order quashing the Decision and a declaration that it was invalid.⁵⁶ He seeks

⁵⁵ *Supreme Court Act 1986* (Vic), s 33J(4) provides that, except with the leave of the Court, the trial of a group proceeding must not commence earlier than the date before which a group member may opt out of the proceeding. Neither party suggested that s 33J(4) applied to a summary judgment application made before trial: Defendants' submissions, [52]; Transcript, 23 April 2024, 53:30–56:15, 97:7–98:9.

⁵⁶ Cf *Kikuyu v Hazzard* [2022] FCA 310, [7].

declarations that the Decision did not give proper consideration to the human rights of Group Members, and that in making the Decision Cabinet acted incompatibly with Group Members' human rights. He also seeks an injunction restraining the Minister and Homes Victoria from taking any steps to implement the Decision. It appears to me that the interests of Group Members are likely to be relevant to any equitable relief sought in the reformulated claim, in particular the terms and scope of any injunction. In those circumstances, there may well be some utility in the relief being sought on behalf of all Group Members.

Disposition

75 The claim as it is currently framed has no real prospect of success, and must be summarily dismissed.

76 Mr Berih sought leave to recast his claim, while the defendants resisted that course. They submitted that the proceeding commenced by Mr Berih had been shown to be entirely misconceived, and that summary judgment should be given in their favour. They said that Mr Berih could, if he chose, commence a fresh proceeding seeking judicial review of a different decision, perhaps against different defendants.

77 I am not persuaded that the course proposed by the defendants would facilitate the just, efficient, timely, and cost-effective resolution of the real issues in dispute between Mr Berih and the Group Members on the one hand, and the defendants on the other.⁵⁷ The dispute concerns the imminent demolition of the Towers in which Mr Berih and the other Group Members live. The claim as initially framed identified the wrong decision as its subject. However, it seems clear that Homes Victoria has made its own decisions to demolish the Towers and redevelop the sites on which they stand. The language of Homes Victoria's letter of 27 November 2023 regrettably blurred the distinction between Cabinet's policy decision announced in the Housing Statement and its own operational decisions in relation to the Towers.⁵⁸

⁵⁷ Civil Procedure Act, s 7.

⁵⁸ See [16] above.

78 The substance of Mr Berih’s complaint is that the decision to demolish his home was made without consultation with him and other Group Members, contrary to Homes Victoria’s local action plan for North Melbourne and its Paving the Way Forward Initiative,⁵⁹ and contrary to s 38(1) of the Charter. The complaint relates to both the policy decision of Cabinet and the operational decisions taken to implement that policy. In those circumstances, and in light of the case management effort already invested in this proceeding by the parties and the Court, I consider that the better course is to give Mr Berih leave to reformulate his claim. However, I accept the defendants’ request that Mr Berih first file and serve a proposed amended indorsement of claim for consideration.

79 I make the following orders:

- (a) Pursuant to s 63 of the *Civil Procedure Act 2010* (Vic), the claim set out in the plaintiff’s general indorsement of claim dated 24 January 2024 is summarily dismissed.
- (b) The plaintiff has leave to reformulate his claim.
- (c) Orders 14 to 18 of the Orders of the Honourable Justice Keogh made 22 March 2024 are vacated.
- (d) The name of the second defendant is amended to ‘Minister for Housing’.
- (e) By 17 May 2024, the plaintiff is to file and serve his proposed amended indorsement of claim.
- (f) The proceeding is listed for a further case management conference and for argument on the question of the costs of paragraphs 2 and 3 of the defendants’ summons filed 26 March 2024 at 11:00 am on 31 May 2024.

⁵⁹ An initiative ‘to find better ways of working with residents at the Flemington and North Melbourne public housing estates’: Victorian Government, Department of Families, Fairness and Housing, *North Melbourne local action plan 2022-2023* (2022), exhibited to the affidavit of Louisa Una Bassini dated 15 February 2024.

- (g) The further hearing of paragraph 1 of the defendants' summons filed 26 March 2024 is adjourned to a date to be fixed.

CERTIFICATE

I certify that this and the 25 preceding pages are a true copy of the reasons for judgment of Justice Richards of the Supreme Court of Victoria delivered on 10 May 2024.

DATED this tenth day of May 2024.



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Associate