FEDERAL COURT OF AUSTRALIA

Higginson v Australian Capital Territory [2025] FCA 66

File number:	ACD 6 of 2024
Judgment of:	**BROMWICH J**
Date of judgment:	11 February 2025
Catchwords:	**PRACTICE AND PROCEDURE** – application by applicant for leave to file a further amended statement of claim (**FASOC**) –application by respondent for summary dismissal of the proceeding – where respondent objects to leave to amend being granted on basis that aspects of proposed FASOC – whether breach of lease contract claim discloses any reasonable cause of action or has reasonable prospects of success – whether *Australian Consumer Law* unconscionable conduct claim discloses any reasonable cause of action or has reasonable prospects of success - held: leave to file FASOC with amendments granted – respondent's summary judgment application otherwise be dismissed
Legislation:	*Competition and Consumer Act 2009* (Cth) ss 2A(1), 4, 131, sch 2, s 21 *Corporations Act 2001* (Cth) *Federal Court of Australia Act 1976* (Cth) ss31A(2), 37M(1) *Federal Court Rules 2011* (Cth) rr 8.21(1)(g)(i), 16.53(1), 16.53(2), 26.01(1)(a), 26.01(1)(c) *Fair Trading (Australian Consumer Law) Act 1992* (ACT) ss 7, 15 *Housing Assistance Act 2007* (ACT) ss 9(1), 9(2), 11(1), 37 *Housing Assistance Public Rental Housing Assistance Program 2013 (No 1)* (ACT) cls 5, 28(2) *Human Rights Act 2004* (ACT) ss 11, 12(a), 13, 40B(1)(a) *Public Sector Code of Conduct* (ACT) *Public Sector Management Act 1994* (ACT) *Residential Tenancies Act 1997* (ACT) ss 8(1), 71(1)(c), sch 1, cl 52
Cases cited:	*BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 *Bropho v Western Australia* [1990] HCA 24; 171 CLR 1 *Gemmell Power Farming Co Ltd v Nies* (1935) 35 SR

	(NSW) 469 *J S McMillan Pty Ltd v Commonwealth* [1997] FCA 619; 77 FCR 337 *Lynch v Cash Converters Personal Finance Pty Ltd* [2016] FCA 1536 *Owen v Gadd* [1956] 2 QB 99 *Spencer v Commonwealth* [2010] HCA 28; 241 CLR 118 *Village Building Company Ltd v Canberra International Airport Pty Ltd* [2004] FCA 133; 134 FCR 422 *Worrall v Commissioner for Housing (ACT)* [2002] FCAFC 127
	Allan Anforth et al, *Residential Tenancies Law and Practice, New South Wales* (Federation Press, 8th ed, 2022) Community Law Reform Committee's *Report 8: Private Residential Tenancy Law* (1994) Explanatory Statement, *Residential Tenancies Bill 1997* (ACT)
Division:	General Division
Registry:	Australian Capital Territory
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	66
Date of hearing:	11 December 2024
Counsel for the Applicant:	Mr M Albert and Ms E Smith
Solicitor for the Applicant:	Ken Cush & Associates
Counsel for the Respondent:	Mr A Berger KC and Mr B Kaplan
Solicitor for the Respondent:	ACT Government Solicitor

ORDERS

ACD 6 of 2024

BETWEEN:	**GAI HIGGINSON** Applicant
AND:	**AUSTRALIAN CAPITAL TERRITORY** First Respondent
	COMMISSIONER FOR SOCIAL HOUSING Second Respondent
ORDER MADE BY:	**BROMWICH J**
DATE OF ORDER:	**11 FEBRUARY 2025**

THE COURT ORDERS THAT:

1. The Commissioner for Social Housing be added as the second respondent pursuant to r 9.05 of the *Federal Court **Rules** 2011* (Cth).

2. The applicant be granted leave to alter the description of the group in accordance with the draft Further Amended Statement of Claim referred to in paragraph 3 below, pursuant to s 33K(1) of the *Federal Court of Australia Act 1976* (Cth).

3. Within 7 days, or such further time as may be allowed, the applicant serve on the respondents her:

   (a) proposed Further Amended Statement of Claim in the form annexed to the correspondence from the applicant' solicitors, Ken Cush & Associates, to the ACT Government Solicitor dated 11 October 2024 (**proposed FASOC**); and

   (b) proposed Amended Originating Application in the form annexed to the correspondence from the applicant' solicitors, Ken Cush & Associates, to the ACT Government Solicitor dated 10 December 2024 (**proposed AOA**),

   with amendments to address the contents of the reasons in this judgment.

4. The respondents advise the applicant in writing of their consent or opposition to the filing of the proposed FASOC and proposed AOA within 7 days of service of those documents, with reasons for any opposition.

5. If the respondents consent to the filing of the proposed FASOC and proposed AOA, pursuant to r 8.21 of the *Rules*, the applicant be given leave to file and serve those documents as soon as reasonably practicable.

6. If the respondents oppose the filing of the proposed FASOC and proposed AOA, and that opposition cannot be resolved between the parties, the parties confer and submit agreed or competing procedural orders by email to the chambers of Justice Bromwich to facilitate the Court adjudicating upon the dispute.

7. The first respondent's interlocutory application dated 14 June 2024 otherwise be dismissed.

8. The applicant pay the first respondent's costs thrown away by reason of the amendments made via the Further Amended Statement of Claim as ultimately filed, not to be taxed until the proceedings are finalised, pursuant to r 40.13 of the *Rules*.

9. Otherwise, there be no order as to costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BROMWICH J:

1 This proceeding concerns a decision by the Australian Capital Territory's **Commissioner** for Social Housing to require the relocation of a number of residents of social housing properties (the **relocation decision**) and notice of the implementation of the relocation decision (the **relocation notice**). The relocation decision was subsequently reversed and the required relocation of the residents did not proceed. According to the Territory, no forced relocations in fact took place. The proceeding was commenced by Ms Gai Higginson, a resident of a property affected by the relocation decision, as the representative applicant for residents of approximately 585 such properties, against the Territory.

2 The substance of Ms Higginson's application, in the form that commenced this proceeding, was that:

(a) the relocation decision was unlawful as it either contravened or failed to properly consider the *Human Rights Act 2004* (ACT), the *Public Sector Management Act 1994* (ACT), the *Public Sector Code of Conduct* (ACT), the *Housing Assistance Act 2007* (ACT) and the *Housing Assistance Public Rental Housing Assistance Program 2013 (No 1)* (ACT); and

(b) by the relocation notice, the Commissioner had committed a repudiatory breach of the residents' leases.

3 Both Ms Higginson and the Territory now accept that the case as commenced and initially amended is not viable, but disagree on the appropriate path forward. Ms Higginson seeks leave to file substantially further amended pleadings, contending that the case now proposed to be advanced would have reasonable prospects of success. The proposed pleadings allege that the relocation decision and notice gave rise to two causes of action:

(a) breach of the Commissioner's obligation under the leases not to interfere with the quiet peace and enjoyment of the tenancy; and

(b) unconscionable conduct in breach of s 21 of the *Australian Consumer Law*, being applied:

(i) either as Schedule 2 to the *Competition and Consumer Act 2009* (Cth) by operation of ss 2A(2) and 131 of that Act (**ACL**);

(ii) or via ss 7 and 15 of the *Fair Trading (Australian Consumer Law) Act 1992* (ACT) (**FTA**), which applies the ACL as a law of the ACT (**ACT ACL**).

4 The Territory originally sought summary dismissal of the proceeding pursuant to s 31A(2) of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) or r 26.01(1)(a) and (c) of the *Federal Court **Rules** 2011* (Cth). Summary judgment was still sought by the Territory upon the basis that the proposed amendments to the pleadings could not overcome the asserted absence of a reasonable prospect of successfully prosecuting the proceeding, or that it did not disclose a reasonable cause of action. Thus, the Territory objects to the grant of leave to amend, contending that this new case lacks reasonable prospects of success as well.

Background

The relocation decision

5 The Commissioner is the lessor for a number of Crown leases for social housing properties in the Territory, including those affected by the relocation decision. The class members described in Ms Higginson's proposed further amended pleadings includes tenants, co-tenants and occupants of those properties. It is the Territory's contention that at least some of the named members of the class were residents, but not leaseholders, of properties affected by the relocation decision – as children or partners and the like of the leaseholders. I therefore distinguish between the **residents**, as all persons residing in the affected properties, and the **tenants**, being the leaseholders of these properties. The **group** refers to those people who would be covered by the class description in the proposed further amended pleadings.

6 The following timeline is drawn from an affidavit affirmed by the Commissioner on 14 June 2024 and assumes for present purposes only its accuracy, there being no suggestion to the contrary at this stage.

7 A body called Housing ACT appears to function at the direction of, or perhaps on behalf of, the Commissioner. Nothing turns on whether that is accurate or not. Before 19 February 2019, the Asset Planning Team for Housing ACT identified 40 public housing properties potentially suitable for redevelopment. This became known as the Growth and Renewal Program.

8 On 19 February 2019, the Commissioner approved the redevelopment of the identified properties, and the transfer of their tenants to new public housing dwellings. On the same day, a person acting on the Commissioner's behalf approved a decision to require the relocation of those tenants to new public housing, pursuant to cl 28(2) of the *Housing Assistance Public*

Rental Housing Assistance Program 2013 (No 1) (ACT). That was the **relocation decision**. Additional properties were subsequently identified and their tenants made subject to the relocation decision. As of 23 December 2020, 585 properties had been identified, though an affidavit affirmed by the Commissioner suggests further additions were made later.

9 The relocation decision was initially implemented on a voluntary basis. In the period between February 2019 and February 2022, tenants in properties identified for redevelopment were contacted, and asked if they were interested in transferring to new properties. Some residents requested relocation, and were transferred to new properties. There is a dispute as to what else transpired, but that does not need to be addressed in these reasons.

10 On or around 21 February 2022, the Commissioner notified Ms Higginson and some other tenants that they would be required to relocate to new public housing dwellings. That is, the process moved from a voluntary to non-voluntary phase. I have already referred to the notice by which this was conveyed to tenants as the **relocation notice.**

Reversal of the relocation decision

11 On 20 October 2022, three residents commenced proceedings in the ACT Supreme Court against the Commissioner and officers employed by ACT Housing seeking relief in the form of a writ of certiorari and declarations for breaches of human rights under the *Human Rights Act 2004* (ACT) with respect to the relocation decision.

12 On 4 July 2023, the Commissioner and other defendants to those proceedings filed submissions in which it was conceded that the relocation decision was made without affording the plaintiffs sufficient procedural fairness. The Commissioner accepted that the relocation decision was therefore affected by jurisdictional error and void.

13 On 1 November 2023, the Commissioner informed the tenants that the relocation decision would no longer apply to them because "we did not make decisions in the right way."

The current proceeding

14 On 22 December 2023, Ms Higginson commenced this class action proceeding by way of an originating application and statement of claim. She subsequently filed an amended statement of claim on 24 May 2024 (the **ASOC**).

15 On 14 June 2024, the Territory filed an interlocutory application for summary dismissal of the whole of the proceeding or, in the alternative, that the whole of the ASOC be struck out, and

the Territory be replaced by the Commissioner as the respondent to the proceeding. In the alternative to that, the Territory sought a partial strike out of the ASOC.

16 That interlocutory application was accompanied by a supporting affidavit affirmed by the Commissioner and submissions, which pointed to several deficiencies with the ASOC. This included the assertion that no member of the group had ultimately been required to relocate, as the relocation decision had been reversed. Other members of the group were said not to be affected by the relocation decision, because they were not leaseholders, resided in dwellings not affected by the relocation decision, had voluntarily relocated, or had been exempted from the relocation decision before it was generally reversed. That application was set down for hearing on 19 August 2024.

17 In an apparent response to the Territory's application, a week before that interlocutory hearing was set to occur, Ms Higginson filed an interlocutory application seeking leave to file a further amended statement of claim (**proposed FASOC**) and an amended originating application (**proposed AOA**). I explain the proposed FASOC in further detail below. A further version of that interlocutory application with minor amendments was filed on 11 October 2024.

18 In light of the proposed FASOC, Ms Higginson did not resist the striking out of the existing ASOC. On 19 August 2024, I ordered that the ASOC be struck out and listed the respondent's summary judgment application and Ms Higginson's leave to amend application for hearing. That hearing took place on 11 December 2024. There was no cross-examination of the Commissioner on her affidavits. Nonetheless, Ms Higginson is on notice of its contents and the factual barriers that may stand in the way of success in any ensuing litigation.

The proposed further amended pleadings

19 The new pleadings, constituted by the proposed FASOC and proposed AOA, if allowed to be filed in any form, would substantially change the nature of the proceeding brought. The proposed FASOC discloses two causes of action, both said to arise from the relocation decision and relocation notice:

(a) breach of express and asserted implied terms of the lease contracts; and

(b) unconscionable conduct in breach of s 21 of the ACL (as applied directly or as the ACT ACL).

20 The description of the class members is altered, though the members listed in Annexure A to the ASOC is left unaltered, save to correct the name of one member. The accuracy of this aspect may need to be revisited, with care.

21 Ms Higginson also seeks to add the Commissioner as the second respondent, on the basis that it is the Commissioner's actions that gave rise to the causes of action. Ms Higginson contends that the Territory's continued involvement in the proceedings is justified by s 37 of the *Housing Assistance Act*, which provides that any liability the Commissioner would personally incur in the exercise of her functions under that Act attaches instead to the Territory. The Territory denies that s 37 would render it liable for the Commissioner's conduct in this case, even if the Commissioner were found liable, but it does not oppose the Commissioner's addition if leave to amend pleadings is granted. If any version of the proposed FASOC is allowed to be filed, it is appropriate to join the Commissioner, but not remove the Territory as this should not add to costs and will enable the issue concerning the application of s 37 to be determined in the course of the litigation, rather than in the course of a summary process.

Applicable principles

22 Two distinct but related questions arise for the disposition of these interlocutory applications:

(a) Should leave to amend be granted?

(b) Should the proceeding be summarily dismissed?

23 Though slightly different standards must be applied in answering those questions, both turn on the viability of the underlying causes of action proposed to be pleaded.

24 An applicant may apply for leave to amend their pleadings for any reason, including to add or substitute a new claim for relief arising out of the same or substantially similar facts pleaded to support the existing claim: see rr 8.21(1)(g)(i), 16.53(1), (2) of the *Rules*.

25 Whether leave to amend should be granted is a question of the Court's discretion. It must be exercised in accordance with the overarching purpose of the Court's civil practice and procedure provisions, being the just resolution of disputes according to law, as quickly, inexpensively and efficiently as possible: FCA Act s 37M(1). The relevant principles are uncontroversial, and are helpfully summarised by Gleeson J in *Lynch v Cash Converters Personal Finance Pty Ltd* [2016] FCA 1536 at [55]:

> The principles applicable to applications for leave to amend are well established and include the following:

(1) the starting point is "that all amendments should be made and allowed that are necessary to ensure the real questions in controversy between the parties are decided": *Oswal v Apache Corporation (No 3)* [2014] FCA 835 at [5];

(2) an amendment will "ordinarily be allowed provided it can be done without harm to the other party which cannot be compensated by an award of costs or an adjournment": *S.P.I. Spirits (Cyprus) Ltd v Diageo Australia Ltd (No. 4)* [2007] FCA 1035 ("*S.P.I. Spirits*") at [14];

(3) **leave should be granted unless the proposed amendment "is so obviously futile that it would be struck out if it had appeared in the original pleading or would cause substantial injustice which cannot be compensated for in the manner" indicated above**: *S.P.I. Spirits* at [17];

(4) the allowance of an amendment before the commencement of a trial "stands in a very different position from amendment towards the end of a trial": *S.P.I. Spirits* at [18]; and

(5) relevant matters the Court may consider include the nature and importance of the amendment to the party applying for it and the prejudice caused by the amendment: *Tamaya* at [127].

(Emphasis added).

26 The bar for summary judgment is different. Section 31A(2) of the FCA Act and r 26.01(1)(a) of the *Rules* provide that parties may apply for summary judgment where a party lacks reasonable prospects of successfully prosecuting the proceeding. Rule 26.01(1)(c) provides the same where no reasonable cause of action is disclosed. There is overlap in the concepts of lacking reasonable prospects of success, and failing to disclose a reasonable cause of action. In this case, because the pleadings are not said to be deficient because they fail to articulate a cause of action that this Court could determine, the thrust of the Territory's argument focuses on the reasonable prospects.

27 In ***Spencer*** *v Commonwealth* [2010] HCA 28; 241 CLR 118, French CJ and Gummow J considered it was sufficient for summary judgment to be refused on the basis that the prospects of success were more than fanciful: see [25] and [34]. The plurality of Hayne, Crennan, Kiefel and Bell JJ concluded at [60] that full weight had to be given to the expression "no reasonable prospect" in relation to successfully prosecuting or defending a proceeding, with no single epithet providing a sufficient chart of the metes and bounds of the power, which was not to be exercised lightly.

28 It follows that leave to amend (in whole or in part) should be granted unless it is so obviously futile that it (or part of it) would be struck out if was included in the original pleading. That requires the Court to ask whether the proposed further amended pleadings disclose a reasonable

cause of action, and whether the applicant would have reasonable prospects of success. If leave is not granted in this case, it would be difficult to resist the conclusion that summary judgment should not be awarded, given the accepted deficiencies in the existing pleadings. Attention must therefore be turned to the new proposed causes of action.

First proposed cause of action: Breach of contract

29 Ms Higginson contends that, by the relocation notice, the Commissioner breached the following terms of the lease contract with Ms Higginson:

(a) the express obligation in cl 52 of Sch 1 to the *Residential Tenancies Act 1997* (ACT), that the lessor (here the Commissioner), "*not cause or permit any interference with the reasonable peace, comfort or privacy of the tenant in the use by the tenant of the premises*", deemed to be incorporated as a term of all residential leases in the Territory by operation of s 8(1) and Sch 1 of that Act (the **express term**);

(b) a term implied in all residential leases by the common law that lessors not substantially interfere with a tenant's quiet possession and enjoyment of the premises (the **common law term**);

(c) an implied term that the Commissioner not interfere arbitrarily with the family or home of each resident, said to derive from the fact of the Commissioner being a public authority under the *Human Rights Act 2004* (ACT), with an obligation not to breach the human rights enumerated therein (the **HRA term**).

30 Ms Higginson contends that these three terms created overlapping obligations not to interfere with her use of her residence, all of which were breached by the serving of the relocation notice. It is the express term that is primarily relied upon, with the implied terms relied upon only in the alternative.

31 The Territory's challenge to the viability of this cause of action proceeds along two strands:

(a) an argument that the common law and HRA terms cannot be implied, largely on the basis that they are inconsistent with the express term; and

(b) an argument that the relocation notice could not amount to a contravention of the express term.

Challenge to implication of the common law term and the HRA term

32 Tests for implication differ depending on whether a term is said to be implied in fact or law. The common law term is said to be implied in law to all residential tenancy agreements. The HRA term, by contrast, would presumably be implied in fact, if at all. Implication of the HRA term must therefore be necessary for the "business efficacy" of the lease contract, be so obvious that it goes without saying, and meet the other factors identified in the Privy Council case of ***BP Refinery*** *(Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283.

33 For either the common law term or the HRA term, implication must be consistent with the express terms of the contract, including where an express term already "covers the field": *Gemmell Power Farming Co Ltd v Nies* (1935) 35 SR (NSW) 469 at 476-7. An implied term will, at least theoretically, reflect the intentions of the parties; it must therefore give way to the express intention of the parties to the extent of inconsistency.

34 Given the overlapping subject matter and textual similarity between the express term, the HRA term and (especially) the common law term, the Territory rightly notes the likelihood that the express term covers the field, preventing implication of either the HRA or common law terms. Notably, the express term borrows from the language of the common law term, amended to be wider in some respects and in others, arguably narrower. The common law term is breached only by "substantial interference", whereas the express term applies to "any interference." But the express term is limited to interference "in the use by the tenant of the premises", which the Territory contends narrows its scope in different ways. I return to that point later.

35 Real uncertainty would be introduced into the contractual relationship if either or both implied terms operated simultaneously with the express term. It is implausible that the parties would be taken to bind the Commissioner by an additional unwritten term, with slightly different standards to an express term that appears on its face to state the obligation conclusively. There is slightly more to distinguish the HRA and express terms than is true of the common law term, but at core both implied terms concern the interference with the tenant's home by the Commissioner. It is therefore implausible that the express term allows for the implication of either the HRA term of the common law term.

36 Implication of the HRA term faces additional problems. First, it is not at all clear how the *Human Rights Act* actually leads to its implication. That Act provides that it is unlawful for a public authority (including the Commissioner) to act in a way that is incompatible with human rights: s 40B(1)(a). Those rights are enumerated in the *Human Rights Act*, relevantly including

the right for one's home and family not to be interfered with arbitrarily or unlawfully, and the right for one to choose their residence in the Territory: ss 11, 12(a), 13. But the *Human Rights Act* creates no express positive duty to comply with human rights. Ms Higginson has not made clear how those statutory provisions interact with the residential lease contracts, and there is certainly no express provision that contracts with public authorities are affected by that Act.

37 Perhaps more importantly, it is difficult to see how the HRA term would meet the *BP Refinery* requirements for implication: a broad obligation not to interfere with tenants' homes or families certainly does not seem so obvious it would go without saying. It is also significant that only the Commissioner as lessor would be burdened by the term, which is contrary to the requirement that the term be reasonable and equitable: *BP Refinery* at 286. The existence of the express obligation also makes it difficult to see how the implication of a similar term would be necessary to give the contract "business efficacy" without it: *BP Refinery* at 286. Context is important here. Sch 1 of the *Residential Tenancies Act* provides a standard set of terms that are deemed to be included in all residential tenancy agreements in the Territory. They are regulated contracts, creating a basic and irreducible form of lease that will be universally workable without the need for additions. In that context, it is difficult to see how the implication of any term would be necessary to give business efficacy to the lease contract. To the contrary, it would likely introduce complexity and uncertainty.

38 Ms Higginson further contended that there is textual support in the *Residential Tenancies Act* for the view that the express term does not bar the implication of the common law term. Section 71(1)(c) provides that, on application by a tenant, the Australian Capital Administrative Tribunal (**ACAT**) must order a reduction of rent where a tenant's quiet peace and enjoyment is interfered with. Section 71(2) further clarifies that, to remove any doubt, a tenant's quiet enjoyment is interfered with "*if there is substantial interference with, or a significant lessening of freedom in exercising, the tenant's rights*." The better view, however, is that that provision merely provides a specific statutory remedy for certain kinds of problems that may arise over the course of a tenancy, which the ACAT may administer. The provision does not, explicitly or by necessary implication, express a Parliamentary intention to retain the common law term in residential tenancy agreements affected by the Act.

39 The parts of the proposed further amended pleadings that rely upon the implied contractual terms cannot be allowed to be advanced. To that extent, the Territory's argument succeeds. I

therefore will not grant leave for the inclusion of the common law and HRA terms in any filed version of the proposed FASOC.

Relocation notice could not be interference contrary to the express term

40 The second strand in the Territory's argument, going to the operation of the express term, was the contention that the relocation notice was merely the statement of future legal intent, and was therefore conduct incapable of amounting to a contravention of the express term. The express term requires the Commissioner, as lessor, to:

> not cause or permit any interference with the reasonable peace, comfort or privacy of the tenant in the use by the tenant of the premises.

41 At the outset it is necessary to address the scope of the express term and whether, if at all, it differs from the protection offered to tenants by the common law term. As noted above it is in one respect wider: the lessor must not cause or permit "any interference" as opposed to only "substantial interference" at common law. But the subject matter that must not be interfered with is framed differently: "reasonable peace, comfort or privacy of the tenant in the use by the tenant of the premises" as opposed to the common law concept of "quiet possession and enjoyment" of the residence. While the words in the two terms differ, they appear broadly to reflect the same concept.

42 The concept of "reasonable peace, comfort or privacy" seems, if anything, broader than "quiet possession and enjoyment", and uses more comprehensive and contemporary language. The words "use by the tenant of the premises" seem not to limit the scope of the express term, but appear in order to tie the concepts of peace, comfort and privacy to the tenancy. In any case, if the primary "use" of a residential tenancy is its possession and enjoyment as a home, it is not clear how these words would restrict the express term's scope as compared to the common law term.

43 This essentially synonymous reading of what was provided for at common law and what is legislated for is, in any event, apparently supported by the supplementary materials for *Residential Tenancies Act*. By that Act, the legislature sought to implement many of the recommendations made by the Community Law Reform Committee's *Report 8: Private Residential Tenancy Law* (1994): Explanatory Statement, *Residential Tenancies Bill 1997* (ACT) at 1. The express term's language is drawn from recommendation 78 (Explanatory

Statement at 43), and the Report explains its purpose is to highlight the existence of a tenant's common law right to quiet enjoyment, rather than changing its substance:

> [389] The [Consumer Affairs] Bureau points out that few tenants appear to realise that they have the right to refuse entry of the lessor and others, subject to the terms of the lease. Submissions suggested that legislation or a standard lease should include the term of the tenancy agreement and the right of the tenant to quiet enjoyment. The Committee agrees with these submissions. The aim here is not to create new law but to make the existing law [that is, the common law term] as to access and quiet enjoyment more accessible. All jurisdictions except Tasmania have provisions similar to the ACT for the protection of quiet enjoyment.
>
> [390] The proposed Act should prohibit the lessor from interfering with the quiet enjoyment, reasonable peace, comfort and privacy of the tenant. This restriction covers interference in the legal entitlement of the tenant to occupy the premises as well as interference by other means…

44 Existing authority on the nature of the common law term is therefore likely to be directly relevant, or at least this is arguable as a trial issue. That authority indicates that interference need not take any particular form and, significantly, does not need to involve actual physical interference with the use of the residence: see ***Owen v Gadd*** [1956] 2 QB 99 at 107 (Lord Evershed MR) quoted in ***Worrall*** *v Commissioner for Housing (ACT)* [2002] FCAFC 127 at [70] (Miles, Ryan and Higgins JJ). Once that is accepted, it is difficult for the Territory to maintain that the cause of action lacks any reasonable prospect of success based on the general nature of the interference alleged alone, without regard to the evidence that may be adduced. Of course, such evidence may or may not be sufficient to establish the alleged interference; and the metes and bounds of the application of common law principles to an express term applied by statute may be contestable.

45 Further, it is not clear or beyond contest that correspondence or communication of future legal intention are categories of conduct that are, as a matter of principle, inherently incapable of amounting to interference. It is easy to imagine extreme cases of baseless eviction notices or correspondence from a landlord that would constitute interference. That is, at least, the view expressed in an Australian residential tenancies textbook, which provides that "the range of conduct that may constitute a breach of this right is almost limitless but commonly includes: … wrongful eviction or attempted wrongful evictions": Allan Anforth et al, *Residential Tenancies Law and Practice, New South Wales* (Federation Press, 8th ed, 2022) 142-143; see also, *Davies v Cantoni* [1998] NSWRT 21.

46 The proper question for this case is whether the relocation notice is capable of having caused a sufficient degree of interference with the tenants' use of the properties to amount to a breach of the Commissioner's obligation: see *Worrall* at [71], quoting Romer LJ in *Owen v Gadd* at 108. The relocation notice is not overtly abusive or threatening; it seems to be professional in tone and appears to be written in the belief that the relocation decision was made lawfully. While it is difficult to imagine that a letter such as that was sufficiently interfering to amount to a breach, that is a question of degree and has not yet been the subject of evidence or submissions. I am not satisfied that this issue is appropriately disposed of at this stage, by denying leave to amend and summarily dismissing the proceeding. As was observed by French CJ and Gummow J in *Spencer* at [25], in considering s 31A(2), summary processes must not be used to stultify the development of the law; see also Hayne, Crennan, Kiefel and Bell JJ at [60].

Second proposed cause of action: Unconscionable conduct

47 Section 21(1) of the *Australian Consumer Law* (**ACL**) provides:

> A person must not, in trade or commerce, in connection with:
>
> (a) the supply or possible supply of goods or services to a person; or
>
> (b) the acquisition or possible acquisition of goods or services from a person;
>
> engage in conduct that is, in all the circumstances, unconscionable.

48 Ms Higginson alleges that the relocation notice amounted to an exercise of undue influence or pressure or was an unfair tactic that was not reasonably necessary for the protection of the Commissioner's legitimate business interests, and because the relocation decision was contrary to law it was not reasonable, due or fair.

49 The central disagreement between the parties is whether the ACL applies to the conduct of the Commissioner. Ms Higginson contends the ACL applies to the Commissioner's conduct by two paths. The proposed FASOC relies on both.

50 The first path is as a corporation which is subject to the ACL by operation of s 131 of the *Competition and Consumer Act*. There are two difficulties with that approach, neither of which were satisfyingly addressed by the parties, but which did not need to be resolved at this stage because I am persuaded that the second path is reasonably arguable. I only address them in order to make the parties aware of some early concerns that will need to be addressed in due course if the case is based on the ACL, as opposed to only the ACT ACL, is maintained.

51 The first difficulty is that Acts are presumed not to bind the Crown, which would work to exempt the Commissioner from the reach of s 131. That is, of course, only a presumption, and more substantive argument on the point could point to countervailing factors that overcome it: see, *Bropho v Western Australia* [1990] HCA 24; 171 CLR 1 at 22. A nuance to that is the question of whether the Commissioner, as a statutory corporate sole, is intended to enjoy the rights, privileges and immunities of the Crown, including the benefit that legislation does not bind her, but there has been no suggestion to that effect as yet.

52 Section 2A(1) of the *Competition and Consumer Act* creates an express, limited exception to that presumption, but it does not appear to apply to the Commissioner. It states:

> Subject to this section and sections 44AC, 44E and 95D, this Act binds the Crown in right of the Commonwealth in so far as the Crown in right of the Commonwealth carries on a business, either directly or by an authority of the Commonwealth.

53 An "authority of the Commonwealth" is further defined to be "a body corporate established for a purpose of the Commonwealth by or under a law of the Commonwealth or a law of a Territory": *Competition and Consumer Act* s 4. The Commissioner is established under s 9(1) of the *Housing Assistance Act* and rendered a statutory corporation by s 9(2). Section 11(1) provides that her functions are to administer, on behalf of the Territory, programs to deliver housing assistance and related services. Housing assistance is defined in s 7 to mean "*services, programs, assets, rebates and amounts, provided under an approved housing assistance program to help entities who are eligible for assistance under the program to meet their emergency, short-term, medium-term and long-term housing needs*."

54 Given the Commissioner was established to administer housing assistance programs *on behalf of the Territory*, it is difficult to see how the office could be said to be established "*for a purpose of the Commonwealth*." Importantly, because this question goes to the purpose of the office, not the functions the Commissioner in fact carried out, it can be answered by reference to the legislation that established it alone. That legislation points against coverage by the ACL.

55 The second difficulty is that the Territory asserts that s 131 would not apply to the Commissioner in any case, because of the way in which "*corporation*" is defined in s 4 of the *Competition and Consumer Act*, which includes relevantly "*a body corporate that … (c) is incorporated in a Territory*." The contention is that "*incorporated in a Territory*" means formed and registered under the *Corporations Act 2001* (Cth), with a registered office in the Territory, and that is not true of the Commissioner as her office is created and deemed to be a

corporation by the *Housing Assistance Act*. That argument was not really developed nor responded to, but I do not accept the argument as so obviously wrong as to preclude it being advanced later.

56 The second path is created by operation of s 7 of the FTA, which applies the ACL as a law of the Territory. I have already referred to the ACL so applied as the **ACT ACL**. Section 15 of the FTA applies the ACT ACL to the Territory "*so far as [it] carries on a business, either directly or by an authority*". On its proper construction, this provision applies the ACT ACL to the Territory and its authorities "*where the conduct complained of is engaged in, in the course of business*": *J S McMillan Pty Ltd v Commonwealth* [1997] FCA 619; 77 FCR 337 at 356 (Emmett J).

57 Both parties accept that, by this path, the ACT ACL is capable of applying to the Commissioner. The dispute is as to whether the relocation decision took place in the course of the Commissioner carrying on a business.

58 The statutory purposes of the Commissioner's conduct are important to this assessment: see the summary of the relevant principles in *Village Building Company Ltd v Canberra International Airport Pty Ltd* [2004] FCA 133; 134 FCR 422 at [90(5)] (Finn J). In addition to the Commissioner's functions described in the *Housing Assistance Act* (see [53] above), regard must be had to the *Housing Assistance Public Rental Housing Assistance* ***Program*** *2013 (No 1)* (ACT), which empowered the Commissioner to offer dwellings for rent, to offer rebates and to order the transfer of tenants: see cls 5 and 28(2). It was under this instrument that the relocation decision was made. These powers must be exercised consistently with the Program's objects, including "*to provide assistance to eligible people in the Territory who are most in need*": cl 3.

59 I am not satisfied, however, that these statutory purposes are necessarily dispositive of the question of whether the Commissioner's conduct took place "in the course of business". Conduct can occur for multiple purposes. Government entities might engage in commercial conduct as a means to a public end, such as entering into commercial contracts to complete an infrastructure project, offering a low-cost alternative product in a market, or engaging in asset recycling. Taken at a high enough level, and assuming no corruption is involved, all commercial conduct by governments is arguably for an ultimate public purpose. That will not necessarily deny the business character of the conduct.

60 It appears at least reasonably possible that the Commissioner in fact carried on a business (by providing leases for value) for an ultimate public purpose (providing housing assistance to the community). That might not be correct, and it may turn out that the conduct has a solely governmental purpose. By way of example, the Commissioner has the power to issue rental rebates in certain circumstances, and it may be the case that the kinds of rebates issued to residents were significant enough to change the character of the relationship between lessee and lessor. But that is just to say that the proper characterisation of that conduct may turn on the way in which it was performed, not just the statutory functions for which it was in service.

61 The evidence as to how the Commissioner performed her functions, via employees or others, is necessarily preliminary, and could not support a concluded view either way. It is made up only really of an affidavit of the current Commissioner, which is untested. There is no evidence about the rebate that was in fact provided to Ms Higginson or the other members of the group she represents.

62 It follows that I am unable to be satisfied that there is no reasonable prospect of Ms Higginson's unconscionable conduct case succeeding. That is not to say that it is a strong or compelling case.

Conclusion

63 I have concluded that:

(a) the proposed breach of contract case reliant on the express contractual term should be allowed to proceed as part of the proposed FASOC, but the implied common law term and the implied HRA term should not be allowed to proceed;

(b) the proposed unconscionable conduct case should be allowed to proceed.

64 In light of the above, and for the efficient conduct of the hearing, serious consideration should be given by Ms Higginson to making an election as to the basis upon which she ultimately contends that the ACL is said to be engaged in this case.

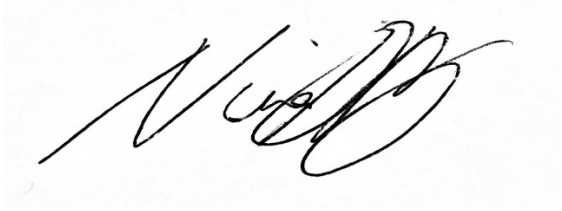
65 While the Territory has successfully pointed to some deficiencies with Ms Higginson's proposed pleadings, at least two questions posed by the proposed pleadings are more appropriately addressed on the full body of evidence and therefore leave should be granted to allow their determination:

(a) Did the relocation notice amount to interference with the use of the premises?

(b) Was the relocation notice sent in the course of the Commissioner carrying on a business?

66 I will therefore allow a version of the proposed FASOC furnished by Ms Higginson to be filed, which excludes reliance on either the common law or HRA implied terms for the breach of contract cause of action and otherwise takes into account these reasons. It will be a matter for her as to how best to advance the ACL claim in terms of which version is pursued. The proposed FASOC uses the misleading defined terms of "involuntary dislocation decision" and "involuntary dislocation notice", which I do not grant leave to be used. There will need to be an opportunity for the respondents to see a revised version of the proposed FASOC before it is filed, so as to be able to raise, in a sensible way, any further perceived difficulties of substance. The Territory's application for summary judgment must otherwise be dismissed.

I certify that the preceding sixty-six (66) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Bromwich.

Associate: 

Dated: 11 February 2025