

## **EXPLANATORY STATEMENT**

Issued by the authority of the Attorney-General

*Federal Circuit Court (Commonwealth Tenancy Disputes) Instrument 2015*

The *Federal Circuit Court of Australia Act 1999* (the Act) confers jurisdiction on the Federal Circuit Court of Australia (the FCC) to hear and determine Commonwealth tenancy disputes between the parties to a lease, licence or other arrangement in which:

- the lessor (other than as a sublessor), licensor (other than as a sublicensor) or the grantor of a right to possess, occupy or use land owned by the Commonwealth, is the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, and
- the lessee (other than as a sublessee), licensee (other than as a sublicensee) or grantee is a person other than the Commonwealth, a person suing or being sued on behalf of the Commonwealth, or a Commonwealth officer or employee.

For ease of reference, these will be referred to as ‘Commonwealth tenancy disputes’ in this Explanatory Statement.

Subsection 10AA(3) of the Act confers on the Minister the power to, by legislative instrument, make provision for and in relation to all or any of the following matters in respect of a Commonwealth tenancy dispute:

- (a) the rights of the parties to the Commonwealth tenancy dispute;
- (b) the law (whether a law of the Commonwealth or a law of a State or Territory) to be applied in determining the Commonwealth tenancy dispute;
- (c) any modifications of the applicable law that are to apply in relation to the Commonwealth tenancy dispute;
- (d) the powers that the Federal Circuit Court of Australia may exercise under the applicable law;
- (e) if the Federal Circuit Court of Australia makes an order when exercising jurisdiction over the Commonwealth tenancy dispute—the powers that may be exercised when executing the order or a class of orders.

The purpose of the Instrument is to make provision for the FCC to apply, with modifications, applicable New South Wales (NSW) law when determining Commonwealth tenancy disputes that involve land within NSW. This clarifies the law that the FCC is to apply when determining Commonwealth tenancy disputes involving residential tenants, to ensure tenants have rights in the FCC that are substantially equivalent to those that would be afforded to them if the dispute were to be heard in the Civil and Administrative Tribunal of NSW (the Tribunal).

Details of the Instrument are set out in the Attachment.

The Act specifies no conditions that need to be met before the power to make the Instrument may be exercised.

The Instrument applies, with modification, the provisions of the following legislation:

- the *Residential Tenancies Act 2010* (NSW)
- the *Residential Tenancies Regulation 2010* (NSW), and
- the *Sheriff Act 2005* (NSW).

The relevant NSW legislation is available at [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au).

The Instrument applies the above legislation as in force from time to time. This ensures tenants are not disadvantaged by having their matter heard in the FCC compared to the Tribunal as the Tribunal applies the legislation as in force from time to time when determining tenancy disputes, rather than at a particular point in time. Subsection 10AA(3) of the Act authorises the Instrument to make provision in relation to the law to be applied in determining the Commonwealth tenancy dispute and any modifications of the law to be applied.

Consistent with Drafting Direction No. 3.8 from the Office of Parliamentary Counsel, it is appropriate for the matters dealt with in this Instrument to be made in the form of a legislative instrument rather than regulations. Although the Instrument clarifies the application of provisions in NSW law that relate to entry of premises for the purposes of enforcing warrants, it does not itself prescribe these matters. To ensure that all sensitivities with the application of these powers have been considered, the Instrument has been drafted by the Office of Parliamentary Counsel.

The Instrument is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Instrument was developed in consultation with the FCC and relevant departments likely to be parties to Commonwealth tenancy disputes within NSW. The Office of Best Practice Regulation has been consulted and has advised that no Regulatory Impact Statement is required for the Instrument.

Authority: Subsection 10AA(3) of the *Federal Circuit Court of Australia Act 1999*

Details of the *Federal Circuit Court (Commonwealth Tenancy Disputes) Instrument 2015*

**Part 1 - Preliminary**

Section 1 – Name

This is a formal clause which provides that the Instrument is named the *Federal Circuit Court (Commonwealth Tenancy Disputes) Instrument 2015*.

Section 2 – Commencement

This clause provides that the Instrument commences on the day after it is registered on the Federal Register of Legislative Instruments.

Section 3 – Authority

This is a formal clause that provides that the Instrument is made under subsection 10AA(3) of the *Federal Circuit Court of Australia Act 1999*.

Section 4 – Definitions

This clause defines two terms used in the Instrument.

The clause provides that ‘Act’ means the *Federal Circuit Court of Australia Act 1999*.

The clause also provides that ‘applicable NSW law’ has the meaning given by subsection 7(2) of the Instrument. Subsection 7(2), by reference to subsection 7(1), provides that the *Residential Tenancies Act 2010* (NSW) (the Residential Tenancies Act) and any regulations made under that Act are to be applied to the extent necessary to determine the dispute and subject to any modifications made in this Instrument.

**Part 2 – Commonwealth tenancy disputes involving land in New South Wales**

Section 5 – Operation of Part 2

This clause sets out the operation of Part 2 of the Instrument, which makes provision for certain matters involving land in New South Wales (NSW).

The intention is to provide clarity about the law that is to be applied by the Federal Circuit Court of Australia (FCC) in determining Commonwealth tenancy disputes involving land in NSW. This clarity is expected to assist the FCC to resolve disputes without needing to hear arguments from parties about the applicable law, which would be costly and time-consuming.

It is also intended to ensure that, as far as possible, the rights of parties to a Commonwealth tenancy dispute are not substantially different from the rights of parties to tenancy disputes determined in the Tribunal. There is no intention to remove

protections available to tenants simply because their dispute is being resolved in the FCC rather than the Tribunal.

Subsection 5(1) states that Part 2 of the Instrument makes provision for the following matters in respect of a Commonwealth tenancy dispute involving land in NSW:

- (a) the rights of the parties to the dispute (consistent with paragraph 10AA(3)(a) of the Act)
- (b) the law to be applied in determining the dispute (consistent with paragraph 10AA(3)(b) and (c) of the Act)
- (c) the powers that the Federal Circuit Court of Australia may exercise under the law to be applied (consistent with paragraph 10AA(3)(d) of the Act), and
- (d) the powers that may be exercised when executing an order made by the Federal Circuit Court of Australia (consistent with paragraph 10AA(3)(e) of the Act).

Subsection 5(2) clarifies that the Part does not apply in relation to a Commonwealth tenancy dispute involving land in NSW unless the dispute involves a tenancy within the meaning of the *Residential Tenancies Act 2010* (NSW). This ensures that the Instrument only applies to residential tenancies within NSW and not to other types of tenancies, such as agricultural tenancies. Under section 3 of the Residential Tenancies Act, a tenancy is defined as ‘the right to occupy residential premises under a residential tenancy agreement’.

Subsection 5(3) makes it clear that nothing in the Part has effect so as to confer non-judicial power on the FCC unless that exercise of non-judicial power is incidental to the exercise of judicial power by the Court. This reflects the well-established principle that a court constituted under Chapter III of the Constitution cannot exercise non-judicial powers unless the non-judicial power is ancillary to the exercise of judicial power.

#### Section 6 – Rights of the parties

Subsection 6(2) is the operative part of section 6. It provides that parties to certain Commonwealth tenancy disputes must not make applications to the Tribunal under the Residential Tenancies Act in relation to a lease, licence or other arrangement to possess, occupy or use land that is the subject of the dispute, where the Federal Circuit Court has jurisdiction to hear the dispute.

The Residential Tenancies Act directs matters to the Tribunal. However, the Tribunal is not a ‘court’ within the meaning of Chapter III of the Constitution and as such, cannot exercise federal judicial power.

Subsection 6(2) ensures that Commonwealth tenancy disputes (to which the section applies) can only be brought in the FCC, thereby providing jurisdictional certainty and precluding parties from commencing disputes in an inappropriate forum, which would increase the cost and time taken to resolve such disputes.

Subsection 6(1) sets out the Commonwealth tenancy disputes in NSW to which the section applies. Two criteria apply in order for the section to apply.

The first criterion in paragraph 6(1)(a) provides that section 6 applies if the party is a tenant within the meaning of the Residential Tenancies Act. Section 3 of the Residential Tenancies Act defines a tenant as:

- the person who has the right to occupy residential premises under a residential tenancy agreement
- the person to whom such a right passes by transfer or operation of the law, or
- a sub-tenant of a tenant.

The second criterion in paragraph 6(1)(b) provides that section 6 applies if the FCC has jurisdiction to hear and determine the dispute. The FCC's jurisdiction in relation to Commonwealth tenancy disputes is set out in subsection 10AA of the Act, which allows the FCC to hear and determine a Commonwealth tenancy dispute between the parties to a lease, licence or other arrangement in which:

- the Commonwealth, or a person suing or being sued on behalf of the Commonwealth is the lessor (other than a sublessor), the licensor (other than a sublicensor), or the grantor of a right or permission to possess, occupy or use land owned by the Commonwealth, and
- a person other than the Commonwealth, a person suing or being sued on behalf of the Commonwealth or a Commonwealth officer or employee is the lessee (other than as a sublessee), the licensee (other than a sublicensee) or the grantee of the right or permission.

#### Section 7 – Law to be applied

This section sets out the law to be applied by the FCC when determining a Commonwealth tenancy dispute to which the Instrument applies.

Subsection 7(1) provides that the Residential Tenancies Act and any regulations made under that Act are to be applied to the extent necessary to determine the dispute and subject to the modifications set out in section 8 of this Instrument.

Paragraph 7(1)(a) deliberately only 'picks up' and applies the Residential Tenancies Act to the extent necessary to determine the dispute. This is because the Residential Tenancies Act has a much broader role and application than simply how tenancy disputes are resolved and it is expected that some parts of the Act will not necessarily be relevant to the determination of a Commonwealth tenancy dispute. This can be contrasted with Divisions 1 and 2 of Part 9 of the Residential Tenancies Act which relate to the powers that can be exercised by the Tribunal in dealing with disputes, which is expected to be highly relevant to the FCC when determining Commonwealth tenancy disputes.

Paragraph 7(1)(a) operates to allow the parts of the Residential Tenancies Act that are relevant to the dispute to be applied, whatever they may be. This approach has been taken to ensure that there is flexibility in how the Residential Tenancies Act applies to Commonwealth tenancy disputes in NSW no matter what factual scenarios may arise in the future.

Paragraph 7(1)(b) specifies that the Residential Tenancies Act applies subject to modifications set out in section 8 of the Instrument. This reflects that some modifications are necessary to substitute appropriate references to officers of the FCC and to provide flexibility to the Court in determining certain matters.

Subsection 7(2) provides that the law referred to in subsection (1) is known throughout the Instrument as the ‘applicable NSW law’. This provides the content of the definition of ‘applicable NSW law’ in section 4 of the Instrument, as discussed above.

Naturally, while this Instrument applies NSW law to the determination of certain Commonwealth tenancy disputes, the FCC will apply its usual procedures when hearing a Commonwealth tenancy dispute.

#### Section 8 – Modifications of applicable NSW law

Section 8 modifies the applicable NSW law, as defined in section 4 and subsection 7(2) of the Instrument.

Subsection 8(1) substitutes references to the Tribunal and officers of the Tribunal with references to the FCC and officers of the FCC.

Paragraph 8(1)(a) provides that references to the Tribunal in the Residential Tenancies Act should be read as references to the FCC. Paragraph 8(1)(b) provides that references to the principal registrar of the Tribunal should be read as references to a Registrar of the FCC. Paragraph 8(1)(c) provides that references to the Sheriff, or to a sheriff’s officer, should be read as references to the Sheriff of the FCC.

Subsection 8(2) provides that the Residential Tenancies Act is to be applied as if it included a section stating that, despite anything else in the Act, if the FCC makes a termination order in respect of residential premises, the FCC may make such orders as it considers appropriate in relation to the day vacant possession of the premises is to be given to the landlord. This will ensure the FCC has discretion to consider all relevant factors when determining an appropriate date for vacant possession of the premises to be given to the landlord, including notice given in any other form.

#### Section 9 – Powers of the Court

Section 9 sets out the powers that the FCC may exercise when determining a Commonwealth tenancy dispute in NSW.

Paragraph 9(a) states that the Court may exercise any powers that are powers of the Tribunal under the ‘applicable NSW law’, as defined in sections 4 and 7 of the Instrument. As set out in subsection 5(3), this provision will not operate to confer non-judicial power on the FCC unless that exercise of non-judicial power is incidental to the exercise of judicial power by the Court.

Paragraph 9(b) states that the Court may exercise any powers that are relevant to determination of the dispute. This provides flexibility to engage whichever parts of the Residential Tenancies Act are relevant for the particular dispute before the FCC.

This reflects that there are a range of factual scenarios involving tenancy disputes that may engage different parts of the Residential Tenancies Act. For example, in one case, non-payment of rent may be the relevant issue and those provisions will need to be applied in order to determine the dispute. In another case, non-payment of rent may be completely irrelevant to the determination of the dispute because the issue centres on termination of a lease for other reasons.

This section ensures, to the extent possible, that the rights of the parties to the Commonwealth tenancy dispute are substantially equivalent to what they would be if the matter were to be heard in the Tribunal.

### Section 10 – Powers when executing orders made by the Court

Section 10 sets out the powers that may be exercised to execute or enforce an order made by the FCC when exercising jurisdiction over a Commonwealth tenancy dispute involving land in NSW.

Subsection 10(1) provides for the FCC, and officers of the FCC, to exercise powers to execute or enforce an order to the extent that those powers are relevant to execution or enforcement of the order. This reflects that there are a range of factual scenarios involving tenancy disputes that may engage different parts of the Residential Tenancies Act.

Paragraph 10(1)(a) provides that the FCC may exercise any powers of the Tribunal under the applicable NSW law, as defined in sections 4 and 7 of the Instrument. This allows the FCC to make any orders or exercise any powers that are available to the Tribunal under the Residential Tenancies Act. For example, the FCC could make a termination order in proceedings initiated by a tenant on the ground that the landlord has breached the residential tenancy agreement (see section 103 of the Residential Tenancies Act).

Paragraph 10(1)(b) provides that a Registrar of the FCC may exercise any powers of the principal registrar of the Tribunal under the applicable NSW law (as defined in sections 4 and 7 of the Instrument), such as the ability to issue warrants for possession of premises consistent with subsection 121(1) of the Residential Tenancies Act.

Paragraph 10(1)(c) provides that, subject to subsection (2), the Sheriff or a Deputy Sheriff of the FCC may exercise any powers of a sheriff's officer under section 7A of the *Sheriff Act 2005* (NSW). Section 7A provides for the powers of a sheriff when executing writs and warrants for possession of land. Subsection 7A(1) of the Sheriff Act provides that a sheriff's officer may enter the premises and:

- take all reasonably necessary steps to enforce the warrant (paragraph 7A(1)(a))
- use such force as is reasonably necessary to enforce the warrant (paragraph 7A(1)(b), and
- obtain the assistance of a police officer (paragraph 7A(1)(c)).

Subsection 7A(3) of the Sheriff Act requires the Sheriff to give the occupier of land subject to a writ of possession of land not less than 30 days' notice to deliver up possession of land.

Subsection 10(2) of the Instrument provides for additional safeguards when a Sheriff or a Deputy Sheriff of the FCC is executing a warrant for possession of residential premises. These safeguards reflect those found in section 55A of the *Federal Court of Australia Act 1976* which deals with the ability of sheriffs and police officers to use reasonable force when entering premises in the execution of arrest warrants.

Paragraph 10(2)(a) allows the Sheriff or a Deputy Sheriff to obtain the assistance of a member or special member of the Australian Federal Police (as defined in section 4 of the *Australian Federal Police Act 1979* (Cth)). This ensures that appropriately trained officers are available to assist in the execution of warrants in appropriate circumstances so that warrants are executed in a safe and correct manner using the minimum force necessary.

Paragraph 10(2)(b) provides that the Sheriff or a Deputy Sheriff must not enter a dwelling house between 9pm one day and 6am the next day unless the Sheriff or a Deputy Sheriff reasonably believes that it would not be practicable to execute the warrant at another time. This limitation prevents interference with a tenant's land during the hours that an individual is most likely to wish to enjoy rest and privacy. It also recognises that the effect of executing a warrant for possession of land is to remove a tenant from their land or premises and it is important for this to occur during business hours when a tenant will be able to engage removalists or make other arrangements to convey possessions to a new place of residence. However, paragraph 10(2)(b) allows a Sheriff or a Deputy Sheriff to execute a warrant between 9pm and 6am if he or she reasonably believes that it would not be practicable to execute the warrant at another time.

Paragraph 10(2)(c) provides that a Sheriff or a Deputy Sheriff must not use more force, or subject any person on the premises to greater indignity, than is necessary and reasonable to execute the warrant. Paragraph 10(2)(d) provides that a Sheriff or a Deputy Sheriff must not do anything that is likely to cause the death of, or grievous bodily harm to, any person on the premises unless he or she reasonably believes that doing that thing is necessary to protect life or prevent serious injury to another person, including the Sheriff or a Deputy Sheriff.

Paragraphs 10(2)(c) and (d) recognise Commonwealth criminal law policy as set out in 'A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' that legislation should only allow an authorised person to use such force against persons as is reasonable and necessary to execute the warrant. The limitations imposed on the use of force by paragraphs 10(2)(c) and (d) represent situations of unreasonable force, or force that is disproportionate and could result in death or grievous bodily harm.

Subsection 10(3) provides that nothing in section 10 is intended to limit any other power of the FCC, a Registrar of the FCC or the Sheriff or a Deputy Sheriff of the FCC. This is a clarifying provision that is intended to avoid doubt and to ensure the FCC and officers of the FCC have access to the full suite of powers that are required



in order to execute and enforce orders of the court, including those found in the Federal Circuit Court Rules 2001.

## Statement of compatibility with human rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### ***Federal Circuit Court (Commonwealth Tenancy Disputes) Instrument 2015***

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of Instrument**

The *Federal Circuit Court of Australia Act 1999* (the Act) confers jurisdiction on the Federal Circuit Court of Australia (the FCC) to hear and determine Commonwealth tenancy disputes between the parties to a lease, licence or other arrangement in which

- the lessor (other than as a sublessor), licensor (other than as a sublicensor) or the grantor of a right to possess, occupy or use land owned by the Commonwealth, is the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, and
- the lessee (other than as a sublessee), licensee (other than as a sublicensee) or grantee is not the Commonwealth, a person suing or being sued on behalf of the Commonwealth, or a Commonwealth officer or employee.

Subsection 10AA(3) of the Act confers on the Minister the power to, by legislative instrument, make provision for and in relation to all or any of the following matters in respect of a Commonwealth tenancy dispute:

- (a) the rights of the parties to the Commonwealth tenancy dispute;
- (b) the law (whether a law of the Commonwealth or a law of a State or Territory) to be applied in determining the Commonwealth tenancy dispute
- (c) any modifications of the applicable law that are to apply in relation to the Commonwealth tenancy dispute;
- (d) the powers that the Federal Circuit Court of Australia may exercise under the applicable law;
- (e) if the Federal Circuit Court of Australia makes an order when exercising jurisdiction over the Commonwealth tenancy dispute—the powers that may be exercised when executing the order or a class of orders.

The purpose of the Instrument is to make provision for the FCC to apply, with modifications, applicable New South Wales (NSW) law when determining Commonwealth tenancy disputes that involve land within NSW. This clarifies the law that the FCC is to apply when determining Commonwealth tenancy disputes involving residential tenants, to ensure tenants have rights in the FCC that are substantially equivalent to those that would be afforded to them if the dispute were to be heard in the Civil and Administrative Tribunal of NSW (the Tribunal). The Tribunal cannot hear Commonwealth tenancy disputes because it is not a ‘court’ within the meaning of Chapter III of the Constitution and therefore cannot exercise federal judicial power when the Commonwealth is a party to a tenancy dispute.

Specifically, the Instrument makes provision for the rights of the parties to the dispute, the law to be applied in determining the dispute, the powers the FCC may exercise under that law, and the powers that may be exercised when executing an order made by the FCC. The Instrument makes provision for these matters in relation to Commonwealth tenancy disputes involving land in NSW.

### **Human rights implications**

The Instrument engages the following human rights:

- the right to a fair hearing – article 14 of the International Covenant on Civil and Political Rights (ICCPR)
- the right to adequate housing as an element of the right to an adequate standard of living – article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- the right to security of person – article 9 of the ICCPR, and
- the right to freedom from arbitrary or unlawful interference with privacy – article 17 of the ICCPR.

#### *The right to a fair hearing*

Article 14 of the ICCPR provides for the right to a fair hearing in the determination of one's rights and obligations in a suit at law. This right is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body.

The Instrument engages the right to a fair hearing in that subsection 6(2) of the Instrument limits a party to a Commonwealth tenancy dispute from making an application to the Tribunal.

The measures engage but do not limit the right to a fair hearing because they ensure, as far as possible, that the rights of the parties involved in Commonwealth tenancy disputes in the FCC remain the same as they would if the matters were heard in the Tribunal. The FCC is a well-established forum in which parties receive a fair hearing. Parties in the FCC can put their case forward, have their arguments heard and appeal findings which they feel are adverse. The measures in the Instrument ensure that the only practical difference between Commonwealth tenancy disputes being heard in the FCC and the Tribunal is the forum hearing the dispute.

#### *The right to adequate housing*

The right to adequate housing is an economic, social and cultural right derived from article 11 of the ICESCR which provides for the right to an adequate standard of living, and is therefore subject to progressive realisation. However, States Parties to the ICESCR have immediate obligations under article 11, including the obligation not to engage in illegal or arbitrary evictions of persons.

Subsection 8(2) of the Instrument modifies the law so that notwithstanding anything in the Residential Tenancies Act, it is the FCC that has discretion to determine when

vacant possession of residential premises is to be given to the Commonwealth if the FCC determines the Commonwealth is entitled to residential premises which is the subject of a Commonwealth tenancy dispute. This is specifically relevant to long-term tenants who have been in continual possession of the same residential premises for a period of 20 years or more because subsection 94(4) of the Residential Tenancies Act provides that long-term tenants must not be ordered to vacate premises earlier than 90 days after a termination order is made.

The effect of subsection 8(2) is to remove the application of the 90 day minimum rule with respect to the eviction of long-term tenants. The subsection provides that if the FCC determines the Commonwealth is entitled to possession of the residential premises, the FCC may take into consideration all the circumstances of the Commonwealth tenancy dispute before making an order in relation to the day vacant possession of the premises is to be given to the Commonwealth. In some cases, the FCC may find that an order of less than 90 days is appropriate, for example, because of preceding events in which tenants were forewarned about the termination of their tenancy. In other cases, the FCC may find that tenants should be provided with 90 days to vacate premises after a termination order is made.

By allowing the FCC to exercise discretion in these cases, the Instrument does not limit the right of long-term tenants to adequate housing. The measure is reasonable and appropriate to ensure that both parties to a Commonwealth tenancy dispute are provided with equitable rights by the FCC in the determination of the date vacant possession of residential premises should be provided.

#### *The right to security of person*

Section 10 of the Instrument provides that the Sheriff and a Deputy Sheriff of the FCC can exercise any of the powers of a sheriff's officer under section 7A of the *Sheriff Act 2005* (NSW) when enforcing a warrant for possession of residential premises owned by the Commonwealth involving land in NSW. Section 7A of the *Sheriff Act* allows a sheriff's officer to enter premises and take all reasonable steps to enforce the warrant, use such force as is reasonably necessary to enforce the warrant, and to obtain the assistance of a police officer. Section 21 of the *Interpretation Act 1987* (NSW) defines a police officer to mean a member of the NSW Police Force who is a police officer within the meaning of the *Police Act 1990* (NSW). Paragraph 10(2)(a) of the Instrument allows the Sheriff or a Deputy Sheriff of the FCC to obtain the assistance of a member or special member of the Australian Federal Police.

To the extent that the Instrument allows for the use of force in certain circumstances, it limits the right to security of person under article 9 of the ICCPR. Article 9 requires States Parties to protect individuals from interferences with personal security by private persons, but also obliges States themselves to refrain from using force against individuals except in limited circumstances.

It is conceivable that situations may arise where tenants who are the subject of an adverse Commonwealth tenancy dispute decision by the FCC may physically refuse to leave the premises. In these situations, the sheriffs and police officers may need to physically remove tenants who refuse to leave the premises or do not cooperate. Section 10 of the Instrument is aimed at the legitimate and lawful objective of

executing a warrant for possession of Commonwealth property in NSW where the FCC finds that the Commonwealth is entitled to possession of the premises. The measures contained in section 10 are necessary as they will ensure possession of residential premises owned by the Commonwealth on NSW land is able to be returned to the Commonwealth if the FCC determines that the Commonwealth is entitled to possession of the premises.

The Instrument provides a number of important safeguards to ensure that any use of force is reasonable and proportionate. The sheriffs and police officers are the only class of persons who may use force to enter premises. The sheriffs and police officers must not use more force or subject any person on the premises to greater indignity than is necessary and reasonable to execute the warrant. Additionally, the sheriffs and police officers must not do anything that is likely to cause the death of, or grievous bodily harm to, any person on the premises unless they reasonably believe that doing that thing is necessary to protect life or prevent serious injury to another person, including the sheriffs and police officers.

The limitation on the class of persons who may use force ensures that sheriffs and police officers have received appropriate and adequate training so that warrants are executed in a safe and correct manner, using the minimum force necessary. Sheriffs and police officers who do not adhere to the safeguards provided in the Instrument may face criminal charges, particularly if they are found to have used more force than is reasonably necessary to execute the warrant. Moreover, the sheriffs and police officers will be wearing uniforms in order to be correctly identified by the tenants.

#### *The right to privacy*

Section 10 of the Instrument provides that the Sheriff and a Deputy Sheriff of the FCC can exercise any of the powers of a sheriff's officer under section 7A of the *Sheriff Act 2005* (NSW) when enforcing a warrant for possession of residential premises owned by the Commonwealth involving land in NSW. Section 7A of the *Sheriff Act* allows a sheriff's officer to enter premises and take all reasonable steps to enforce the warrant, use such force as is reasonably necessary to enforce the warrant, and to obtain the assistance of a police officer. Section 21 of the *Interpretation Act 1987* (NSW) defines a police officer to mean a member of the NSW Police Force who is a police officer within the meaning of the *Police Act 1990* (NSW). Paragraph 10(2)(a) of the Instrument allows the Sheriff or a Deputy Sheriff of the FCC to obtain the assistance of a member or special member of the Australian Federal Police.

To the extent that the Instrument allows for Sheriffs to enforce a warrant for the possession of residential premises, it limits the right to freedom from arbitrary or unlawful interferences with privacy under article 17 of the ICCPR. Article 17 provides that any interferences with a person's home or privacy must not only be authorised by law, but also not be arbitrary.

It is conceivable that situations may arise where tenants who are the subject of an adverse Commonwealth tenancy dispute decision by the FCC may physically refuse to leave the premises. In these situations, the sheriffs and police officers may need to enter the premises to physically remove tenants who refuse to leave or do not cooperate. However, the measures contained in section 10 are necessary as they will ensure possession of residential premises owned by the Commonwealth on NSW land

is able to be returned to the Commonwealth if the FCC determines that the Commonwealth is entitled to possession of the premises. Section 10 of the Instrument is aimed at the legitimate and lawful objective of executing a warrant for possession of Commonwealth property in NSW where the FCC finds that the Commonwealth is entitled to possession of the premises.

Section 10 of the Instrument provides a number of important safeguard to ensure that any interference with privacy is not arbitrary. The sheriffs and police officers will not be able to enter the residential premises between 9 pm one day and 6 am the next day unless they reasonably believe it would not be practicable to execute the warrant at another time. This limitation prevents interference with a tenant's land during the hours that an individual is most likely to wish to enjoy rest and privacy. It also recognises that the effect of executing a warrant for possession of land is to remove a tenant from their land or premises and it is important for this to occur during business hours when a tenant will be able to engage removalists or make other arrangements to convey possessions to a new place of residence.

However, by providing that sheriffs and police officers may enter premises between these hours if they reasonably believe that it would not be practicable to execute the warrant at another time, the Instrument makes provision for circumstances where, for example, a tenant is actively seeking to evade the sheriffs and police officers.

### **Conclusion**

The Instrument is compatible with human rights in that, to the extent that it limits human rights, these limitations are reasonable, necessary and proportionate to achieving a legitimate aim.

**George Brandis QC**  
**Attorney-General**