

EXPLANATORY STATEMENT

Issued by the authority of the Attorney-General

*Federal Circuit Court (Commonwealth Tenancy Disputes) Amendment Instrument
2016*

The *Federal Circuit Court of Australia Act 1999* (the Act) confers jurisdiction on the Federal Circuit Court of Australia (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.

Subsection 10AA(2) of the Act confers on the Minister the power to, by legislative instrument, confer jurisdiction on the FCC in respect of any other specified Commonwealth tenancy dispute.

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,
- (b) the law (whether a law of the Commonwealth or a law of a State or Territory) to be,
- (c) any modifications of the applicable law that are to apply,
- (d) the powers that the Federal Circuit Court of Australia may exercise under the applicable law,
- (e) if the FCC makes an order—the powers that may be exercised when executing the order or a class of orders.

The purpose of the amendment to the Instrument is to confer jurisdiction on the FCC to hear and determine Commonwealth tenancy disputes involving land in a non-self-governing Territory in which a Commonwealth officer or employee (other than a member of the Defence Force) is the lessee (other than a sublessee), the licensee (other than a sublicensee) or a grantee of a right or permission to possess, occupy or use land owned by the Commonwealth. This will allow such disputes to be determined in the FCC.

The Instrument would also make provision for the FCC to apply, with modifications, the *Residential Tenancies Act 1997* (ACT) (JBT) (ACT RTA) (available at <http://www.legislation.act.gov.au/>) when determining Commonwealth tenancy disputes that involve land within the Jervis Bay Territory (JBT), and provide that

parties to such a dispute must not make an application in respect of the dispute to the ACT Civil and Administrative Tribunal (ACAT).

The Instrument has been drafted 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 ACAT.

Details of the Instrument are set out in the 'Notes on Clauses'.

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

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 by Regulation.

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 the JBT. 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(2) of the *Federal Circuit Court of Australia Act 1999*

Notes on Clauses

Details of the *Federal Circuit Court (Commonwealth Tenancy Disputes) Amendment Instrument 2016*

Section 1 – Name

This is a formal clause which provides that the Instrument is named the *Federal Circuit Court (Commonwealth Tenancy Disputes) Amendment Instrument 2016*.

Section 2 – Commencement

This clause provides that the Instrument commences the day after the Instrument is registered.

Section 3 – Authority

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

Section 4 – Schedules

This clause provides that each instrument that is specified in a schedule is amended or repealed as set out in the applicable items in the schedule concerned. Any other item in a schedule has effect according to its terms.

Schedule 1 – Amendments

Amendments to the Federal Circuit Court (Commonwealth Tenancy Disputes) Instrument 2015 (the FCC Instrument)

Item 1 – Section 3

This item amends section 3 of the Federal Circuit Court Instrument (FCC Instrument) to reflect that, its amendment will result in it being made under section 10AA of the FCC Act, as opposed to only under subsection 10AA(3).

Item 2 – Section 4

This item adds two definitions to the FCC Instrument.

The item provides that ‘ACT Residential Tenancies Act’ means the *Residential Tenancies Act 1997* (ACT), as in force in the Jervis Bay Territory (JBT) under section 4A of the *Jervis Bay Territory Acceptance Act 1915* (the JBTA Act). The JBTA Act provides that the laws of the ACT are in force in the JBT ‘so far as they are applicable to the Territory and not inconsistent with an Ordinance’ (subsection 4A(1)) and that such a law ‘may be amended or repealed by an Ordinance or by a law made under an Ordinance’ (section 4C). The ACT Residential Tenancies Act referred to in the Instrument is that Act as in force in the JBT, pursuant to these provisions.

The item also provides that ‘applicable Jervis Bay Territory law’ has the meaning given by subsections 13(4) and 18(4) of the FCC Instrument. Subsections 13(4) and 18(4) provide that certain provisions of the ACT Residential Tenancies Act and regulations made under that Act are to be applied to the extent necessary to determine certain Commonwealth tenancy disputes, and subject to any modifications made in the FCC Instrument.

Item 3 – After section 4

This item adds a new Part to the FCC Instrument.

This Part confers jurisdiction on the Federal Circuit Court (FCC), in accordance with subsection 10AA(2) of the FCC Act.

New section 4A – Conferral of jurisdiction in relation to disputes involving non-self-governing territories

New section 4A confers jurisdiction on the FCC to hear and determine Commonwealth tenancy disputes involving land in a non-self-governing Territory in which a Commonwealth officer or employee (other than a member of the Defence Force) is the lessee (other than a sublessee), the licensee (other than a sublicensee) or a grantee of a right or permission to possess, occupy or use land owned by the Commonwealth. This will allow such disputes to be determined in the FCC rather than superior courts, providing an appropriate and effective use of court resources.

Item 4 – Part 2 (heading)

This item substitutes a new Part number and heading for Part 3 Division 1 of the FCC Instrument which is reflected as Provisions relating to Commonwealth tenancy disputes.

Item 5 – Section 5 (heading)

This item updates the reference to ‘Part’ in the heading to section 5 to ‘Division’ as a consequence of allowing provisions for Commonwealth tenancy disputes in the JBT to be included in the Instrument.

Item 6 – Subsections 5(1) to (3)

This item updates each reference to ‘Part’ in these subsections to ‘Division’.

Item 7 – At the end of the instrument

This item adds a new Division 2 to Part 3 of the FCC Instrument.

Division 2 of Part 3 provides clarity about the law that is to be applied by the FCC in determining Commonwealth tenancy disputes involving land in the JBT.

It is also intended to ensure that, as far as possible, the rights of parties to a Commonwealth tenancy dispute are the same as the rights of parties to tenancy disputes determined in the ACT Civil and Administrative Tribunal (the Tribunal).

Division 2 of Part 3 consists of two Subdivisions, which make different provision in relation to the matters listed in subsection 10AA(3) of the FCC Act depending on whether the ACT Residential Tenancies Act would, but for the FCC Instrument, apply to the lease, licence or other arrangement involved in the dispute.

This distinction is needed because there are relevantly two types of leases, licences or other arrangements in the JBT that can fall within the definition of 'residential tenancy agreement' in the ACT Residential Tenancies Act:

- leases, licences or other arrangements to which, even if it were not for the FCC Instrument, the ACT Residential Tenancies Act applies (this covers the majority of residential tenancies over Commonwealth-owned housing in the JBT), and
- leases, licences or other arrangement to which, but for the FCC Instrument, the ACT Residential Tenancies Act would not apply (the majority of these are leases granted under the *Leases Ordinance 1992* (JBT) (the Leases Ordinance)).

It is intended that the protections contained in the ACT Residential Tenancies Act relating to the resolution of tenancy disputes will apply to both types of residential tenancy agreements to the same effect. To achieve the same effect for both types of agreements, different provisions of the ACT Residential Tenancies Act need to be applied, with different modifications.

Section 11 – Operation of Subdivision A

This clause sets out the operation of Subdivision A of Division 2 of Part 3 of the FCC Instrument, which makes provision for certain matters in respect of a Commonwealth tenancy dispute which involves a lease, licence or other arrangement to which the ACT Residential Tenancies Act, even if it were not for the FCC Instrument, applies, and which involves land in the JBT.

Subsection 11(1) states that Subdivision A of Part 3 of the FCC Instrument makes provision for the following matters in respect of a Commonwealth tenancy dispute involving land in the JBT:

- (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 11(2) limits the operation of Subdivision A to Commonwealth tenancy disputes involving land in the JBT which involve residential tenancy agreements

within the meaning of the ACT Residential Tenancies Act, and to which the ACT Residential Tenancies Act would apply (disregarding the effect of the FCC Instrument). This ensures that Subdivision A only applies to disputes involving residential tenancy agreements that concern land within the JBT and that are subject to the ACT Residential Tenancies Act, and not to other types of leases, licences or other arrangements, such as commercial leases or leases granted under the Leases Ordinance. Under subsection 6A(1) of the ACT Residential Tenancies Act, a residential tenancy agreement is defined as an agreement under which:

- a person gives someone else (the *tenant*) a right to occupy stated premises, and
- the premises are for the tenant to use as a home (whether or not together with other people), and
- the right is given for value.

Subsection 11(3) makes it clear that nothing in Subdivision A 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 12 – Rights of the parties

Subsection 12(2) provides that parties to certain Commonwealth tenancy disputes must not make applications to the Tribunal under the ACT 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 FCC has jurisdiction to hear and determine the dispute.

Subsection 12(2) ensures an application for the determination of a Commonwealth tenancy disputes (to which the section applies) can only be made in the FCC, thereby providing jurisdictional certainty and precluding parties from commencing disputes in forum that is not appropriate for the resolution of Commonwealth disputes.

Subsection 12(1) provides the criteria for determining the Commonwealth tenancy disputes in the JBT to which the section applies.

The first criterion, in paragraph 12(1)(a), is that section 12 applies if the party is a tenant within the meaning of the ACT Residential Tenancies Act. Section 6 of the ACT Residential Tenancies Act defines a tenant as a person who ‘has a right of occupation under a residential tenancy agreement’, and provides that ‘tenant’ includes a prospective tenant.

The second criterion, in paragraph 12(1)(b), is that section 12 applies if the FCC has jurisdiction to hear and determine the dispute. The FCC’s jurisdiction in relation to Commonwealth tenancy disputes involving land in the JBT is set out in subsection 10AA(1) of the Act and section 4A of the FCC Instrument (as inserted by this instrument), 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 member of the Defence Force is the lessee (other than as a sublessee), the licensee (other than a sublicensee) or the grantee of the right or permission.

Section 13 – Law to be applied

This section sets out the law to be applied when determining a Commonwealth tenancy dispute to which Subdivision A applies.

Subsection 13(1) provides that the section applies when determining a Commonwealth tenancy dispute involving land in the JBT and any of the following:

- the recovery of rent or other payments payable under or in relation to a lease, licence or other arrangement, or
- the termination of a lease, licence or other arrangement, or
- the possession, occupation or use of land.

A ‘Commonwealth tenancy dispute’ may be about any of the above three issues (see the definition of ‘Commonwealth tenancy dispute’ in section 5 of the FCC Act). These matters have been expressly stated here because different parts of the ACT Residential Tenancies Act (with relevant modifications) are to be applied in determining the respective issues as may be present in a given Commonwealth tenancy dispute.

Subsection 13(2) provides that, to the extent a Commonwealth tenancy dispute to which Subdivision A applies relates to the recovery of rent or other payments payable under or in relation to a lease, licence or other arrangement, section 83 of the ACT Residential Tenancies Act and any other provision of that Act or regulations made under that Act (to the extent that it relates to section 83) are to be applied to the extent necessary to determine the dispute, and subject to the modifications set out in section 14.

Subsection 13(3) sets out the provisions of the ACT Residential Tenancies Act that are to be applied in determining a Commonwealth tenancy dispute to which Subdivision A applies, to the extent that the dispute covers the following issues:

- the termination of a lease, licence or other arrangement, or
- the possession, occupation or use of land.

The provisions that are to be applied are:

- Part 4 of the ACT Residential Tenancies Act,

- section 83 of that Act,
- clauses 92 and 93 of Schedule 1 to that Act, and
- any other provision of that Act or regulations made under that Act, to the extent that they relate to Part 4 or section 83 of that Act, or clauses 92 and 93 of Schedule 1 to that Act.

These provisions are only to be applied to the extent necessary to determine the dispute, and subject to the modifications set out in section 14.

Only specified provisions of the ACT Residential Tenancies Act are to be applied in determining the specified issues in a Commonwealth tenancy dispute. This is because the ACT Residential Tenancies Act has a broader role and application than simply how tenancy disputes are resolved, and some parts of the Act may not be relevant to the determination of a Commonwealth tenancy dispute.

Subsection 13(4) provides that the laws referred to in subsections (2) and (3) are, for the purposes of Subdivision A, to be referred to as the ‘applicable Jervis Bay Territory law’. The purpose of the provision is to provide the content of the definition of ‘applicable Jervis Bay Territory law’ in section 4 of the FCC Instrument.

While this instrument applies ACT law to the determination of certain Commonwealth tenancy disputes, the FCC will apply its usual procedures when hearing a Commonwealth tenancy dispute.

Section 14 – Modifications of applicable JBT law

Section 14 modifies the applicable JBT law, as defined in subsections 13(2) and (3) of the FCC Instrument.

Subsection 14(1) substitutes references to the Tribunal and officers of the Tribunal with references to the FCC and officers of the FCC.

Paragraph 14(1)(a) provides that references to the Tribunal in the applicable JBT law should be read as references to the FCC. Paragraph 14(1)(b) provides that references to the registrar of the Tribunal should be read as references to a Registrar of the FCC.

Subsection 14(2) provides that the ACT Residential Tenancies Act is to be applied as if sections 76, 77, 78 and 86 were excluded. These provisions relate specifically to how the Tribunal is to perform its functions under the ACT Residential Tenancies Act, and are not relevant to the FCC’s exercise of its jurisdiction in relation to Commonwealth tenancy disputes.

Section 15 – Powers of the Court

Section 15 clarifies that the FCC may exercise any powers that are powers of the Tribunal under the applicable JBT law and any powers that are relevant to the determination of the dispute when determining a Commonwealth tenancy dispute involving land in the JBT. The section ensures that, to the extent possible, the rights of the parties to the Commonwealth tenancy dispute are substantially equivalent to

what they would be if the matter were heard in the Tribunal. Subsection 11(3) clarifies that non-judicial power is not conferred on the FCC unless that exercise of non-judicial power is incidental to the exercise of judicial power.

Section 16 – Operation of Subdivision B

This section sets out the operation of Subdivision B of Division 2 of Part 3 of the FCC Instrument, which makes provision for certain matters in respect of a Commonwealth tenancy dispute which involves a lease, licence or other arrangement to which the ACT Residential Tenancies Act, but for the FCC Instrument, does not apply, and which involves land in the JBT.

Subsection 16(1) clarifies that the Subdivision provides for the following matters in respect of a Commonwealth tenancy dispute involving land in the JBT:

- (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 16(2) limits the operation of Subdivision B to Commonwealth tenancy disputes involving land in the JBT which involve residential tenancy agreements within the meaning of the ACT Residential Tenancies Act, and to which the ACT Residential Tenancies Act, disregarding the effect of the FCC Instrument, would not apply. This ensures that Subdivision B only applies to disputes involving residential tenancy agreements that concern land within the JBT and that are not subject to the ACT Residential Tenancies Act (predominantly leases made under the Leases Ordinance), and not to other types of leases, licences or other arrangements, such as commercial leases or leases made under the ACT Residential Tenancies Act. Under subsection 6A(1) of the ACT Residential Tenancies Act, a residential tenancy agreement is defined as an agreement under which:

- a person gives someone else (the *tenant*) a right to occupy stated premises, and
- the premises are for the tenant to use as a home (whether or not together with other people), and
- the right is given for value.

Subsection 16(3) makes it clear that nothing in Subdivision B confers 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 17 – Rights of the parties

Section 17(2) provides that parties to certain Commonwealth tenancy disputes must not make applications to the Tribunal under the ACT 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 FCC has jurisdiction to hear and determine the dispute.

The ACT Residential Tenancies Act directs tenancy disputes 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 17(2) ensures an application about a relevant of a Commonwealth tenancy dispute (to which the section applies) can only be made in the FCC, thereby providing jurisdictional certainty and ensuring disputes are resolved in the most appropriate forum.

Subsection 17(1) provides the criteria for the section to apply to a Commonwealth tenancy disputes in the JBT.

The first criterion, in paragraph 17(1)(a), is that the party is a tenant within the meaning of the ACT Residential Tenancies Act. Section 6 of the ACT Residential Tenancies Act defines a tenant as a person who ‘has a right of occupation under a residential tenancy agreement’, and provides that ‘tenant’ includes a prospective tenant.

The second criterion, in paragraph 17(1)(b), is that the FCC has jurisdiction to hear and determine the dispute. The FCC’s jurisdiction in relation to Commonwealth tenancy disputes involving land in the JBT is set out in subsection 10AA(1) of the Act and section 4A of the FCC Instrument (as inserted by this instrument), 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 member of the Defence Force is the lessee (other than as a sublessee), the licensee (other than a sublicensee) or the grantee of the right or permission.

Section 18 – Law to be applied

This section sets out the law to be applied when determining a Commonwealth tenancy dispute to which Subdivision B applies.

Subsection 18(1) provides that the section applies when determining a Commonwealth tenancy dispute involving land in the JBT and any of the following:

- the recovery of rent or other payments payable under or in relation to a lease, licence or other arrangement, or
- the termination of a lease, licence or other arrangement, or
- the possession, occupation or use of land.

Different parts of the ACT Residential Tenancies Act (with relevant modifications) are to be applied in determining the respective issues.

Subsection 18(2) provides that, to the extent a Commonwealth tenancy dispute to which Subdivision B applies covers the recovery of rent or other payments payable under or in relation to a lease, licence or other arrangement, section 83 of the ACT Residential Tenancies Act and any other provision of that Act or regulations made under that Act (to the extent that it relates to section 83) are to be applied to the extent necessary to determine the dispute, and subject to the modifications set out in section 19.

Subsection 18(3) sets out the provisions of the ACT Residential Tenancies Act that are to be applied in determining a Commonwealth tenancy dispute to which Subdivision B applies, to the extent that the dispute covers the following issues:

- the termination of a lease, licence or other arrangement, or
- the possession, occupation or use of land.

The provisions that are to be applied are:

- Part 4 of the ACT Residential Tenancies Act,
- section 83 of that Act, and
- any other provision of that Act or regulations made under that Act, to the extent that they relate to Part 4 or section 83 of that Act.

These provisions only apply to the extent necessary to determine the dispute, and subject to the modifications set out in section 19.

Only the specified provisions of the ACT Residential Tenancies Act are to be applied in determining the specified matters in a Commonwealth tenancy dispute. This is because the ACT Residential Tenancies Act deals with issues that are broader than the resolution of tenancy disputes and parts of the Act may not be relevant to the determination of a Commonwealth tenancy dispute.

Subsection 18(4) provides that the law referred to in subsections (2) and (3) are, for the purposes of Subdivision B, to be referred to as the ‘applicable Jervis Bay Territory law’. This provides the content of the definition of ‘applicable Jervis Bay Territory law’ in section 4 of the FCC Instrument, as discussed above.

While this instrument applies ACT law to the determination of certain Commonwealth tenancy disputes, the FCC will apply its usual procedures when hearing a Commonwealth tenancy dispute.

Section 19 – Modifications of applicable JBT law

Section 19 modifies the applicable JBT law, as defined in subsections 18(2) and (3) of the FCC Instrument, as it is to apply in disputes to which Subdivision B applies.

As outlined above, the leases involved in disputes to which Subdivision B applies are not made in compliance with the ACT Residential Tenancies Act. Thus, in order to apply the protections contained in the ACT Residential Tenancies Act to such leases, specific modifications of that Act are needed.

Subsection 19(1) makes the following substitutions, for the following reasons:

- each reference to ‘ACAT’ or the tribunal is to be a reference to the FCC: this allows the FCC to exercise judicial power conferred on the Tribunal under the relevant provisions of the ACT Residential Tenancies Act,
- each reference to ‘the registrar’ is to be a reference to a Registrar of the FCC: this is necessary to enable the FCC registrar to issue eviction warrants under Division 4.2 of the ACT Residential Tenancies Act,
- each reference to a ‘residential tenancy agreement’ is to be a reference to a ‘lease, licence or other arrangement’: this is to make sure that the provisions can operate despite the lease, licence or other arrangement not being a residential tenancy agreement to which the ACT RTA applies,
- each reference to ‘standard residential tenancy terms’ is to be a reference to the ‘terms and conditions of the lease, licence or other arrangement’: this ensures that the FCC can terminate in accordance with, or for a breach of, the terms of a lease, licence or other arrangement,
- each reference to a ‘tenancy dispute’ is to be a reference to a ‘Commonwealth tenancy dispute’: this is to ensure that the applied law applies only to Commonwealth tenancy disputes,
- the reference to the Territory in paragraph 83(c) is omitted: as it is unnecessary,
- a reference to “under the Residential Tenancies Act 1997, Schedule 1” in subparagraph 5(a)(iii) of the Residential Tenancies Regulation 1998 (ACT) is to be a reference to “under the lease, licence or other arrangement”: Schedule 1 to the ACT Residential Tenancies Act is not applicable to a lease to which that Act does not apply.

Subsection 19(2) provides that the ACT Residential Tenancies Act is to be applied as if the following provisions were excluded, for the following reasons:

- Part 2: to make sure that there is no argument that a lease, licence or other arrangement to which the ACT Residential Tenancies Act does not apply must comply with the standard residential tenancy terms,
- paragraph 43(1)(b), subparagraph 48(1)(a)(iv) and paragraph 54(1)(b): these provisions refer to ACAT being able to endorse a term of a residential tenancy agreement, and are inapplicable to a lease, licence or other arrangement to which the ACT Residential Tenancies Act does not apply,

- section 72: this section defines ‘tenancy dispute’; this definition is unnecessary as the intention is for the applicable JBT law to apply to Commonwealth tenancy disputes, which is defined in the FCC Act,
- sections 76, 77 and 78: these provisions relate specifically to how the Tribunal is to perform its functions under the ACT Residential Tenancies Act, and are not relevant to the FCC’s exercise of its jurisdiction in relation to Commonwealth tenancy disputes,
- paragraph 82(a): this provision sets up a condition requiring the ACT Residential Tenancy Act to apply to a residential tenancy agreement before certain action can be taken. This provision is inapplicable to a lease, licence or other arrangement to which that Act does not apply,
- paragraph 83(e): this provision allows orders to be made requiring an amount to be paid from the ACT’s residential tenancy bond trust account. As parties to a lease, licence or other arrangement to which the ACT Residential Tenancy Act does not apply do not pay bonds into the trust account, it would be inappropriate to allow such orders to be made in respect of disputes involving such a lease, licence or other arrangement,
- section 86: this provision makes it an offence for a party to fail to comply with an order of the Tribunal. It is not necessary for such an offence to be made in relation to orders of the FCC.

Section 20 – Powers of the Court

Section 20 sets out the powers that the FCC may exercise when determining a Commonwealth tenancy dispute involving land in the JBT.

Paragraph 20(a) states that the Court may exercise any powers that are powers of the Tribunal under the applicable JBT law. As set out in subsection 16(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 20(b) states that the Court may exercise any powers that are relevant to determination of the dispute.

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 heard in the Tribunal.

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) Amendment Instrument 2016

The 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 Instrument will amend the FCC Instrument to confer jurisdiction on the FCC to hear and determine Commonwealth tenancy disputes involving land in a non-self-governing Territory in which a Commonwealth officer or employee (other than a member of the Defence Force) is the lessee (other than a sublessee), the licensee (other than a sublicensee) or a grantee of a right or permission to possess, occupy or use land owned by the Commonwealth. The purpose of the Instrument is to establish an appropriate forum namely the FCC for the resolution of disputes.

Subsection 10AA(1) of 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 sublicensee) 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(2) of the Act confers on the Minister the power to, by legislative instrument, confer jurisdiction on the FCC in respect of any other specified Commonwealth tenancy dispute.

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.

This Instrument makes provision for the FCC to apply, with modifications, the *Residential Tenancies Act 1997* (ACT)(JBT) (the ACT RTA) (available at <http://www.legislation.act.gov.au/>) when determining Commonwealth tenancy disputes that involve land within the Jervis Bay Territory (JBT). The Instrument also prevents parties to a Commonwealth tenancy dispute from making an application about the dispute to the ACT Civil and Administrative Tribunal (ACAT), which is not a federal review body.

This Instrument has been drafted 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 ACAT.

Human rights implications

This 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 an adequate standard of living – article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

These rights are engaged in relation to a lessee, licensee or grantee who is a person, and are not engaged in relation to corporations, which are not owed human rights.

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 subsections 12(2) and 17(2) limit a party to a Commonwealth tenancy dispute from making an application to the ACAT.

The measures engage but do not limit the right to a fair hearing because they ensure, as far as possible, that the rights of parties involved in Commonwealth tenancy disputes in the FCC remain the same as they would if the matters were heard in the ACAT. 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 ACAT is the forum hearing the dispute.

The right to an adequate standard of living

Article 11(1) of the ICESCR provides that everyone has a right to an adequate standard of living, including food, clothing and housing and requires States parties to take appropriate steps to ensure the realisation of this right. Under article 2(1) of ICESCR, a country is obliged to take steps ‘to the maximum of its available resources, with a view to achieving progressively the full realisation’ of the rights recognised in ICESCR.

The measures engage but do not limit the right to an adequate standard of living with respect to housing. Sections 13 and 18 of the Instrument provide the FCC, rather than the ACAT, with 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. By allowing the FCC, rather than the ACAT, to exercise discretion in these cases, the Instrument does not impose a limit on the right of a person to adequate housing. 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.

Conclusion

This Instrument is compatible with human rights because it does not limit human rights.

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