

EXPLANATORY STATEMENT

Issued by the authority of the Attorney-General

Federal Circuit Court (Commonwealth Tenancy Disputes) Amendment Instrument 2017

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(3) of the Act confers on the Attorney-General 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 applied,
- (c) any modifications of the applicable law that are to apply,
- (d) the powers that the FCC 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 *Federal Circuit Court (Commonwealth Tenancy Disputes) Amendment Instrument 2016* amended the *Federal Circuit Court (Commonwealth Tenancy Disputes) Instrument 2015* (the FCC Instrument) to make provision in relation to the FCC hearing Commonwealth tenancy disputes involving land in the Jervis Bay Territory (JBT). This amendment provided that the FCC was to apply the *Residential Tenancies Act 1997* (ACT) (the ACT Residential Tenancies Act), but did not confer on the Court all powers available under that Act to execute or enforce orders made by the FCC in determining such disputes.

The purpose of this amendment to the FCC Instrument is to provide that the FCC, and a Registrar of the FCC, may exercise the powers of the ACT Civil and Administrative Tribunal and a Registrar of that Tribunal respectively under the applicable JBT law (such as the *Residential Tenancies Act 1997* (ACT) (available at <http://www.legislation.act.gov.au/>) as modified by the FCC Instrument) to the extent

those powers are relevant to the execution or enforcement of an order of the FCC in the dispute.

This Instrument will ensure that orders made by the Court in relation to JBT tenancies can be enforced by the FCC and a Registrar of the FCC.

Details of this 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.

This Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

This Instrument was developed in consultation with the FCC and the Department of Infrastructure and Regional Development, which administers the JBT on behalf of the Commonwealth. The Office of Best Practice Regulation has been consulted and has advised that no Regulatory Impact Statement is required for this Instrument.

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

Notes on Clauses

Details of the *Federal Circuit Court (Commonwealth Tenancy Disputes) Amendment Instrument 2017*

Section 1 – Name

This is a formal clause which provides that this instrument is named the *Federal Circuit Court (Commonwealth Tenancy Disputes) Amendment Instrument 2017*.

Section 2 – Commencement

This clause provides that this instrument commences the day after the instrument is registered.

Section 3 – Authority

This is a formal clause that provides that this instrument is made under section 10AA of the *Federal Circuit Court of Australia Act 1999*.

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 – At the end of Subdivision A of Division 2 of Part 3

15A Powers when executing orders made by the Court

This is a new clause which adds a provision to the end of Subdivision A of Division 2 of Part 3 of the FCC Instrument (disputes involving tenancy arrangements to which the *Residential Tenancies Act 1997* (ACT) applies).

The section ensures that the Court and a Registrar of the FCC have the same powers to enforce and execute orders made by the Court in the exercise of its jurisdiction over Commonwealth tenancy disputes involving land in the JBT as the ACAT and a Registrar of the Tribunal would have if the dispute did not involve a Commonwealth party and had been heard and determined by the ACAT under applicable JBT law.

Item 2 – At the end of the instrument

21 Powers when executing orders made by the Court

This is a new clause which adds a provision to the end of Subdivision B of Division 2 of Part 3 of the FCC Instrument (disputes involving tenancy arrangements to which the *Residential Tenancies Act 1997* (ACT) does not apply).

The section ensures that the Court and a Registrar of the FCC have the same powers to enforce and execute orders made by the Court in the exercise of its jurisdiction over Commonwealth tenancy disputes involving land in the JBT as the ACAT and a Registrar of the ACAT would have if the dispute did not involve a Commonwealth party and had been heard and determined by the ACAT under applicable JBT law.

Part 4 – Transitional and application provisions

Division 1 – Application of the Federal Circuit Court (Commonwealth Tenancy Disputes) Amendment (No. 2) Instrument 2016

50 Application of amendments

This item clarifies that the amendments made by the *Federal Circuit Court (Commonwealth Tenancy Disputes) Amendment Instrument 2017* apply in relation to Commonwealth tenancy disputes arising before or after the commencement of this instrument. The purpose of this item is to ensure that powers allowing for the execution and enforcement of FCC orders are conferred on a Court or a Registrar of the FCC in respect of all proceedings, including those which may have commenced before this instrument comes into effect.

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 2017

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 *Federal Circuit Court (Commonwealth Tenancy Disputes) Amendment Instrument 2016* amended the *Federal Circuit Court (Commonwealth Tenancy Disputes) Instrument 2015* (the FCC Instrument) to confer jurisdiction on the Federal Circuit Court of Australia (FCC) to hear Commonwealth tenancy disputes in Jervis Bay Territory (JBT). However, the amendment did not confer on the Court (including a Registrar of the FCC) all the powers available under the *Residential Tenancies Act 1997* (ACT) to execute or enforce orders made by the FCC in determining such disputes.

This amendment remedies this issue by providing the Court and a Registrar of the FCC with the relevant discretionary powers to enforce such decisions.

Subsection 10AA(1) of the *Federal Circuit Court of Australia Act 1999* (the Act) confers jurisdiction on the Court 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 Attorney-General 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 amendment to the FCC Instrument provides that the Court, and a Registrar of the FCC, may exercise the powers of the ACT Civil and Administrative Tribunal (ACAT) and a Registrar of that Tribunal respectively under applicable JBT law (such as the *Residential Tenancies Act 1997* (ACT) (available at <http://www.legislation.act.gov.au/>) as modified by the FCC Instrument) to the extent those powers are relevant to the execution or enforcement of an order of the FCC in the dispute.

This Instrument has been drafted to ensure that orders made by the FCC in relation to JBT tenancies can be enforced.

Human rights implications

This amendment and the FCC Instrument engage 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.

This amendment and the FCC 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 in this amendment and the FCC Instrument 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 this amendment and the FCC 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 in this amendment and the FCC Instrument engage but do not limit the right to an adequate standard of living with respect to housing. Sections 13 and 18 of the FCC 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, this amendment and the FCC Instrument do not impose a limit on the right of a person to adequate housing. This amendment merely ensures that orders made by the FCC can be appropriately enforced and executed.

Conclusion

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

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