

FEDERAL CIRCUIT COURT (COMMONWEALTH TENANCY DISPUTES)
AMENDMENT INSTRUMENT 2021

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General

under section 133 of the *Federal Circuit and Family Court of Australia Act 2021*

PURPOSE AND OPERATION OF THE INSTRUMENT

The *Federal Circuit Court (Commonwealth Tenancy Disputes) Amendment Instrument 2021* (the amending instrument) amends the *Federal Circuit Court (Commonwealth Tenancy Disputes) Instrument 2015* (the instrument) to reflect the commencement of the Federal Circuit and Family Court of Australia (FCFC). The amendments are minor and consequential and do not substantively change the operation of the instrument.

Under the *Federal Circuit and Family Court of Australia Act 2021* (FCFC Act) and the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021* (FCFC Consequentials Act), the Family Court of Australia (Family Court) and the Federal Circuit Court of Australia (FCC) are brought together into a unified administrative structure, the FCFC. The FCFC (Division 1) is a continuation of the Family Court, and the FCFC (Division 2) is a continuation of the FCC. The FCFC Acts received Royal Assent on 1 March 2021 and commenced on 1 September 2021.

Prior to 1 September 2021, the *Federal Circuit Court of Australia Act 1999* (the FCC Act) conferred jurisdiction on the FCC to hear and determine tenancy disputes involving the Commonwealth in certain circumstances. It also conferred power on the Attorney-General to, by legislative instrument, make provision in relation to certain matters relating to Commonwealth tenancy disputes. The instrument provides, for example, for the FCC to apply applicable New South Wales (NSW) law, with modifications, when determining Commonwealth tenancy disputes that involve land within NSW. The instrument also confers additional jurisdiction on the FCC to hear and determine Commonwealth tenancy disputes involving land in a non-self-governing Territory, and contains a number of provisions to enable the FCC to hear and determine such disputes with respect to land in the Jervis Bay Territory.

The FCC Act is repealed by the FCFC Consequentials Act (Part 1 of Schedule 3). In its place, section 133 of the FCFC Act confers jurisdiction on the FCFC (Division 2) to hear and determine certain Commonwealth tenancy disputes, and provides an instrument-making power. The FCFC Consequentials Act (Item 3 in Part 2 of Schedule 3) has a savings provision which preserves the instrument, taking into account the FCC's continuation as the FCFC (Division 2) and the new legislative authority for the instrument under section 133 of the FCFC Act.

This amending instrument will amend the instrument to ensure that the authority for the instrument and the operation of the FCFC (Division 2), as the continuation of the FCC, are

clear on the face of legislation, rather than relying on the savings provision in the FCFC Consequential Act.

CONSULTATION

Consultations were undertaken with the FCC and the Department of Infrastructure, Transport, Regional Development and Communications, which administers the Jervis Bay Territory on behalf of the Commonwealth. Consultation involved the exchange of correspondence.

REGULATION IMPACT STATEMENT

The Office of Best Practice Regulation (OBPR) advised that no Regulatory Impact Statement is required for this amending instrument (OBPR reference: 43315).

Details of the Regulation are set out in **Attachment A**.

A Statement of Compatibility with Human Rights is at **Attachment B**.

NOTES ON SECTIONS

Section 1 – Name

Section 1 provides that the title of the instrument is the *Federal Circuit Court (Commonwealth Tenancy Disputes) Amendment Instrument 2021*.

Section 2 – Commencement

Section 2 provides that the *Federal Circuit Court (Commonwealth Tenancy Disputes) Amendment Instrument 2021* (the amending instrument) commences on the later of the day after the instrument is registered and the day the *Federal Circuit and Family Court of Australia Act 2021* (FCFC Act) commences.

Section 3 – Authority

Section 3 provides that this instrument is made under the FCFC Act.

Section 4 – Schedules

Section 4 provides that each instrument that is specified in a Schedule to the instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the instrument has effect according to its terms.

Schedule 1 – Amendments

Federal Circuit Court (Commonwealth Tenancy Disputes) Instrument 2015

Item 1 – Section 1

Item 1 amends section 1, which provides the title of the instrument. Item 1 changes the title of the instrument from the *Federal Circuit Court (Commonwealth Tenancy Disputes) Instrument 2015* to the *Federal Circuit and Family Court of Australia (Commonwealth Tenancy Disputes) Instrument 2015*.

This amendment to the title of the instrument reflects the name of the new authorising Act. The *Federal Circuit Court (Commonwealth Tenancy Disputes) Instrument 2015* (the instrument) is made under the *Federal Circuit Court of Australia Act 1999* (FCC Act). As of 1 September 2021, the FCC Act is repealed by the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021* (FCFC Consequentials Act) (Item 1 of Schedule 3). The new authority for making an instrument setting out matters relating to Commonwealth tenancy disputes is section 133 of the FCFC Act.

Item 2 – Section 3

Item 2 amends section 3 to update the authority for the instrument from section 10AA of the *Federal Circuit Court of Australia Act 1999* (FCC Act) to section 133 of the FCFC Act. This amendment reflects the repeal of the FCC Act by the FCFC Consequentials Act (Part 1 of Schedule 3). Section 10AA of the FCC Act is reproduced as section 133 of the FCFC Act,

with modifications to reflect the continuation of the FCC as the FCFC (Division 2). Item 2 reflects that from 1 September 2021, section 133 of the FCFC Act provides the authority for making an instrument setting out matters relating to Commonwealth tenancy disputes.

Item 3 – Section 4 (definition of Act)

Item 3 amends the definition of *Act* in section 4 by omitting the reference to the FCC Act and substituting it with the FCFC Act. This amendment reflects the repeal of the FCC Act by the FCFC Consequentials Act (Part 1 of Schedule 3). Section 10AA of the FCC Act, which provides the authority for the instrument, is reproduced as section 133 of the FCFC Act, with modifications to reflect the continuation of the FCC as the FCFC (Division 2). Item 3 reflects that from 1 September 2021, the FCFC Act provides the authority for making this instrument and references to the *Act* in the instrument means the FCFC Act.

Item 4 – Section 4

Item 4 amends section 4 by inserting a new definition of *relevant Registrar*. This definition provides that, in relation to the FCFC (Division 2), *relevant Registrar* means the Chief Executive Officer (CEO) and Principal Registrar (within the meaning of the FCFC Act), or a Senior Registrar or Registrar of the FCFC (Division 2). Section 83 of the FCFC Act provides that there is to be a CEO and Principal Registrar of the FCFC (Division 1), and section 250 of the FCFC Act provides that the CEO and Principal Registrar of the FCFC (Division 1) will also serve in this role with respect to the FCFC (Division 2).

This new definition is necessary as Items 10, 16, 20, 26, 28, 33 and 37 replace references to Registrar of the FCC throughout the instrument with *relevant Registrar* of the FCFC (Division 2). This terminology change is necessary to ensure that all appropriate officers of the FCFC (Division 2) are able to exercise the powers of a Registrar under the instrument.

Consistent with subsection 13(1) of the *Legislation Act 2003* (the Legislation Act), which provides that expressions used in an instrument made under an Act have the same meaning as in the Act, all references to Registrar in the instrument are interpreted by reference to the definition of Registrar in the authorising Act. Section 5 of the FCC Act defines *Registrar* to mean a Registrar of the FCC. Section 7 of the FCFC Act defines *Registrar* to mean a Senior Registrar or Registrar. However, the policy intention is for the CEO and Principal Registrar (in addition to the Senior Registrar and Registrar) to be able to exercise the powers of a Registrar under the instrument. Since an instrument cannot define a term inconsistently with the enabling Act, the new terminology of *relevant Registrar* is used to ensure that all the appropriate officers of the FCFC (Division 2) can exercise the powers of a Registrar under the instrument.

Item 5 – Section 4A

Item 5 amends section 4A by omitting the reference to the ‘Federal Circuit Court’ and substituting it with a reference to the ‘Federal Circuit and Family Court of Australia (Division 2)’. Section 4A confers jurisdiction on the FCC to hear and determine Commonwealth tenancy disputes involving land in a non-self-governing Territory in which:

- The Commonwealth, or a person being sued on behalf of the Commonwealth, is the lessor (other than as a sublessor), or the licensor (other than as a sublicensor) or the

grantor of a right or permission to possess, occupy or use land owned by the Commonwealth, and

- 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 amending item appropriately reflects the continuation of the FCC as the FCFC (Division 2) and does not change the operation of the section.

Item 6 – Paragraph 5(1)(c)

Item 6 amends paragraph 5(1)(c) by omitting the reference to the ‘Federal Circuit Court’ and substituting it with a reference to the ‘Federal Circuit and Family Court of Australia (Division 2)’. Paragraph 5(1)(c) states that Division 1 of Part 3 of the instrument makes provision for the powers that the FCC may exercise in respect of a Commonwealth tenancy dispute involving land in New South Wales. This amending item appropriately reflects the continuation of the FCC as the FCFC (Division 2) and does not change the operation of the paragraph.

Item 7 – Subsection 5(3)

Item 7 amends subsection 5(3) by omitting the reference to the ‘Federal Circuit Court’ and substituting it with a reference to the ‘Federal Circuit and Family Court of Australia (Division 2)’. Subsection 5(3) provides that nothing in Division 2 of the instrument 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 FCC. 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. This amending item appropriately reflects the continuation of the FCC as the FCFC (Division 2) and does not change the operation of the subsection.

Item 8 – Paragraph 6(1)(b)

Item 8 amends paragraph 6(1)(b) by omitting the reference to the ‘Federal Circuit Court’ and substituting it with a reference to the ‘Federal Circuit and Family Court of Australia (Division 2)’. Paragraph 6(1)(b) provides that section 6 applies if the FCC has jurisdiction to hear and determine Commonwealth tenancy disputes in New South Wales (NSW). Under section 6, parties to certain Commonwealth tenancy disputes in NSW must not make applications to the NSW Civil and Administrative Tribunal (NCAT) under the *Residential Tenancies Act 2010* (NSW) (NSW 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 the dispute.

This amending item appropriately reflects the continuation of the FCC as the FCFC (Division 2) and does not change the operation of the paragraph.

Item 9 – Paragraph 8(1)(a)

Item 9 amends paragraph 8(1)(a) by omitting the reference to the ‘Federal Circuit Court’ and substituting it with a reference to the ‘Federal Circuit and Family Court of Australia

(Division 2)’. Section 8 modifies the applicable NSW law (as defined in section 7(2)) to be applied by the FCC in Commonwealth tenancy disputes involving land in NSW. Paragraph 8(1)(a) provides that the applicable NSW law is to be applied as if a reference to the Tribunal (i.e. NCAT) were a reference to the FCC. This amending item appropriately reflects the continuation of the FCC as the FCFC (Division 2) and does not change the operation of the paragraph.

Item 10 – Paragraph 8(1)(b)

Item 10 repeals paragraph 8(1)(b) and substitutes it with a new paragraph 8(1)(b) to reflect the change in terminology from *Registrar* to *relevant Registrar*, as outlined under Item 4, and the continuation of the FCC as the FCFC (Division 2).

Section 8 modifies the applicable NSW law (as defined at subsection 7(2)) to be applied by the FCC in Commonwealth tenancy disputes involving land in NSW. Existing paragraph 8(1)(b) provides that the applicable NSW law is to be applied as if a reference to the principal registrar of the Tribunal (i.e. NCAT) were a reference to a Registrar of the FCC. New paragraph 8(1)(b) provides that the applicable NSW law is to be applied as if a reference to the principal registrar of the Tribunal were a reference to a relevant Registrar of the FCFC (Division 2).

As outlined under Item 4, this amendment ensures that all appropriate officers of the FCFC (Division 2) will be able to exercise the powers of a Registrar under the instrument.

Item 11 – Paragraph 8(1)(c)

Item 11 amends paragraph 8(1)(c) by omitting the reference to the ‘Federal Circuit Court’ and substituting it with a reference to the ‘Federal Circuit and Family Court of Australia (Division 2)’. Section 8 modifies the applicable NSW law (as defined at subsection 7(2)) to be applied by the FCC in Commonwealth tenancy disputes involving land in NSW. Paragraph 8(1)(c) provides that the applicable NSW law is to be applied as if references to the Sheriff, or to a sheriff’s officer, were a reference to the Sheriff of the FCC. This amending item appropriately reflects the continuation of the FCC as the FCFC (Division 2) and does not change the operation of the paragraph.

Item 12 – Subsection 8(2)

Item 12 amends subsection 8(2) by omitting the reference to the ‘Federal Circuit Court’ and substituting it with a reference to the ‘Federal Circuit and Family Court of Australia (Division 2)’. Subsection 8(2) provides that the NSW 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 ensures that 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.

This amending item appropriately reflects the continuation of the FCC as the FCFC (Division 2) and does not change the operation of the subsection.

Item 13 – Section 9

Item 13 amends section 9 by omitting the reference to the ‘Federal Circuit Court’ and substituting it with a reference to the ‘Federal Circuit and Family Court of Australia (Division 2)’. Section 9 sets out the powers that the FCC may exercise when determining a Commonwealth tenancy dispute in NSW. This amending item appropriately reflects the continuation of the FCC as the FCFC (Division 2) and does not change the operation of the section.

Item 14 – Subsection 10(1)

Item 14 amends subsection 10(1) by omitting the reference to the ‘Federal Circuit Court’ and substituting it with a reference to the ‘Federal Circuit and Family Court of Australia (Division 2)’. Subsection 10(1) provides for the powers that the FCC, and officers of the FCC, can exercise in order to execute or enforce orders made by the FCC when exercising jurisdiction over a Commonwealth tenancy dispute involving land in NSW. This amending item appropriately reflects the continuation of the FCC as the FCFC (Division 2) and does not change the operation of the subsection.

Item 15 – Paragraph 10(1)(a)

Item 15 amends paragraph 10(1)(a) by omitting the reference to the ‘Federal Circuit Court’ and substituting it with a reference to the ‘Federal Circuit and Family Court of Australia (Division 2)’. Paragraph 10(1)(a) provides that the FCC may exercise any powers of the Civil and Administrative Tribunal (i.e. NCAT) under the applicable NSW law (as defined at subsection 7(2)) in order to execute or enforce orders made by the FCC when exercising jurisdiction over a Commonwealth tenancy dispute involving land in NSW. This amending item appropriately reflects the continuation of the FCC as the FCFC (Division 2) and does not change the operation of the paragraph.

Item 16 – Paragraph 10(1)(b)

Item 16 repeals paragraph 10(1)(b) and substitutes it with a new paragraph 10(1)(b) to reflect the change in terminology from *Registrar* to *relevant Registrar*, as outlined under Item 4, and the continuation of the FCC as the FCFC (Division 2).

Existing paragraph 10(1)(b) provides that a Registrar of the FCC may exercise any powers of the principal registrar of the Civil and Administrative Tribunal (i.e. NCAT) under the applicable NSW law (as defined at subsection 7(2)) in order to execute or enforce orders made by the FCC when exercising jurisdiction over a Commonwealth tenancy dispute involving land in NSW. New paragraph 10(1)(b) provides that a relevant Registrar of the FCFC (Division 2) may exercise any powers of the principal registrar of the Civil and Administrative Tribunal under the applicable NSW law in order to execute or enforce orders made by the FCFC (Division 2) when exercising jurisdiction over a Commonwealth tenancy dispute involving land in NSW.

This amending item appropriately reflects the continuation of the FCC as the FCFC (Division 2) and ensures that all appropriate officers of the FCFC (Division 2) will be able to exercise the powers of a Registrar under the instrument, as outlined under Item 4.

Item 17 – Paragraph 10(1)(c)

Item 17 amends paragraph 10(1)(c) by omitting the reference to the ‘Federal Circuit Court’ and substituting it with a reference to the ‘Federal Circuit and Family Court of Australia (Division 2)’. Paragraph 10(1)(c) provides that, subject to subsection 10(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) in order to execute or enforce orders made by the FCC when exercising jurisdiction over a Commonwealth tenancy dispute involving land in NSW. This amending item appropriately reflects the continuation of the FCC as the FCFC (Division 2) and does not change the operation of the paragraph.

Item 18 – Subsection 10(2)

Item 18 amends subsection 10(2) by omitting the reference to the ‘Federal Circuit Court’ and substituting it with a reference to the ‘Federal Circuit and Family Court of Australia (Division 2)’. Subsection 10(2) provides for additional safeguards when a Sheriff or a Deputy Sheriff of the FCC is executing a warrant for possession of residential premises. This amending item appropriately reflects the continuation of the FCC as the FCFC (Division 2) and does not change the operation of the subsection.

Item 19 – Paragraph 10(3)(a)

Item 19 amends paragraph 10(3)(a) by omitting the reference to ‘Federal Circuit Court’ and substituting it with a reference to the ‘Federal Circuit and Family Court of Australia (Division 2)’. Paragraph 10(3)(a) clarifies that nothing in section 10 is intended to limit any other power of the FCC. This amending item appropriately reflects the continuation of the FCC as the FCFC (Division 2) and does not change the operation of the paragraph.

Item 20 – Paragraph 10(3)(b)

Item 20 repeals paragraph 10(3)(b) and substitutes it with a new paragraph 10(3)(b) to reflect the continuation of the FCC as the FCFC (Division 2) and the change in terminology from *Registrar* to *relevant Registrar*. As outlined under Item 4, this change ensures that all appropriate officers of the FCFC (Division 2) will be able to exercise the powers of a Registrar under the instrument.

Existing paragraph 10(3)(b) clarifies that nothing in section 10 is intended to limit any other power of a Registrar of the FCC. New paragraph 10(3)(b) provides that nothing in section 10 limits any other power of a relevant Registrar of the FCFC (Division 2).

Item 21 – Paragraph 10(3)(c)

Item 21 amends paragraph 10(3)(c) by omitting the reference to the ‘Federal Circuit Court’ and substituting it with a reference to the ‘Federal Circuit and Family Court of Australia (Division 2)’. Paragraph 10(3)(c) provides that nothing in section 10 is intended to limit any other power of the Sheriff or a Deputy Sheriff of the FCC. This amending item appropriately reflects the continuation of the FCC as the FCFC (Division 2) and does not change the operation of the paragraph.

Item 22 – Paragraph 11(1)(c)

Item 22 amends paragraph 11(1)(c) by omitting the reference to the ‘Federal Circuit Court’ and substituting it with a reference to the ‘Federal Circuit and Family Court of Australia (Division 2)’. Paragraph 11(1)(c) provides that Subdivision A under Part 3 of the instrument makes provision for the powers that the FCC may exercise in respect of a Commonwealth tenancy dispute involving land in the Jervis Bay Territory.

This amending item appropriately reflects the continuation of the FCC as the FCFC (Division 2) and does not change the operation of the paragraph.

Item 23 – Subsection 11(3)

Item 23 amends subsection 11(3) by omitting the reference to the ‘Federal Circuit Court’ and substituting it with a reference to the ‘Federal Circuit and Family Court of Australia (Division 2)’. Subsection 11(3) makes it clear that nothing in Subdivision A under Part 3 of the instrument 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 FCC. 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.

This amending item appropriately reflects the continuation of the FCC as the FCFC (Division 2) and does not change the operation of the subsection.

Item 24 – Paragraph 12(1)(b)

Item 24 amends paragraph 12(1)(b) by omitting the reference to the ‘Federal Circuit Court’ and substituting it with a reference to the ‘Federal Circuit and Family Court of Australia (Division 2)’. Paragraph 12(1)(b) provides that section 12 applies to a party to a Commonwealth tenancy dispute involving land in the Jervis Bay Territory if the FCC has jurisdiction to hear and determine the dispute. Under section 12, parties to certain Commonwealth tenancy disputes in the Australian Capital Territory (ACT) must not make applications to the ACT Civil and Administrative Tribunal (ACAT) under the *Residential Tenancies Act 1997* (ACT) (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 the dispute.

This amending item appropriately reflects the continuation of the FCC as the FCFC (Division 2) and does not change the operation of the paragraph.

Item 25 – Paragraph 14(1)(a)

Item 25 amends paragraph 14(1)(a) by omitting the reference to the ‘Federal Circuit Court’ and substituting it with a reference to the ‘Federal Circuit and Family Court of Australia (Division 2)’. Paragraph 14(1)(a) provides that the applicable Jervis Bay Territory law is to be applied as if a reference to the ACAT or the tribunal were a reference to the FCC.

This amending item appropriately reflects the continuation of the FCC as the FCFC (Division 2) and does not change the operation of the paragraph.

Item 26 – Paragraph 14(1)(b)

Item 26 repeals paragraph 14(1)(b) and substitutes it with a new paragraph 14(1)(b) to reflect the change in terminology from *Registrar* to *relevant Registrar*, as outlined under Item 4, and the continuation of the FCC as the FCFC (Division 2).

Existing paragraph 14(1)(b) provides that the applicable Jervis Bay Territory law is to be applied as if a reference to the registrar were a reference to a Registrar of the FCC. New paragraph 14(1)(b) provides that the applicable Jervis Bay Territory law is to be applied as if a reference to the registrar were a reference to a relevant Registrar of the FCFC (Division 2).

This amending item ensures that all appropriate officers of the FCFC (Division 2) will be able to exercise the powers of a Registrar under the instrument, as outlined under Item 4.

Item 27 – Section 15

Item 27 amends section 15 by omitting the reference to the ‘Federal Circuit Court’ and substituting it with a reference to the ‘Federal Circuit and Family Court of Australia (Division 2)’. Section 15 provides that the FCC may exercise any powers of the ACAT under the applicable Jervis Bay Territory law, which are relevant to the determination of the dispute, when determining a Commonwealth tenancy dispute involving land in the Jervis Bay Territory.

This amending item appropriately reflects the continuation of the FCC as the FCFC (Division 2) and does not change the operation of the section.

Item 28 – Section 15A

Item 28 repeals section 15A and replaces it with a new section 15A to reflect the change in terminology from *Registrar* to *relevant Registrar*, as outlined under Item 4, and the continuation of the FCC as the FCFC (Division 2).

Existing section 15A provides that in order to execute or enforce orders made by the FCC when exercising jurisdiction over a Commonwealth tenancy dispute involving land in the Jervis Bay Territory:

- the FCC may exercise the same powers as the ACAT under the applicable Jervis Bay Territory law, and
- a Registrar of the FCC may exercise any powers of a registrar of the ACAT.

New section 15A provides that that in order to execute or enforce orders made by the FCFC (Division 2) when exercising jurisdiction over a Commonwealth tenancy dispute involving land in the Jervis Bay Territory:

- the FCFC (Division 2) may exercise the same powers as the ACAT under the applicable Jervis Bay Territory law, and
- a relevant Registrar of the FCFC (Division 2) may exercise any powers of a registrar of the ACAT.

This amending item appropriately reflects the continuation of the FCC as the FCFC (Division 2) and ensures that all appropriate officers of the FCFC (Division 2) will be able to exercise the powers of a Registrar under the instrument, as outlined under Item 4.

Item 29 – Paragraph 16(1)(c)

Item 29 amends paragraph 16(1)(c) by omitting the reference to the ‘Federal Circuit Court’ and substituting it with a reference to the ‘Federal Circuit and Family Court of Australia (Division 2)’. Paragraph 16(1)(c) provides that Subdivision B under Part 3 of the instrument provides for the powers that the FCC may exercise in respect of a Commonwealth tenancy dispute involving land in the Jervis Bay Territory.

This amending item appropriately reflects the continuation of the FCC as the FCFC (Division 2) and does not change the operation of the paragraph.

Item 30 – Subsection 16(3)

Item 30 amends subsection 16(3) by omitting the reference to the ‘Federal Circuit Court’ and substituting it with a reference to the ‘Federal Circuit and Family Court of Australia (Division 2)’. Subsection 16(3) provides that nothing in Subdivision B under Part 3 of the instrument confers non-judicial power on the FCC unless that exercise of non-judicial power is incidental to the exercise of judicial power by the FCC. 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.

This amending item appropriately reflects the continuation of the FCC as the FCFC (Division 2) and does not change the operation of the subsection.

Item 31 – Paragraph 17(1)(b)

Item 31 amends paragraph 17(1)(b) by omitting the reference to the ‘Federal Circuit Court’ and substituting it with a reference to the ‘Federal Circuit and Family Court of Australia (Division 2)’. Paragraph 17(1)(b) provides that section 17 applies to a party to a Commonwealth tenancy dispute involving land in the Jervis Bay Territory if the FCC has jurisdiction to hear and determine the dispute.

This amending item appropriately reflects the continuation of the FCC as the FCFC (Division 2) and does not change the operation of the paragraph.

Item 32 – Paragraph 19(1)(a)

Item 32 amends paragraph 19(1)(a) by omitting the reference to the ‘Federal Circuit Court’ and substituting it with a reference to the ‘Federal Circuit and Family Court of Australia (Division 2)’. Section 19 modifies the applicable Jervis Bay Territory law (as defined at subsection 18(4)). Paragraph 19(1)(a) provides that the applicable Jervis Bay Territory law applies as if each reference to the ACAT or the tribunal were a reference to the FCC.

This amending item appropriately reflects the continuation of the FCC as the FCFC (Division 2) and does not change the operation of the paragraph.

Item 33 – Paragraph 19(1)(b)

Item 33 repeals paragraph 19(1)(b) and substitutes it with a new paragraph 19(1)(b) to reflect the change in terminology from *Registrar* to *relevant Registrar*, as outlined under Item 4, and the continuation of the FCC as the FCFC (Division 2).

Existing paragraph 19(1)(b) provides that the applicable Jervis Bay Territory law (as defined at subsection 18(4)) is to be applied as if a reference to the registrar were a reference to a Registrar of the FCC. New paragraph 19(1)(b) provides that that the applicable Jervis Bay Territory law is to be applied as if a reference to the registrar were a reference to a relevant Registrar of the FCFC (Division 2).

This amending item appropriately reflects the continuation of the FCC as the FCFC (Division 2) and ensures that all appropriate officers of the FCFC (Division 2) will be able to exercise the powers of a Registrar under the instrument, as outlined under Item 4.

Item 34 – Section 20

Item 34 amends section 20 by omitting the reference to the ‘Federal Circuit Court’ and substituting it with a reference to the ‘Federal Circuit and Family Court of Australia (Division 2)’. Section 20 sets out the powers that the FCC may exercise when determining a Commonwealth tenancy dispute involving land in the Jervis Bay Territory.

This amending item appropriately reflects the continuation of the FCC as the FCFC (Division 2) and does not change the operation of the section.

Item 35 – Section 21

Item 35 amends section 21 by omitting the reference to the ‘Federal Circuit Court’ and substituting it with a reference to the ‘Federal Circuit and Family Court of Australia (Division 2)’. Section 21 provides for the powers that the FCC, and officers of the FCC, can exercise in order to execute or enforce orders made by the FCC when exercising jurisdiction over a Commonwealth tenancy dispute involving land in Jervis Bay Territory.

This amending item appropriately reflects the continuation of the FCC as the FCFC (Division 2) and does not change the operation of the section.

Item 36 – Paragraph 21(a)

Item 36 amends paragraph 21(a) by omitting the reference to the ‘Federal Circuit Court’ and substituting it with a reference to the ‘Federal Circuit and Family Court of Australia (Division 2)’. Section 21(a) provides that in order to execute or enforce orders made by the FCC when exercising jurisdiction over a Commonwealth tenancy dispute involving land in Jervis Bay Territory, the FCC may exercise the same powers as the ACAT under the applicable Jervis Bay Territory law (as defined at subsection 18(4)).

This amending item appropriately reflects the continuation of the FCC as the FCFC (Division 2) and does not change the operation of the paragraph.

Item 37 – Paragraph 21(b)

Item 37 repeals paragraph 21(b) and substitutes it with a new paragraph 21(b) to reflect the change in terminology from *Registrar* to *relevant Registrar*, as outlined under Item 4, and the continuation of the FCC as the FCFC (Division 2).

Existing paragraph 21(b) provides that a Registrar of the FCC may exercise any powers of a registrar of the ACAT under the applicable Jervis Bay Territory law (as defined at subsection 18(4)) in order to execute or enforce orders made by the FCC when exercising jurisdiction over a Commonwealth tenancy dispute involving land in the Jervis Bay Territory.

New paragraph 21(b) provides that that a relevant Registrar of the FCFC (Division 2) may exercise any powers of a registrar of the ACAT under the applicable Jervis Bay Territory law in order to execute or enforce orders made by the FCFC (Division 2) when exercising jurisdiction over a Commonwealth tenancy dispute involving land in the Jervis Bay Territory.

This amending item appropriately reflects the continuation of the FCC as the FCFC (Division 2) and ensures that all appropriate officers of the FCFC (Division 2) will be able to exercise the powers of a Registrar under the instrument, as outlined under Item 4.

Item 38 – At the end of Part 4

Item 38 provides that the amendments made by the amending instrument apply in relation to Commonwealth tenancy disputes arising before or after the commencement of this instrument. This clarifies that the amended instrument applies to Commonwealth tenancy disputes which arose before the commencement of the instrument.

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 2021

This Disallowable 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 the Disallowable Legislative Instrument

The *Federal Circuit Court (Commonwealth Tenancy Disputes) Amendment Instrument 2021* (the amending instrument) amends the *Federal Circuit Court (Commonwealth Tenancy Disputes) Instrument 2015* (the instrument) to reflect the commencement of the Federal Circuit and Family Court of Australia (FCFC). The amendments are minor and consequential and do not substantively change the operation of the instrument.

Under the *Federal Circuit and Family Court of Australia Act 2021* (FCFC Act) and the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021* (FCFC Consequentials Act), the Family Court of Australia (Family Court) and the Federal Circuit Court of Australia (FCC) are brought together into a unified administrative structure, the FCFC. The FCFC (Division 1) is a continuation of the Family Court, and the FCFC (Division 2) is a continuation of the FCC. The FCFC Acts received Royal Assent on 1 March 2021 and commenced on 1 September 2021.

Prior to 1 September 2021, the *Federal Circuit Court of Australia Act 1999* (the FCC Act) conferred jurisdiction on the FCC to hear and determine tenancy disputes involving the Commonwealth in certain circumstances. It also conferred power on the Attorney-General to, by legislative instrument, make provision in relation to certain matters relating to Commonwealth tenancy disputes. The instrument provides, for example, for the FCC to apply, with modifications, applicable New South Wales (NSW) law when determining Commonwealth tenancy disputes that involve land within NSW. The instrument also confers additional jurisdiction on the FCC to hear and determine Commonwealth tenancy disputes involving land in a non-self-governing Territory, and contains a number of provisions to enable the FCC to hear and determine such disputes with respect to land in the Jervis Bay Territory.

The FCC Act is repealed by the FCFC Consequentials Act (Part 1 of Schedule 3). In its place, section 133 of the FCFC Act confers jurisdiction on the FCFC (Division 2) to hear and determine certain Commonwealth tenancy disputes, and provides an instrument-making power. The FCFC Consequentials Act (Item 3 in Part 2 of Schedule 3) has a savings provision which preserves the instrument, taking into account the FCC's continuation as the

FCFC (Division 2) and the new legislative authority for the instrument under section 133 of the FCFC Act.

This amending instrument will amend the instrument to ensure that the authority for the instrument and the operation of the FCFC (Division 2), as the continuation of the FCC, are clear on the face of legislation, rather than relying on the savings provision in the FCFC Consequentials Act.

Human rights implications

The amending instrument does not engage any of the applicable rights or freedoms.

Conclusion

The amending instrument is compatible with human rights as it does not raise any human rights issues.