

EXPLANATORY STATEMENT

Ordinance No. 9, 2015

Issued by the Authority of the Minister for Territories, Local Government and Major Projects

Jervis Bay Territory Acceptance Act 1915

Jervis Bay Territory Leases Amendment Ordinance 2015 (No. 1)

Authority

Subsection 4F(1) of the *Jervis Bay Territory Acceptance Act 1915* (the Act) provides that the Governor-General may make Ordinances for the peace, order and good government of the Jervis Bay Territory (JBT).

Legislative Background

The *Jervis Bay Territory Leases Amendment Ordinance 2015 (No. 1)* amends the *Leases Ordinance 1992* (the Leases Ordinance) to ensure the proper application of the *Residential Tenancies Act 1997* (ACT)(JBT) (the ACT RTA) to residential tenancies in Commonwealth-owned property in the JBT.

Purpose and operation

The ACT RTA applies in the JBT because of s 4A of the Act (which provides that the laws in force in the ACT are, so far as they are applicable to the JBT and are not inconsistent with an Ordinance, in force in the JBT), and provides that each residential tenancy agreement to which it applies is taken to contain the standard terms and conditions set out in Schedule 1 to the ACT RTA. The ACT RTA applies under the Act to a variety of leases, licences or other arrangements in the JBT. The standard terms and conditions set out in Schedule 1 to the ACT RTA provide that residential tenancy disputes are to be heard by the ACT Civil and Administrative Tribunal.

However, as a result of changes to the *Federal Circuit Court of Australia Act 1999*, and instruments made under that Act, certain residential tenancy disputes involving leases, licences and other arrangements over Commonwealth-owned property in the JBT are to be heard and determined by the Federal Circuit Court. Jurisdiction to hear such disputes also continues to be conferred on the courts of the ACT under s 4D of the Act.

The proposed Ordinance would modify the operation of the ACT RTA to ensure that the terms which residential tenancy agreements involving Commonwealth-owned properties are taken to include by virtue of the ACT RTA refer to the correct dispute resolution forum for residential tenancy disputes.

It is possible that section 5 of the Leases Ordinance may imply that the Minister cannot grant leases of land in the JBT otherwise than under that section (and, based on this argument, that leases of land in the blocks specified in that section cannot be granted at all). The proposed Ordinance would clarify that the Minister may grant leases in the JBT otherwise than under subsection 5(1) of the Leases Ordinance (e.g. under other legislation, or on behalf of the Commonwealth under the executive power).

The Leases Ordinance makes provision relating to various matters regarding leases (including how leases are to be terminated). However, these provisions should only apply in relation to leases granted under subsection 5(1) of the Leases Ordinance, and should not apply in relation to leases granted

otherwise. This is because such provisions are likely, in the case of leases granted by the Minister in the JBT which are residential tenancies, to be inconsistent with the ACT RTA, with the result that the ACT RTA (and the protections for tenants contained therein) will not apply in relation to such residential tenancies because of subsection 4A(1) of the Act.

The proposed Ordinance would clarify that certain provisions of the Leases Ordinance apply only in relation to leases granted under subsection 5(1) of the Leases Ordinance. This would remove any doubt that the ACT RTA may not apply to residential tenancies granted by the Minister in the JBT otherwise than under subsection 5(1) of the Leases Ordinance.

Consultation

This Ordinance was developed in consultation with the Attorney-General's Department. No further consultation was undertaken as the amendments contained in this Ordinance are to rectify a legislative anomaly that currently may result in the protections for tenants contained in the ACT RTA not applying to tenants of Commonwealth-owned property in the JBT. The Office of Best Practice Regulation has been consulted and has advised that no Regulatory Impact Statement is required for this Ordinance (OBPR ID 19871).

This Ordinance is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Commencement

This Ordinance commences on 17 December 2015.

Details of this Ordinance are set out in the [Attachment](#).

Details of the *Jervis Bay Territory Leases Amendment Ordinance 2015 (JBT)*

1 Name

This section provides that the name of the Ordinance is the *Jervis Bay Territory Leases Amendment Ordinance 2015 (No. 1)*.

2 Commencement

This section provides that the Ordinance is to commence on 17 December 2015.

3 Authority

This section provides that the authority that the Ordinance is made under is the *Jervis Bay Territory Acceptance Act 1915*.

4 Schedules

This section 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 Leases Ordinance 1992 (JBT) (the Leases Ordinance)

Item [1] – Section 4

Item 1 amends section 4 of the Leases Ordinance by inserting the definition for ‘lease’, which refers the reader to section 4A of the Leases Ordinance.

Item [2] – After section 4

Item 2 inserts section 4A into the Leases Ordinance, which provides a definition for the word ‘lease’ as used in the Leases Ordinance. This has the effect of clarifying that the substantive provisions in the Leases Ordinance relating to leases apply to leases granted under subsection 5(1) of the Leases Ordinance.

Item [3] – Section 5

Item 3 inserts a new subsection number “(1)” before “The Minister” in section 5 of the Leases Ordinance.

Item [4] – At the end of section 5

Item 4 adds a new subsection (2) to section 5 of the Leases Ordinance, which clarifies that subsection (1) does not limit the Minister’s power to grant, or to have granted, a lease of Territory land (including Blocks 124 to 149 in Deposited Plan 9271/1) otherwise than under subsection (1).

The purpose of this amendment is to clarify that the Minister may grant leases of Territory land otherwise than under the Leases Ordinance (e.g. under other legislation, or on behalf of the Commonwealth under the executive power).

Item [5] – After section 23

Item 5 inserts section 23AA into the Leases Ordinance. The purpose of this section is to ensure that the forum in which tenancy disputes involving Commonwealth-owned property in the JBT can be heard is correctly reflected in the terms and conditions each relevant residential tenancy agreement is taken to include by virtue of the *Residential Tenancies Act 1997* (ACT)(JBT) (the ACT RTA).

The ACT RTA applies in the JBT because of s 4A of the *Jervis Bay Territory Acceptance Act 1915* (the Act), and provides that each residential tenancy agreement to which it applies is taken to contain the standard terms and conditions set out in Schedule 1 to the ACT RTA. The ACT RTA applies under the Act to a variety of leases, licences or other arrangements in the JBT. The standard terms and conditions set out in Schedule 1 to the ACT RTA provide that residential tenancy disputes are to be heard by the ACT Civil and Administrative Tribunal (the Tribunal).

However, as a result of changes to the *Federal Circuit Court of Australia Act 1999*, and instruments made under that Act, certain residential tenancy disputes involving leases, licences and other arrangements over Commonwealth-owned property in the JBT are to be heard and determined by the Federal Circuit Court. Jurisdiction to hear such disputes also continues to be conferred on the courts of the ACT under s 4D of the Act.

Therefore, modifications to the operation of the ACT RTA are needed to ensure that the terms which residential tenancy agreements involving Commonwealth-owned properties are taken to include by virtue of the ACT RTA refer to the correct dispute resolution forum for residential tenancy disputes. Proposed subsection 23AA(2) will modify the relevant clauses of the ACT RTA so that each reference to the Tribunal in those clauses is taken to be a reference to a court of competent jurisdiction.

Subsection 23AA(1) ensures that the modification to the operation of the ACT RTA in the JBT by subsection 23AA(2) is limited to residential tenancy agreements to which the ACT RTA applies, which are not granted under subsection 5(1) of the Ordinance, and which relate to Commonwealth-owned property. This is because the ACT RTA may not apply to all leases etc. in the JBT, and the intention is to make clear that this section does not change the scope of application of the ACT RTA.

Statement of Compatibility with Human Rights

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

Jervis Bay Territory Leases Amendment Ordinance 2015 (No. 1)

This Ordinance 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 Ordinance

The Ordinance is made under Subsection 4F(1) of the *Jervis Bay Territory Acceptance Act 1915* (the Act).

The *Jervis Bay Territory Leases Amendment Ordinance 2015 (No. 1)* amends the *Leases Ordinance 1992* (the Leases Ordinance) to ensure the proper application of the *Residential Tenancies Act 1997* (ACT)(JBT) (the ACT RTA) to residential tenancies in Commonwealth-owned property in the JBT.

The ACT RTA has the effect that certain standard terms and conditions are taken to form part of residential tenancy agreements. However, due to changes in the law governing the forum in which tenancy disputes involving Commonwealth-owned property are to be heard, the operation of the ACT RTA in relation to such residential tenancies needs to be modified to reflect these changes.

This Ordinance also clarifies that the Minister may grant leases in the JBT otherwise than under subsection 5(1) of the Leases Ordinance, and that the provisions in the Leases Ordinance governing leases apply only to leases granted under subsection 5(1) of the Leases Ordinance. This removes any doubt that the ACT RTA (and the protections for tenants contained therein) may not apply to residential tenancies granted otherwise than under subsection 5(1) of the Leases Ordinance.

Human rights implications

This Ordinance engages the following rights:

- the right to a fair hearing in Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR); and
- the right to an adequate standard of living, including housing in Article 11 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

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 right to a fair hearing is engaged (but not limited) by section 23AA of the Leases Ordinance as it operates to amend relevant leases to clarify the courts in which residential tenancy disputes involving leases, licences and other arrangements over Commonwealth-owned property in the Jervis Bay Territory are to be heard. By modifying the ACT RTA to reflect the appropriate forum for residential tenancy disputes to be heard, the right to a fair hearing is upheld.

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.

The right to an adequate standard of living is upheld by section 5(2) of the Leases Ordinance as it ensures the Minister's power to grant, or to have granted, a lease of Territory land (including Blocks 124 to 149 in Deposited Plan 9271/1) otherwise than under subsection (1) is not limited, and it ensures that the protections for tenants (including protections from illegal or arbitrary eviction) contained in the ACT RTA are clearly applicable to tenants in Commonwealth-owned housing in the JBT.

Conclusion

This Ordinance is compatible with human rights because it promotes the protection of human rights.