2004

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

RESIDENTIAL TENANCIES AMENDMENT BILL 2004

EXPLANATORY STATEMENT

Circulated by authority of the
Attorney General
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Outline

The Residential Tenancies Amendment Bill 2004 (the Bill) makes a series of changes to the *Residential Tenancies Act 1997*.

The Bill introduces the concept of an occupancy agreement and occupancy principles. Occupancy agreements are not residential tenancy agreements, but a range of arrangements that are granted for short periods of time (such as boarder or lodger agreements). "Occupancy principles" provide that an occupant is entitled to:

- a minimum standard of repair and cleanliness of the premises;
- a measure of security of tenure, such that termination and eviction by the owner may only take place in accordance with agreed periods of notice and procedures so that arbitrary eviction is not possible;
- clearly defined rights of privacy subject to access for on inspections and other appropriate purposes;
- clear information concerning the rules of the premises and the rights of residents; and
- access to appropriate in-house and external dispute resolution processes.

Jurisdiction is given to the Residential Tenancy Tribunal to hear disputes in relation to occupancy agreements having regard to the occupancy principles. Regulations may be prepared establishing standard occupancy terms consistent with the occupancy principles.

These amendments clarify the definition of residential tenancy agreements, allowing some agreements to 'opt into' the operation of the Act in relation to residential tenancies. The terminology in the existing Act has been revised to accommodate the new concept of an occupancy agreement – in particular, the concept of "prescribed terms" (which were effectively the core provisions of any tenancy agreement) are renamed "standard residential tenancy terms". This is necessary to distinguish between prescribed terms of residential tenancies, and those that might be prescribed for occupancy agreements.

The Bill makes it clear that an endorsed term cannot be inconsistent with the Act. The Bill removes the existing requirement for a condition report to be lodged with the Rental Bonds Office. The Bill significantly improves a number of provisions in the Bill dealing with the abandonment of premises, retaliatory action, successor in title and quiet enjoyment.

The Bill also contains amendments designed to improve the way the Residential Tenancies Tribunal records its reasons and decisions. The tribunal is a relatively high transaction body – dealing with many matters in the course of a year. The tribunal will be required to keep a written record of the proceedings. The written record will provide a brief statement for an order, and is available to parties at the conclusion of the proceedings without further cost or delay.

The Bill contains a number of improvements to the organisation of the Act together with a number of minor and technical amendments to the Act (such as updating the reference to the relevant Australian Bureau of Statistics "index number". The Bill replaces the relatively few time periods expressed in terms of days to ensure consistency with the rest

of the Act where periods are expressed in terms of weeks. The Bill includes a delayed commencement of amendments in relation to changes to the standard residential tenancy terms (to allow the market time to develop new contracts and comply with the change).

Revenue/Cost Implications

The proposed amendments will have few cost implications. The adoption of some efficiencies in the Bill (such as the clarification of terms, the removal of the requirement to lodge condition reports with the Rental Bonds Office and the new procedure for recording decisions for the tribunal) may reduce expenditure in these areas. Additional proceedings before the tribunal in relation to occupancy disputes are expected to be cost neutral (being funded under the existing arrangements concerning the tribunal).

Clause Notes

Clause 1 – Name of Act – states the title of the Act, which is the *Residential Tenancies Amendment Act 2004.*

Clause 2 – Commencement – states that the Act commences on a day fixed by the Minister by written notice. The Act also provides for delayed commencement of amendments to Schedule 1 of the Act. These amendments must commence by 1 January 2007.

Clause 3 – Legislation amended – states that the legislation being amended is the *Residential Tenancies Act 1997.*

Clause 4 – Title – varies the title of the *Residential Tenancies Act 1997* to reflect the introduction of new part 5A (which deals with occupancy agreements).

Clause 5 – Interpretation – Section 3(1) definition of *energy efficiency rating statement, lessor, prescribed terms, residential tenancy agreement, retirement village, tenancy dispute, tenant* and *working day* – deleted various definitions in the *Residential Tenancies Act 1997* in the light of new provisions (below) dealing with these issues.

Clause 6 – Section 3 (1), definitions (as amended) – provides that the remaining definitions in subsection 3(1) of the *Residential Tenancies Act 1997* are relocated to a dictionary (in accordance with existing drafting practice).

Clause 7 – Section 3, remainder – inserts a standard provision indicating that the dictionary is located at the back of the Act and forms part of the Act.

Clause 8 – Sections 4 to 10 – sets out the application of the Act and inserts new Part 1A and Part 2 dealing with the meaning of a residential tenancy agreement. In particular it states that the Act does not apply to retirement villages (dealt with under the *Fair Trading Act 1992*) and nursing homes and hostels for aged or disabled people (dealt with under Commonwealth legislation). New section 4 also provides for regulations to exclude other premises from the application of the Act.

Proposed sections 5, 6 and 6A replace the existing interpretive provisions dealing with the definition of a *residential tenancy agreement* and defining *lessor* and *tenant*. Attention is drawn to the requirement in paragraph 6A(1)(b) which requires the premises to be for the use of the tenant to use as a home. The following examples indicate a number of agreements which are not intended to be residential tenancy agreements:

> Example 1: An agreement is entered into between a home-owner and a company for the purpose of providing a company director with accommodation. In this situation there are in fact two separate agreements. The first agreement, between the home-owner and company is not a residential tenancy agreement – it is a commercial arrangement for the leasing of an interest in the property. A second

agreement, between the company and the company director for the company director to use the premises for accommodation purposes, may be a residential tenancy agreement, depending on the terms of the agreement.

Example 2: An agreement is entered into between a home-owner and a foreign country (through the agency of a member of staff) for the purpose of providing the member of staff of the diplomatic mission of the foreign country with accommodation. As with the first situation there are in fact two separate agreements. The first agreement, between the home-owner and the foreign country is not a residential tenancy agreement – it is a commercial arrangement for the leasing of an interest in the property. A second agreement, between the foreign country and its member of staff may be a residential tenancy agreement, depending on the terms of the agreement.

Example 3: An agreement is entered into between a home-owner and an incorporated association for the purpose of providing members of the association with accommodation. As in the first situation there are in fact two separate agreements. The first agreement, between the home-owner and the association is not a residential tenancy agreement – it is a commercial arrangement for the leasing of an interest in the property. A second agreement, between the association and its members may be a residential tenancy agreement, depending on the terms of the agreement.

It is intended that, where an agreement is with a number of persons, the agreement may nonetheless be a residential tenancy agreement although one of the persons does not intend or cannot use the premises for a residential tenancy purpose. The following examples indicate a number of agreements which are intended to be residential tenancy agreements:

Example: An agreement is entered into between a home-owner (as lessor) and, jointly, a company and a company director (as tenants) for the purpose of providing the company director with accommodation. In this situation it is intended that the agreement should be considered to be a residential tenancy agreement.

New sections 6B to 6F state particular situations where there is, or is not a residential tenancies agreement. These sections replace the existing sections 5 and 6. New section 6B states that there is a residential tenancies agreement if there is an agreement which complies with section 6A(1-3) and it is in writing and expressly states that it is a residential tenancy agreement. This effectively allows an agreement to ‘opt into’ the operation of the Act in relation to residential tenancies.

New section 6C and 6D restate the effect of existing subsections 6(2) and 5 respectively, but remove the exemption from the Act applying to boarders and lodgers.

New section 6E provides that certain people who are given a right of occupation are not tenants, for example boarders and lodgers.

New section 6F lists certain kinds of premises where there is no residential tenancy agreement. For example hotels, caravans and educational institutions.

New section 7 states when a residential tenancy agreement starts. This section replaces existing section 3(2).

New sections 8 to 10 set out the standard residential tenancy terms, where terms are void and provides for the Residential Tenancies Tribunal to endorse inconsistent terms. These new sections replace the existing sections 8 to 10 dealing with these matters. The sections have been modernised and replace the concept of "prescribed term" as used in the existing Act with "standard residential tenancy term". This is necessary to distinguish between prescribed terms of residential tenancies and those which might be prescribed for occupancy agreements.

New section 10 ensures that endorsed terms cannot be inconsistent with the Act (although, at present, they may be inconsistent with the prescribed terms/standard residential tenancy terms).

The new sections also consolidate section 134, which provides for the Minister to determine criteria for the tribunal to consider in determining whether inconsistent terms should be endorsed.

Clause 9 – Alternative to a bond – insurance section 17 – omits section 17 of the Act providing for insurance to be an alternative to a bond. This section is being omitted as no insurance has been prescribed for the Act, since its commencement in 1997 and this alternative to bond would reduce the revenue in the bond scheme.

Clause 10 – Condition reports Section 29(1) – This is the first of a number of amendments that have the effect of removing the requirement for a condition report to be lodged with the Territory (accordingly only two condition reports will need to be prepared under the new provision).

Clause 11 – Section 29(3) – consequential on amendment to existing subsection 29(1).

Clause 12 – Section 29(4) – consequential on amendment to existing subsection 29(1).

Clause 13 – Section 29(5) – consequential on amendment to existing subsection 29(1).

Clause 14 – New section 51 – inserts a new section 51 dealing with damage, injury or intention to damage or injure. The primary change is new subsection (c), which provides that if the lessor is a corporation – injury to a representative of the corporation or a member of a representative's family warrants the tribunal making a termination or possession order.

Clause 15 – Section 57 – provides a redrafted form of section 57 which includes the new ground "or had taken some other reasonable action to secure or enforce his or her rights as a tenant."

Existing section 57 provides that the tribunal shall refuse to make a termination and possession order if it is retaliatory in nature. The NSW and ACT provisions on this are slightly different:

(ii) the tenant complained to a governmental authority in relation to the lessor or had taken some other action to secure or enforce his or her rights as a tenant.

(note: underlined words are absent in the ACT legislation)

It has been suggested that section 57 should be amended in line with the NSW provision, but that the action should be reasonable.

Clause 16 – Effect of abandonment Section 61, new note – inserts a note which provides that the tribunal may, on application by the lessor, declare when premises have been abandoned (in such a circumstance, the tribunal might also make such an additional order under the Act as is necessary concerning the protection of the property or rights of the tenant and lessor).

Clause 17 – Successor in title to lessor New section 64(1), new examples – inserts a number of examples of succession in title and shows where such a successor may terminate the tenancy.

Clause 18 – New section 64(1A) – restricts the operation of section 64 so that it cannot apply to a purchaser of the property from the lessor where the purchaser is on notice of the tenancy.

Clause 19 – Section 64 – provides for section 64 to be renumbered when the Act is next republished.

Clause 20 – Guideline for orders Section 68(5) – provides that the relevant index is the rents component of the housing group of Consumer Price Index for Canberra.

The Act provides that the Residential Tenancies Tribunal shall allow a rental rate increase that is in accordance with the prescribed terms unless the increase is excessive. The Act establishes a presumption that the rental rate increase is not excessive if it is less than 20% greater than any increase in the 'index number' over the period since the last rental rate increase or since the beginning of the lease. The Act presently defines the 'index number' as the Consumer Price Index (privately-owned dwelling rents expenditure class) for Canberra – an index overtaken by the rents component of the housing group of Consumer Price Index for Canberra since the making of the Act.

Clause 21 – Reduction of existing rent New section 71(1A) – provides a statutory form of the concept of quiet enjoyment, confirming the approach of the Supreme Court in *Anthony Worrall v Commissioner for Housing for the ACT* [2001] ACTSC 72.

The concept of 'quiet enjoyment' is used in the Act and the standard residential tenancy terms. Section 71 of the Act permits the tribunal to order a reduction in rent for the lessor to interfere in the tenant's quiet enjoyment of the premises. Clause 70 of the prescribed

terms/standard residential tenancy terms provides that a tenant shall not interfere in the quiet enjoyment of others. Clause 52 also deals with a related issue without reliance on the concept of quiet enjoyment.

The Act presently does not define 'quiet enjoyment'. In the past, common law has required evidence of direct physical interference with the enjoyment of the premises. However, more recently, courts have found that quiet enjoyment is breached by any acts that significantly interfere with a tenant's freedom in exercising his rights as a tenant (Amanda Stickley, 'The Covenant for Quiet Enjoyment' (1998) NLR 8 at paras 6-7, *Hawkesbury Nominees Pty Ltd v Battick Pty Ltd* [2000] FCA 185). This test reflects the terms of section 71 of the Act, but not clause 70 of the prescribed terms.

The ACT Supreme Court in *Anthony Worrall v Commissioner for Housing for the ACT* [2001] ACTSC 72 relied in part on the decision of the Full Court of the Federal Court in *Hawkesbury Nominees* to adopt the new test of quiet enjoyment. The court said:

> "The principle adopted in *Hawkesbury Nominees Pty Ltd v Battick Pty Ltd* was not expressed in the same language as that employed in s 71. In particular, the court referred to the need for 'substantial interference' with the tenant's enjoyment of the premises whilst s 71 requires that there be a 'significant diminution' in such use and enjoyment. Nonetheless, I am inclined to think that, in this context at least, the tests are substantially similar.
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> …However, a lessor may breach a covenant for quiet enjoyment either by act or omission: see *Hawkesbury Nominees Pty Ltd v Battick Pty Ltd* [2000] FCA 185 per Hill J at [37]. Mr Anforth submitted, in my view correctly, that it may be incumbent upon a lessor to exercise contractual rights over third parties in order to prevent a breach of quiet enjoyment: see *Aussie Traveller Pty Ltd v Marklea Pty Ltd* (1997) 1 Qd R 1. Similar principles no doubt apply to any of the conduct referred to in s 71."

Clause 22 – Section 71 - provides for section 71 to be renumbered when the Act is next republished.

Clause 23 – New part 5A – provides for the insertion of a new part 5A, dealing with occupancy agreements.

The existing Act does not deal with a number of agreements for the occupation of premises for living purposes. In particular, it excludes boarder and lodger agreements from the operation of the Act. The Act is amended to apply to a wide range of these agreements (not including those specifically excluded under proposed section 4 (above), principally agreements of a short term nature (including licenses, boarder contracts and lodger contracts – these extend over a wide range of premises presently excluded from the Act, including caravan parks and student accommodation).

This proposal involves two distinct elements, which are designed to commence at different times.

Firstly, the jurisdiction for determining disputes between occupants and lessors under short term occupancies are vested in the Residential Tenancies Tribunal (presently these disputes are heard in other courts). Initially, disputes in relation to this extended jurisdiction would be determined under the existing contracts and the common law having regard to certain specified principles. (Amendments having this effect are found both in new Part 5A and amended Part 6).

Secondly, the legislation is amended to permit the development of new sets of core agreements (by regulations, in consultation with stakeholders) which would apply to different short term occupancies together with a set of general principles, reaffirming the rights of occupants in such agreements to maintain a reasonable standard of living conditions.

New section 71A defines who is a grantor under an occupancy agreement.

New section 71B defines who is an occupant under an occupancy agreement.

New section 71C defines an occupancy agreement to mean an agreement where a person (the grantor) grants to another person (the occupant) for value a right of occupation of premises for use as a residence by the occupant (whether with or without other persons) where the agreement may be terminated at law without cause for any period less than six months. This formulation does not apply to any agreement, which is a residential tenancy (which, in general, may only be terminated without cause with six months notice.)

New section 71D specifies when an occupancy agreement starts.

New section 71E establishes a set of occupancy principles that people must have regard to when making a decision about an occupancy agreement. The principles set out what an occupant and grantor are entitled to and that the parties should try to resolve any dispute by using reasonable dispute resolution processes.

New sections 71F and 71G provide that regulations may set out standard occupancy terms and, when set, an occupancy agreement made after the regulations must be consistent with the terms.

Clause 24 – Part 6, Heading – inserts new sections 71H to 71J. These sections define the terms tenancy dispute and occupancy dispute and provide for the Residential Tenancies Tribunal to have regard to occupancy principles in considering an occupancy dispute.

Clause 25 – Section 72 – provides that the Registrar may also provide assistance in relation to occupancy disputes.

Clause 26 – Applications for resolution of dispute New section 73(1A) – this is the first of a series of amendments that provides that a party to an occupancy agreement may apply for the resolution of the dispute to the Residential Tenancies Tribunal.

Clause 27 – Section 73 – provides for section 73 to be renumbered when the Act is next republished.

Clause 28 – Procedural powers of tribunal Section 102 – is a technical amendment to provide for the other amendments to section 102.

Clause 29 – Section 102(e) – removes section 102(e) which is now a new section 102(2).

Clause 30 – New section 102(2) – inserts a new section 102(2) in the Act based on old section 102(e).

Clause 31 – Section 102 – provides for section 102 to be renumbered when the Act is next republished.

Clause 32 – Orders New section 104(ja) – inserts new section 104(ja) which provides that the Residential Tenancies Tribunal may make an order declaring that premises were abandoned on a particular day.

Clause 33 – Section 104 - provides for section 104 to be renumbered when the Act is next republished.

Clause 34 – Section 105 – inserts new sections 104A, 104B and 105.

Section 104A provides that the Tribunal may refer matters to other entities. Sections 104B and 105 are the first of a series of amendments concerning the way the tribunal records its decisions and reasons.

New section 104B makes provision for the tribunal to keep a written record of the proceedings. It is envisaged that this record will provide a brief statement for an order, and will be available to parties at the conclusion of the proceedings without further cost or delay.

New section 105 states that the Residential Tenancies Tribunal must give a copy of an order and order details to parties within one week after the day the tribunal made the order, or within one week of when a party asks the tribunal for such copies.

The Community Law Reform Committee made recommendations about the way in which the tribunal should discharge its obligations:

> "627. The Committee considers that the tribunal should not only decide disputes between individuals but should also be an important source of information on tenancy law and practice. An important function of the tribunal should be to provide information in the form of written reasons for decisions and also a regular newsletter for wide circulation.
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> 628. The New South Wales Tribunal produces a monthly newsletter which summarises in an easy to read manner key decisions and approaches of the tribunal. The newsletter includes information on:

- recent important decisions of the tribunal; including an outline of the circumstances of the application, the reasons for the decision and a subject index on all decisions reported (subject index published three times per year);
- how the tribunal works;
- the nature of the tenant's obligations to maintain the premises in a reasonable state of cleanliness and the meaning of fair wear and tear;
- the nature of the lessor's obligations to maintain the premises in a reasonable state of repair;
- innovative decisions made in other States if relevant to New South Wales law and the New South Wales public;
- terms of tenancy agreements which contradict the standard agreement and are therefore illegal; and
- the rights of tenant and lessor concerning termination.

629. The newsletter is available to individuals and is provided to tenancy organisations which then reproduce the information for their clients. The South Australian Tribunal maintains an indexed register and summary of significant decisions and produces information sheets concerning significant decisions for tenancy agencies. The tribunal also provides written reasons for each decision made to the people involved in the dispute.

630. The Committee considers that information such as is provided in New South Wales and South Australia would enable the tribunal to be a source of information on tenancy law and make it accountable to the community it is serve. In particular the information would:

- assist individuals to understand their rights and obligations and therefore also to settle disputes at an early stage without recourse to litigation;
- inform individuals in a particular case of the reasons for the decision of the Tribunal and in so doing confirm that their arguments were heard and considered in a fair manner; and
- allow members of the tribunal, lawyers, the judiciary, government and community agencies to monitor the performance of the tribunal and in particular its adherence to precedent and principles of natural justice.

Recommendation 125: The Tribunal should produce:

- *written reasons for a decision when requested to do so by one of the parties within 14 days of the making of the decision;*
- *an indexed register of written reasons, which may be made available on request;*
- *a quarterly newsletter which summarises in a clear and readable manner significant decisions of the Tribunal and other useful information; this newsletter should be available free of charge; and*
- *an annual report, tabled in the ACT Legislative Assembly, which summarises the work of the Tribunal in the period under review and includes detailed statistical information on the parties to disputes, the nature of disputes and their outcomes."*

On the basis of this recommendation, existing section 106 of the Act provides that:

"106(1) Where—

(a) the tribunal makes an order; and

(b) within 14 days after the day on which the order is made a party to the hearing requests a statement of reasons for the making of the order;

the tribunal shall provide to the party a written statement of those reasons.

(2) A statement of reasons shall—

(a) set out the tribunal's findings on material questions of fact; and

(b) refer to the evidence or other material on which the finding was made; and

(c) give the tribunal's reasons for making the order."

In practice, section 106 has provided a large number of statement of reasons which can now be read on the Australasian Legal Information Institute (AustLII) internet site at: http://www.austlii.edu.au/au/cases/act/ACTRTT/. This resource is far more accessible to lessors, tenants and their advisors than perhaps anticipated by the committee at the time it was concluding its recommendations.

However:

- The preparation of a statement of reasons does not come free of cost. This cost indirectly impacts on the fees set by government in relation to those wishing to apply to the tribunal and limits the capacity of the government to distribute funds generated by interest on rental bonds.
- The preparation of a statement of reasons does not come free of delay. This delay may impede the taking of an appeal (section 126 requires an appeal 'no later than 28 days after the day on which a notice under section 105 is given to the person or

within such further time as the Supreme Court (whether on, before or after that day) allows').

- The value of publishing every statement of reason is dubious. Reports of cases that are indistinguishable from early cases serve no broader educative purpose. Even to the parties themselves, reports often convey no more information than provided by the tribunal during the hearing.
- Section 106 provides that a party may request a statement of reasons. It has been suggested that this power is sometimes abused by the party who has lost before the tribunal, not to discover the reason for the decision, but instead for the purpose of putting the tribunal to some perceived discomfort. Leaving aside such cases, the self selection of decision law raises the potential of systemic under or over reporting of particular outcomes.

The present form of section 106 prevents the tribunal from taking considered measures to provide better outcomes to both the parties and the broader community. For example, in most cases, the need for a written statement of reasons might be obviated by adopting the practice of most subordinate jurisdictions of noting on a bench sheet or other document the evidence relied upon and the order made. In some places, the form of this record is undergoing change as technology is providing other options for the capturing of such contemporaneous records (using, for example, voice recognition or tablet-based handwriting recognition software).

There will remain a number of circumstances where complex issues of law arise or come up for reconsideration. A statement of reasons should be prepared in these circumstances and the period for making an appeal should date from the time the reasons are given. There are some similarities between this issue and the manner in which the tribunal is convened. While the tribunal may sit in a number of different modes, it generally adopts a low-cost single-member mode. The wholesale departure from this mode would entail significant cost (which would be unnecessary and undesirable having regard to the present experience of the tribunal). However, it remains open for the president of the tribunal to convene a multi-person tribunal. This formulation similarly provides a basis for the preparation of a statement of reasons.

While the recording of the basis on which a decision was made is a sensible precaution, the compelling of a statement of reasons to be produced at some time after the case has been concluded is not appropriate for a high transaction tribunal that adjudicates rights.

Clause 35 – Membership Section 112(4) new note – inserts a note which states that the president may appoint a member to the Residential Tenancies Tribunal for the hearing of a particular class of matters.

Clause 36 – New section 115A – provides that a dispute in relation to a residential tenancy agreement or occupancy agreement that is no longer in force may be decided under this Act only if:

- the Act applied to the lease while it was in force; and
- the application in relation to the dispute is made within six years of the conduct causing the dispute.

Clause 37 – Functions and powers Section 117(1)(d) and (e) – consequential to occupancy agreements being dealt with by the Residential Tenancies Tribunal. This provision provides for the Tribunal to provide information and education about residential tenancy agreements and occupancy agreements and to consult with relevant entities.

Clause 38 – Section 120 – provides for the Tribunal to determine which details of an order are to be recorded under section 104B.

Clause 39 – Appeal from decisions of tribunal Section 126(2) – consequential to the amendments to section 105. This section states the timeframes within which an appeal can be made.

Clause 40 – Determined criteria section 134 – omits section 134 as this section is now contained within new section 10.

Clause 41 – New Part 10 – inserts new Part 10 into the Act dealing with transitional matters. New section 137 provides that Part 5A of the Act only applies to new occupancy agreements. New section 138 provides that condition reports given to the Territory under section 29(5) are not records to which the *Territory Records Act 2002* applies. New section 139 provides for the expiry of this part dealing with transitional matters.

Clause 42 – New Dictionary – inserts new definitions consequential on amendment to this legislation.

Schedule 1 – Amendments of prescribed terms – makes a number of changes to the existing prescribed terms, including changing the name of the *prescribed terms* to *standard residential tenancy term*s.

Other amendments in the schedule remove any doubt that the tenant and lessor may agree that rent is to be paid electronically; changes references from days to weeks; and modernises the wording of clause 96, including ensuring that the intention of the lessor is genuine.

Schedule 2 – Other amendments – provides minor amendments to give effect to the changes in this Act. For example, in section 12(1) the reference to *prescribed term* is replaced with *standard residential tenancy term* and in section 19(2) the reference to 21 days is changed to three weeks.