AUSTRALIAN CAPITAL TERRITORY

LANDLORD AND TENANT (AMENDMENT) ORDINANCE 1976

EXPLANATORY MEMORANDUM

The purpose of this Ordinance is, in the main, to phase out fair rent determinations in force before the commencement of the Ordinance and to provide for a new system of voluntary fair renting on more modern criteria. It also provides a method of increasing rents while a tenant is in occupation of premises and regulates such increases. Other amendments, including the new provision on bond money, pick up the proposals agreed to by the Legislative Assembly in 1975 (Message No. 82 of 6 August 1975 and Message No. 146 of 13 November 1975). In this memorandum the Landlord and Tenant Ordinance 1949 is referred to as the Principal Ordinance.

Section 1

Short title and citation.

Section 2

Machinery provision.

Section 3 - Commencement

By sub-section (1) most of the provisions of the Ordinance came into effect on 16 December 1976, the date the Ordinance was notified in the Gazette. By sub-section (2), the provisions relating to the giving of certain information and a copy of the lease to the tenant and the limitation on bond money come into effect on 16 March 1977. This is so that persons affected have time to comply with the new provisions and no instant offence is created.

The sections referred to in sub-section (3) are related to the proposed Administrative Appeals Ordinance and will be gazetted at the same time as that Ordinance.

Section 4

Sections 2 and 4 of the Principal Ordinance were machinery provisions. Section 3 of the Principal Ordinance has been repealed to accord with modern drafting practice.

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Section 5 - Holiday premises

This section repeals section 7 of the Principal Ordinance which dealt with the exclusion of premises used as holiday premises from the operation of the Ordinance. It is repealed as part of the removal of the concept of "holiday premises" from the Ordinance. The reason for this is that the new section 20 of the Principal Ordinance as amended should give sufficient flexibility for fair rents of serviced premises let for a short term to be fixed if either the landlord or tenant makes application.

Section 6 - Interpretation

This section amends section 8 of the Principal Ordinance. It inserts a definition of "bond" (see section 26), omits the definition of "holiday premises" and deletes the reference to "the prescribed date". The prescribed date in the Principal Ordinance served two purposes. It was the date at which rents were pegged unless reviewed by the Rent Controller and also the date of valuations unless the premises had been built after the prescribed date. Neither of these is necessary in the new Ordinance.

Paragraphs (b) and (f) of section 6 are to delete references to repealed legislation.

Section 7 - Cessation of application of determinations

Sub-section (1) had the effect of rendering void fair rent determinations made before and having effect before 16 December 1976. New determinations made after 16 December will have effect for 12 months only.

Sub-section (2) provides a cushioning period of 90 days, i.e. until 16 March 1977, before rents revert to the amount specified in the lease. The purpose of the cushioning period is so that rents did not go up or down without notice on the day the Ordinance was gazetted. The 90 day period was chosen to coincide with the period specified in section 34 as the minimum time during which a notice of intention to increase rent may run. The 90 day period also allows tenants to get a new fair rent determination if they consider that the rent specified in the lease is excessive.

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Until 16 March 1977 rents for tenants in occupation cannot be increased unless by a determination made before but having effect after 16 December 1976.

Section 8 - Repeal of section 14

Section 14 of the Principal Ordinance pegged rents at the level they were at 1 January 1973 unless altered by the Rent Controller. Since May 1976, when the Minister for the Capital Territory published an order under section 6 of the Principal Ordinance, all prescribed premises have not been subject to this provision. It has now been repealed formally.

Section 9 - Lessor to furnish information regarding rent to lessee

This section requires all landlords to inform tenants whether or not the premises are subject to a fair rent determination and, if so, give details of that determination within 28 days of the commencement of the tenancy. It also requires landlords to give a copy of any lease to a tenant within the same period.

This section commences on 16 March 1977 (see sub-section 3(2)).

A similar provision was agreed to by the Assembly in 1975.

Section 10 - Notices of application

The new scheme for applications for determinations is that the Rent Controller must give the landlord and tenant 14 (instead of 7) days notice of his intention to make a determination and the landlord must then within 7 days inform any mortgagee. The mortgagee then has 7 days to make representations. The responsibility to inform mortgagees is transferred from the Rent Controller to landlords.

A similar provision was agreed to by the Assembly in 1975.

Section 11 - Parties to application

This section makes no substantive change to the law but is included to conform with modern drafting practice.

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Section 12 - Matters to be considered

By this section the criteria for the making of fair rent determinations are changed:

(a) the amendment to paragraph (a) means that current rather than historic capital values of premises will be taken into account. This means that the "indexation" provision proposed in 1975 is no longer necessary.

(b) Paragraph (f) of the Principal Ordinance read "the rate of interest charged upon overdrafts by the Commonwealth Bank of Australia". It is omitted as agreed to by the Assembly in 1975.

(d) Paragraph (i) of the Principal Ordinance, the justice and merits of the case, is reinstated. It was omitted in 1973 to ensure that the Rent Controller did not have to have regard to current capital values.

(e) Paragraph (j) of the Principal Ordinance, dealing with hardship, is amended as agreed to by the Assembly in 1975.

Section 13 - Date of operation and notice of determination

Two changes are made to section 21 of the Principal Ordinance. The first is to repeal sub-sections (2), (3) and (4) relating to the retrospective operation of a determination. They were relevant only to the circumstances of the 1973 amendment. The date of effect of a determination will now be a date not earlier than the date of application, or, where a fair rent is in existence on the date of application, the day after that existing fair rent ceases to have effect.

The second change is consequent upon section 10 above and requires landlords to give mortgagees details of the determination when it has been made.

Section 14 - Effect of determination

The words "subject to section 13A" are included in section 22 of the Principal Ordinance to make it clear that new determinations have effect for 12 months only and then lapse.

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Section 15 - Controller may determine rents of his own motion

This section amends section 23 of the Principal Ordinance so that the procedure relating to notices informing the mortgagee where the Rent Controller determines rents of his own motion are in line with the comparable provisions applicable where a landlord or tenant applies for a determination.

Section 16 - Premises proposed to be leased

This section has a similar effect in relation to section 24 of the Principal Ordinance as section 15 above has in relation to section 23 of the Principal Ordinance.

Section 17

This amendment is one of drafting only.

Section 18 - Repeal of section 25A

Section 25A of the Principal Ordinance required all landlords to apply for a fair rent determination within a specified period unless the premises in question were let at 1 January 1973 and the landlord did not wish to increase the rent above the amount payable at that date. Since May 1976, when the Minister for the Capital Territory published an order under section 6 of the Principal Ordinance, all prescribed premises have not been subject to this provision. It has now been repealed formally.

Sections 19 & 20 - Shared accommodation

These sections amend sections 27 and 28 of the Principal Ordinance to bring them into line with comparable provisions relating to premises other than shared accommodation. (see sections 18, 21 and 22 of the Principal Ordinance as amended).

Section 21 - Procedure on appeal

This section is to make it clear that fair rents determined on appeal have effect for 12 months only unless renewed.

Section 22

This section is included to make it clear that although applications for the variation of a determination may be made within 12 months only on certain grounds (see sub-section 32(2) of the Principal Ordinance as amended), an application

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for a fresh determination may be made during the 12 months of its currency in any case. But the new determination would not have effect during the 12 months currency of the previous determination. (see section 21 of the Principal Ordinance as amended).

Section 23 - Variation of determinations

Paragraph (a) is a drafting change only. Paragraph (b) is to change section 32 as a consequence of determinations running for 12 months only. Paragraphs (d) and (g) are the only substantive changes to this section. They are to give effect to a proposal agreed to by the Assembly in 1975 that it should be made clear that variations are to be made on the same considerations as are original determinations and that an increase in capital value which arises solely from a general increase in values (i.e. not from improvements etc) is not a ground for applying for a variation.

Section 24

This section corrects an anomaly in section 34 of the Principal Ordinance whereby when a determination had been made the landlord had to notify the Rent Controller of services he began to supply but not of those which he stopped supplying. The new provision requires landlords of premises subject to a fair rent determination to notify the Rent Controller of both types of change in services.

Section 25 - Premises not to be let at rent exceeding fair rent

This section amends section 35 of the Principal Ordinance to make it clear that any person, including an agent, who lets premises at more than the fair rent commits an offence.

Section 26 - Certain payments prohibited

In 1975 the Assembly agreed to a proposal to limit the maximum sum that might be held as a bond to an amount equivalent to 4 weeks rent for the premises in question.

This section gives effect to that proposal. It creates an offence where more than that amount is demanded or received and it creates an offence where the bond is not paid back, less any allowable deductions, within 28 days of the tenant leaving the premises.

This section comes into force on 16 March 1977 (see sub-section 3(2)).

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Paragraph (b) of section 26 removes the discretion vested in the Rent Controller to consent to payments of goodwill or other premiums. This provision was left over from the time when business premises were subject to the Ordinance. It is not considered applicable to residential premises and is therefore repealed.

Section 27 - Repayment of excess bond monies

Section 41 of the Principal Ordinance referred to holiday premises and has therefore been repealed. The new section 41 provides for the repayment of bond money held in excess of 4 weeks rent where the rent is reduced during the period the tenant is in occupation of the premises.

Section 28 - Representation by agent

This section amends section 55 of the Principal Ordinance in anticipation of the gazettal of the proposed Administrative Appeals Ordinance.

Sections 29 & 30 - Records of payment

These sections amend sections 56 and 57 of the Principal Ordinance to take into account the new provisions dealing with bond money. They require a landlord or his agent to keep records of bonds paid, as well as rent, and to issue receipts accordingly.

Section 31 - Lessor to ascertain fair rent

By this section sub-sections 58(2) and (3) of the Principal Ordinance are repealed; the first as a consequence of the abolition of the prescribed date and the second, referring to premises leased on 1 March 1945, because its operation has been exhausted.

The repeal of sub-section 58(3) was agreed to by the Assembly in 1975.

Section 32 - Certificate as to fair rent

Section 59 of the Principal Ordinance has been amended to provide that a Certificate made by the Controller that no fair rent was fixed in respect of a specified period shall be evidence of that fact.

This was agreed to by the Assembly in 1975.

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Section 33 - Service of notices

Sections 60 and 61 of the Principal Ordinance dealt with the service of notices. They now appear as the new sections 95A and 95B of the Principal Ordinance as amended (see section 55 of the amending Ordinance).

Section 34 - Rent increases in relation to prescribed premises where no determination is in force

At common law at the expiry of the term of a lease the landlord and tenant, if they wish to enter into a new lease, are free to renegotiate the rent for the term of any new lease. If they cannot agree on a new rent the landlord may of course not renew the lease but find another tenant willing to pay the rent he, the landlord, wishes to charge.

Under Part III of the Landlord and Tenant Ordinance 1949 however, a tenancy is not terminated solely by virtue of the expiry of the term of a lease. Instead, a statutory tenancy is created. This statutory tenancy may only be terminated by the landlord by the giving of a notice to quit on one or more of the grounds prescribed in section 63 of the Ordinance. It is not one of the prescribed grounds that a tenant has refused to agree to a demand for an increased rent and if the tenant did not consent to pay an increase even where there was no fair rent determination, then the landlord's only recourse would be to apply for a determination. (He could not refuse to renew the lease as this would make no difference neither could he terminate the tenancy on the ground of the tenant's refusal). If the resultant determination made by the Rent Controller were higher than the lease rent the landlord might then increase the rent up to the determined fair rent.

The foregoing only applies where there is no provision in a lease to the effect that the rent may be increased during the term of the lease.

The reason for this situation was that when the Ordinance was originally introduced in 1949 all prescribed premises were subject to fair rent determinations and rents could only be increased by the Rent Controller: the question of the landlord and tenant agreeing on a new rent did not therefore arise.

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The purpose of the new section 34 is to transfer the onus of applying for a fair rent determination from the landlord to the tenant or, to put it another way, to provide a mechanism for a landlord to ask for and enforce if necessary an increased rent without applying for a fair rent determination as ultimately he would have had to do under the law as it stood. It should be noted that section 34 only comes into operation where a tenant is in occupation: there is no limit to the rent a landlord may agree on with a new tenant unless a fair rent determination applies to the premises at that time.

The broad scheme of section 34 is that a landlord may give a tenant notice of at least three months of the increased rent that he wishes to charge and then, after that period has elapsed, if the tenancy is still on foot or no determination has been made, the rent specified in the notice becomes the rent payable. Thereafter if the tenant refuses to pay the increased rent he could be given a notice to quit under paragraph 63(5)(a).

For ease of reference this new provision will be referred to here as section 62A and its various sub-sections.

Sub-section (1) sets out the matters to be contained in any notice of increase to the tenant.

Sub-section (2) allows the landlord to withdraw any such notice at any time before the prescribed day.

The prescribed day is defined in sub-section (10) as the latest day of either

a. the day specified in the notice under sub-section (1)

b. where there is a fair rent determination the first day after the expiry of that determination, or

c. where the rent has been previously increased by a notice, six months after the day of that increase; that is, such notices may only take effect twice a year at most.

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Sub-section (3) provides the machinery by which the rent increases to the new rent.

Sub-section (4), (6) and (7) allow the tenant, faced with such a notice, to terminate the tenancy without liability by a notice given to the landlord not later than 14 days before the prescribed day.

Sub-section (5) allows the tenant to withdraw his notice of termination with the written consent of the landlord.

Sub-section (8) provides that any agreement to increase the rent otherwise than by a fair rent determination or by a notice under section 62A is void.

Sub-section (9) provides that any increase paid pursuant to such a void agreement is recoverable by the tenant.

Section 35

This section repeals a sub-paragraph of section 63 of the Principal Ordinance which had exhausted its operation and a sub-section which referred to Regulations repealed in 1949.

Section 36

This section repeals a sub-section of section 65 of the Principal Ordinance which refers to Regulations repealed in 1949.

Section 37

Section 66 of the Principal Ordinance prohibited a person who became the landlord of premises by purchase from giving notice to quit on the ground that he wished to live in the premises himself for six months from the date of the agreement to purchase. It also prohibited a landlord who had agreed to sell a particular premises from giving a notice to quit on the basis of that agreement for six months from the date of that agreement.

These provisions have been repealed as being unduly onerous and harsh on landlords.

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The new section 66 requires the Rent Controller to inform the tenant where a landlord seeks the Rent Controller's consent to the issue of a notice to quit within the period specified in sub-section 65(1) of the Principal Ordinance. The new section also requires the Rent Controller to consider any submissions made by the tenant.

Sections 38 - 46

These sections contain no changes to the law but effect either drafting changes or repeals of references to repealed Regulations only.

Section 47 - Exclusion of certain premises from operation of Part III

Section 88 of the Principal Ordinance provides for the exclusion of certain premises from the provisions of Part III of the Ordinance which relate to notices to quit. However, buildings containing more than three residential units or residential units in any such building could not be so excluded.

The purpose of the amendment is to remove this distinction and to bring the provisions of the section into line with the circumstances created by the Unit Titles Ordinance.

The other amendments to this section e.g. paragraphs (c) and (d) are drafting changes only.

Section 48

As mentioned, section 48 will come into operation at the same time as the proposed Administrative Appeals Ordinance. Its purpose is to allow representations to be made by tenants where applications affecting their interests are made to the Rent Controller. The proposed Administrative Appeals Ordinance will allow for appeals from decisions of the Rent Controller under sections 87 and 88 of the Principal Ordinance.

Section 88AA will require the Controller to inform the tenant of an application under section 87 and to consider any resultant submissions.

Section 88AB will require the Controller to give a copy of any Certificate of Exclusion or variation of a Certificate of Exclusion to the tenant.

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Section 88AC will require the landlord, where a Certificate under section 88 is in force, to give any new tenant either a copy of the Certificate or a notice setting out details of the Certificate.

Sections 49 - 54

These sections make no changes to the law but either repeal references to the repealed Regulations or remove provisions which have exhausted their operation.

Section 55 - Service of notices etc.

The new sections 95A and 95B substantially reproduce sections 60 and 61 of the Principal Ordinance. They have been moved to the end of the Ordinance so that they apply to all documents required or permitted to be given by the Ordinance rather than applying to documents given under Part II only.

The new section 95C creates an offence where a person knowingly gives a false or misleading notice or document. This relates in particular to the provisions of section 9.

Section 56

This section effects drafting changes only.

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