

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

EXPLANATORY NOTES

PART 3: ENFORCEMENT BY TAKING CONTROL OF GOODS

Summary

319. **Part 3** of the Act unifies the law governing the activities of enforcement agents when taking control of and selling goods, and requires such agents (with certain exceptions) to hold a valid certificate issued by a county court. It also modernises and unifies most of the terminology used in various pieces of legislation where the new unified procedure will apply.
320. **Part 3** also abolishes the common law right to distrain for rent arrears and replaces it with a new, more limited right and a modified ‘out of court’ regime for recovering rent arrears due under a lease of commercial premises.

Background

Procedure

321. At present the law relating to enforcement by the seizure and sale of goods is complex and can be unclear and confusing. It is contained in numerous statutes, secondary legislation and common law and its language is old fashioned. There are various terms that describe this enforcement process, for example execution, distress and levy and various different procedures depending on the type of debt which is being recovered. *Effective Enforcement* recommended the terminology should be modernised and the procedure reformed.
322. *Effective Enforcement* also identified that persons who currently take control of goods are not subject to any uniform regulatory system and highlighted anecdotal evidence of some enforcement agents threatening and intimidating vulnerable debtors. *Effective Enforcement* therefore proposed a system to guard against malpractice and to protect debtors. It is intended (in the longer term) that a licensing regime will be put in place, implemented via a regulatory body. While this is being taken forward independently, as detailed below, as an interim measure the Act replaces (and extends and modifies) the certification process that currently exists for bailiffs under the Law of Distress Amendment Act 1888. The extended and modified certification process will apply to persons taking control of goods who are not Crown employees or constables (the justification for such an exclusion being that Crown employees and constables, by virtue of their status, are already subject to adequate systems of control). A consultative Partial Regulatory Impact Assessment was issued on 30 January 2007 exploring the costs and impact of a licensing regime via a regulatory body. This sets out the options for the future regulation of enforcement agents who are not Crown employees.

Rent Arrears Recovery

323. Distress for rent is a summary remedy which enables landlords to recover rent arrears without going to court, by taking goods from the let premises and either holding them until the arrears are paid or selling them. It is an ancient common law remedy which, over time, has been extended and modified by successive statutes.
324. The Law Commission's Report concluded that distress for rent has a number of features which make it inherently unjust to tenants, to third parties and to other creditors and recommended its abolition.
325. Following a period of consultation, the Government decided to accept the Law Commission's recommendation. However, the consultation revealed that distress for rent is an effective remedy for recovering rent arrears, particularly for commercial properties. If it were to be abolished without any replacement, the Government concluded that there could be disadvantages both to landlords and to tenants of commercial properties.
326. The Act therefore abolishes the current law on distress for rent and replaces it with a modified regime (called Commercial Rent Arrears Recovery or CRAR) for recovering rent arrears due under leases of commercial premises.

Commentary on Sections: Part 3

Section 62: Enforcement by taking control of goods

327. This section gives effect to Schedules 12 and 13 to the Act. Certain current powers to seize and sell goods can only be exercised according to the procedure for taking control of and selling goods detailed in Schedule 12.
328. The terminology in the various pieces of primary legislation relating to these powers has been amended, and some of the warrants and writs which give these powers, namely warrants of execution, warrants of distress and writs of fieri facias (except writs of fieri facias de bonis ecclesiasticis), are renamed warrants of control and writs of control.
329. A warrant of execution empowers a district judge to seize and sell a debtor's goods for the purpose of recovering money payable under a county court judgment or order. A warrant of distress may be issued by a magistrates' court for the purpose of recovering a sum adjudged to be paid by a conviction or order of the court. The warrant requires the sum to be recovered by seizure and sale of the debtor's goods. A writ of fieri facias requires a sheriff or enforcement officer to seize and sell a debtor's goods for the purpose of recovering a sum due under a High Court judgment or order. A writ of fieri facias de bonis ecclesiasticis requires the bishop to seize a debtor's ecclesiastical property in order to satisfy a High Court judgment. As writs of fieri facias de bonis ecclesiasticis are unique and because of the special role of the bishop, they are not renamed (nor are they subject to the new unified procedure detailed in Schedule 12).
330. A writ or warrant of delivery is a writ/warrant to enforce an order for the delivery of particular goods that are identified in the writ/warrant. A writ or warrant of possession is a writ/warrant issued to enforce an order for possession of land.
331. [Schedule 13](#) makes amendments to existing primary legislation, which are necessary to give effect to these changes or as a result of them.

Schedule 12: Taking control of goods

332. This Schedule prescribes a new procedure to be followed by enforcement agents when seizing and selling goods pursuant to powers under High Court writs of execution, county court warrants of execution, certain magistrates' court warrants of distress, High Court writs and county court warrants of delivery and possession which contain a power to seize and sell goods and the following enactments as amended by Schedule 13:

These notes refer to the Tribunals, Courts and Enforcement Act 2007 (c.15) which received Royal Assent on 19th July 2007

- Sections 4 and 16 of the Inclosure Act 1773;
 - Section 91 of the Lands Clauses Consolidation Act 1845;
 - Sections 151 and 159 of the Inclosure Act 1845;
 - Section 33 of the Railways Clauses Act 1863;
 - Section 13 of the Compulsory Purchase Act 1965;
 - Section 61 of the Taxes Management Act 1970;
 - Section 76 of the Magistrates' Court Act 1980;
 - Section 85 of the County Courts Act 1984;
 - Section 62A of the Local Government Finance Act 1988;
 - Section 35 of the Child Support Act 1991;
 - Schedule 15, paragraph 12 of the Water Resources Act 1991;
 - Section 54 of the Land Drainage Act 1991;
 - Section 121A of the Social Security Administration Act 1992;
 - Section 14 of the Local Government Finance Act 1992;
 - Section 51 of the Finance Act 1997;
 - Schedule 12, paragraph 1A of the Finance Act 2003;
 - Section 72 of the Tribunals, Courts and Enforcement Act 2007.
333. The Schedule prescribes, or enables regulations to prescribe, the entire process to be followed by enforcement agents when taking control of and selling goods under the above mentioned powers, from the serving of a notice, to taking control of goods (including which goods may be taken), powers of entry, goods which may be seized, care of goods seized, the sale of goods seized and the distribution of the sale proceeds.
334. On the issue of which goods may be taken, the Schedule provides that all goods of the debtor may be seized other than those which are exempt (as prescribed in regulations) or protected under any other enactment. Examples of protection from seizure are:
- any statutory state or diplomatic immunity;
 - personal property of a trustee pursuant to section 23 of the Trade Union and Labour Relations (Consolidation) Act 1992;
 - works of art from abroad loaned for temporary exhibitions and protected under section 135 of the Tribunals, Courts and Enforcement Act 2007.
335. The Schedule also enables regulations to specify fees, charges and expenses that can be charged by a person in connection with taking control of goods (by way of example, the fees charged by an enforcement agent for taking control of goods). Such regulations will specify when and how such fees, charges and expenses will be recoverable from the debtor, to include when such amounts can be deducted from the proceeds of sale of any goods. The regulations may also specify that any disputed amount of such fees, costs and expenses is to be assessed in accordance with rules of court.
336. In addition, the Schedule sets out the remedial action and the level of damages available to a debtor against an enforcement agent who breaches the procedure. The Schedule does not make any provision for the debtor's right to bring a claim against an enforcement agent whose actions were not authorised at the outset because this is already covered by the existing law of tort. The Schedule also specifies the

circumstances when a creditor can bring a claim against the debtor and it creates offences of intentionally obstructing an enforcement agent in the lawful exercise of his power and interfering with goods seized.

Schedule 13: Taking control of goods: amendments

337. This Schedule amends the existing legislation referred to in paragraph 332 under which the unified procedure in Schedule 12 will be used. It also contains amendments consequential on the introduction of the new procedure and terminology. So, where appropriate, references to warrants of execution and warrants of distress are amended to warrants of control, references to writs of fieri facias are amended to writs of control, references to distrain and distraint are amended to taking control of goods and references to walking possession agreements are amended to controlled goods agreements.
338. A walking possession agreement is an agreement between the person who has the power to seize the goods (“the distrainor”) and the debtor. The distrainor agrees that the debtor can retain possession of the goods without anyone being left on the premises to guard them. In return, the debtor agrees not to remove the goods until he makes payment for the debt and that the distrainor may return to the premises at a later date to remove the goods for sale if payment is not made.
339. In addition, where a power to distrain is not currently set out on the face of an Act, but instead secondary legislation under the Act authorises distraint, the Schedule amends the Act so that the power to distrain (which becomes a power to use the procedure in Schedule 12) is on the face of the Act rather than in secondary legislation.

Section 63: Enforcement agents

340. This section specifies the criteria to be met for an individual to act as an enforcement agent. This includes acting under a certificate under section 64. The section also creates an offence where an individual acts as an enforcement agent and does not meet any of the specified criteria.

Section 64: Certificates to act as an enforcement agent

341. This section specifies who may issue a certificate under which an enforcement agent can act. The section also provides that the Lord Chancellor must make provision about certificates by regulations. The provision may include, for example, conditions that may apply to issued certificates, provision about the suspension and cancellation of certificates, and provision for reasonable fees to be charged for applications for certificates.
342. Subsection (4) enables enforcement agents who currently hold a certificate issued under section 7 of the Law of Distress Amendment Act 1888 to continue to operate under that certificate. After the certificate expires, regulations will specify that a certificate will need to be issued in accordance with the new certification provisions under this section.

Section 65: Common law rules replaced

343. This section provides for the replacement of the common law rules about how the powers to take control of and sell goods are exercised. The provisions in Chapter 1, in particular Schedule 12, replace these common law rules. The replacement of the common law rules includes those that relate to remedies that are currently available to debtors (including replevin) and offences by debtors (such as rescuing goods seized). Replevin is a process by which the owner can recover goods seized in return for an undertaking to bring proceedings to determine the right to seize the goods and for tendering sufficient security for the debt and the proceedings. Rescuing goods is where a person interferes with goods seized.

344. Under section 66 these common law rules will continue to apply in relation to those goods that have been distrained before the new procedure comes into force.

Section 66: Pre-commencement enforcement not affected

345. This section provides that the new procedure for taking control of and selling goods does not affect any power to distrain where the goods were distrained against or made subject to a walking possession agreement before the new procedure comes into force.

Section 67: Transfer of county court enforcement

346. This section transfers the district judge's responsibility for the execution of warrants of control issued by a county court to any person authorised by or on behalf of the Lord Chancellor. (Section 85(2) of the County Courts Act 1984 refers to the "registrar" but, by virtue of section 74 of the Courts and Legal Services Act 1990, the office of "registrar" is now abolished and replaced by "district judge".) In practice, the warrants will be executed by county court bailiffs (who will continue to be known as county court bailiffs).

Section 68: Magistrates' courts warrants of control

347. This section creates a new section 125ZA of the Magistrates' Courts Act 1980 so as to provide for the endorsement of warrants of control issued by the magistrates' court in line with the endorsement process for High Court writs under Schedule 7 to the Courts Act 2003 (and in line with section 69 on county court warrants). The new section is referred to in paragraph 4 of Schedule 12.

Section 69: County court warrants of control etc

348. This section replaces the existing section 99 of the County Courts Act 1984. It applies to warrants of control issued by a county court and warrants of delivery and warrants of possession which include a power to take control of goods and sell them. It details the procedure for endorsing county court warrants in line with High Court writs. The order of priority in execution is dictated by the date and time of endorsement. The new section is referred to in paragraph 4 of Schedule 12.

Section 70: Power of High Court to stay execution

349. This section gives the High Court the power to stay execution of a writ of control for such period of time and on such conditions as the court determines in line with the county court's power to stay execution. The power may only be exercised where the court is satisfied that the debtor is unable to pay any sum or instalment of any sum recovered against him.

Section 71: Abolition of common law right

350. This section abolishes the common law right to distrain for arrears of rent. Statutory repeals are dealt with in Schedule 14 and Part 4 of Schedule 22. Taken together, these provisions will sweep away the existing law on distress for rent.

351. Distress for rent is a summary remedy which enables landlords to recover rent arrears, without going to court, by taking goods from the demised premises and either holding them until the arrears are paid or selling them. At common law, the right of distress for rent arises automatically by virtue of the landlord and tenant relationship. So the remedy is almost always available to the landlord of premises, whether residential or commercial premises, when rent is in arrears. Distress for rent is an ancient common law remedy which, over time, has been extended and modified by statute.

352. The right to distrain has applied to different kinds of rent, including rentcharges. This section and the statutory repeals will abolish distress for all forms of rent (see, for

example, the repeal of section 121(1) of the Law of Property Act 1925, which confers statutory power to distrain for a rentcharge).

Section 72: Commercial rent arrears recovery (CRAR)

353. This section creates a new statutory right for a landlord of commercial premises to recover rent arrears by using the procedure in Schedule 12 for taking control of the tenant's goods. This allows the landlord to enter the let premises in order to take goods belonging to the tenant, then sell those goods and recover the rent arrears from the proceeds of sale. The right, which is called CRAR (commercial rent arrears recovery), replaces the existing right of distress for rent. But in contrast to distress, CRAR is available only to landlords of commercial premises.

Section 73: Landlord

354. This section defines "landlord" for the purposes of CRAR and accordingly identifies the person to whom CRAR is available. The definition in this section reflects the position in the current law of distress for rent as to who can distrain for rent arrears.

355. Subsection (1) sets out the general rule that the landlord is the person entitled to the immediate reversion in the property comprised in the lease. This is the person to whom the property will revert at the end of the lease.

356. In most cases it will be clear who is entitled to the immediate reversion of the property. However, subsections (3) to (7) clarify the position in four particular circumstances, each reflecting the current law on distress for rent. The circumstances are:

- (in subsection (3)) where the premises are let under a tenancy by estoppel;
- (in subsection (4)) where the premises are let by joint landlords;
- (in subsection (5) and (6)) where the let premises have been mortgaged;
- (in subsection (7)) where the court has appointed a receiver to deal with the let premises.

357. In the case of a tenancy by estoppel, the landlord may not have a legal estate in the land comprised in the lease, in which case he will not be entitled to the immediate reversion in that property. Subsection (3) makes it clear that such a person will nevertheless be a "landlord" for the purposes of CRAR and may therefore use CRAR to recover rent arrears from his tenant, provided that all the other conditions are satisfied.

358. Subsection (4) provides that if the premises are let under a joint tenancy, then any one of the persons who hold the legal estate will be the "landlord" for the purposes of CRAR. This means that any one of them may exercise CRAR and may do so to recover the rent due to all of them.

359. Subsections (5) and (6) deal with mortgaged properties. If the premises are let by a person who has taken out a mortgage on the property, then that person (who is the "mortgagor" or borrower) will normally be the "landlord" who is entitled to use CRAR to recover rent due under that lease. But if, at any time, the mortgagee (the lender) gives notice of his intention to repossess the property, then he will become the landlord thereafter in relation to that existing lease.

360. However, as with the current law on distress for rent, a mortgagee who becomes the landlord in this way will not be able to use CRAR to recover rent due under the existing lease if that lease is not binding on the mortgagee. This is because there will be no relationship of landlord and tenant between the mortgagee and the tenant under the existing lease. A lease will not be binding on the mortgagee if it is made after the mortgage was created, and if it is not made under either:

- an express leasing power contained in the mortgage deed, or

*These notes refer to the Tribunals, Courts and Enforcement Act
2007 (c.15) which received Royal Assent on 19th July 2007*

- section 99 of the Law of the Property Act 1925 (leasing powers of mortgagor and mortgagee in possession).
361. By virtue of subsection (7), a receiver who has been appointed by the court in relation to the property that is subject to the lease may exercise CRAR in the name of the landlord.
362. Subsection (8) provides that a landlord who has a right to use CRAR will need to authorise a certificated enforcement agent to exercise CRAR on his behalf (unless he himself is a certificated enforcement agent; see paragraph 2 of Schedule 12). The landlord will need to instruct the enforcement agent in writing. The form, content, and other requirements in relation to the written instructions from the landlord to the enforcement agent will be prescribed by way of secondary legislation.
363. Subsection (9) provides that any person who has a statutory right under any other legislation to use CRAR, is to be treated as “the landlord” for the purposes of CRAR.

Section 74: Lease

364. This section defines the term “lease”. A lease means any lease that may exist in law or in equity. This section makes it clear that a “lease” includes a tenancy at will, but does not include a tenancy at sufferance. So, for the purposes of CRAR, a “lease” includes all forms of lease, including long leases, short tenancies, tenancies by estoppel and other equitable leases.
365. A lease must, however, be evidenced in writing. The intention is to ensure that CRAR can only be used in circumstances where the main terms of the lease (particularly the rent) are clear and certain to the parties concerned.

Section 75: Commercial premises

366. This section defines what is meant by “a lease of commercial premises”. A lease (lease A) will not be “a lease of commercial premises” if any part of the let premises is let under lease A (or let under any sublease B) as a dwelling, or occupied as a dwelling. So, for example, a lease of property comprising a shop and a flat will not be a lease of commercial premises if the flat is used, or is required by the lease to be used, as a dwelling. But if that lease does not impose any requirements as to the use of the flat, and the tenant chooses to use it either as a storeroom or office for the shop, then the lease will be one of commercial premises because no part of the demised premises is let or occupied as a dwelling.
367. This section makes it clear that any occupation as a dwelling will not count if it is in breach of the terms of lease A or any lease that is superior to lease A. Similarly if the property has been sublet then any sub-letting as a dwelling will not count if it is in breach of the terms of a lease that is superior to lease B. The purpose of these provisions is to ensure that a commercial tenant cannot seek to prevent his landlord from using CRAR against him by, for example, allowing a third party to occupy part of the premises as a dwelling. So the landlord can still use CRAR against his tenant in those circumstances, even though there are residential occupiers present. But the provisions are also designed to ensure that a landlord (who is himself a commercial tenant under lease A) cannot rely on his own breach of lease A to use CRAR against the tenants to whom he has sublet the property as a dwelling under lease B. So in those circumstances, the landlord cannot use CRAR because lease B will not be a lease of commercial premises.

Section 76: Rent

368. This section defines rent for the purposes of its recovery by CRAR, as the sum payable by the tenant for the possession and use of the premises under the lease, including any interest payable on that sum and any VAT chargeable on the sum or the interest.

369. Any amounts not directly attributable to the tenant's possession and use of the premises do not qualify e.g. council tax. This is the case even if the lease defines them as rent.
370. The rent may be merged with other sums so that it is payable as a combined figure, the individual figure not being known or able to be ascertained. In this situation, the rent will be considered to be that portion of the total sum as reasonably reflects the amount payable for the possession and use of the premises.
371. Rent which is payable under or by virtue of Part 2 of the [Landlord and Tenant Act 1954 \(c. 56\)](#) is deemed to be rent as defined by the section, and is therefore recoverable by CRAR. Part 2 of the 1954 Act gives security of tenure to business leases, so that they are not ended by the expiry of the contractual term, but continue until terminated in accordance with the provisions of Part 2.
372. The definition of rent given by this section, however, is not congruent with the meaning of rent at section 71 (abolition of common law right) because section 71 relates to a wider range of rents for which the right to the old remedy of distress for rent exists. For that reason, the interpretation of "rent" in this section does not apply to section 71 (see section 87). The definition also does not apply to section 85 which defines "rent" for its own purposes.

Section 77: The rent recoverable

373. This section sets out the conditions that must be met for the right to CRAR to become exercisable. The conditions are:
- the tenant is in arrears of rent before notice of enforcement is given;
 - the amount of the arrears owed by the tenant is certain, or capable of being calculated with certainty; and
 - the "net unpaid rent" equals or exceeds a set amount to be prescribed in regulations.
374. The requirement that the net unpaid rent must equal or exceed the prescribed minimum is a condition that must be satisfied at two stages: first, before the landlord gives notice of enforcement and, second, before he takes control of goods under Schedule 12. This means that the landlord will need to recalculate the "net unpaid rent" immediately before he takes control of goods. If the recalculated figure is lower than the prescribed minimum, it will not be permissible for the landlord to proceed to take control of goods.
375. The "net unpaid rent" is the amount of unpaid rent less any interest or VAT that may be payable on that amount and less any "permitted deductions". Permitted deductions from rent are deductions that a tenant is presently entitled to make from his rent under statute, at common law and in equity. Examples include sums that may be deducted or recouped from, or set off against, rent:
- under the terms of the lease;
 - in respect of damages for the landlord's breach of his obligations to repair (or the cost of repairs, if carried out at the tenant's expense);
 - in respect of damages for the landlord's breach of the covenant of quiet enjoyment;
 - in respect of statutory compensation for improvements under section 11(2) of the Landlord and Tenant Act 1954.
376. The amount of rent that a landlord is entitled to recover by CRAR is the amount of unpaid rent less any permitted deductions that the tenant is entitled to make against that rent.

Section 78: Intervention of the court

377. This section sets out the powers of the High Court or a county court, as rules of court may provide, to intervene in the exercise of CRAR. The court's power arises only where the following conditions are met: firstly, notice of enforcement has been served on the tenant; secondly, the tenant has made an application to the court to intervene; and thirdly, the court is satisfied that the circumstances meet the prescribed grounds for intervening.
378. The court then has two options available to it. It may make an order to set aside the notice of enforcement, which effectively cancels that notice and prevents the landlord from taking any further steps under CRAR in relation to that notice. This would occur, for example, if the court considered that the preconditions for exercising CRAR had not been met.
379. Alternatively, the court may suspend the use of CRAR, by making an order that no further steps may be taken in exercise of CRAR without further order by the court. This might occur, for example, if there is a genuine dispute about the amount of rent in arrears or the calculation of the net unpaid rent. In those circumstances, the court may suspend the use of CRAR until that dispute is resolved.

Section 79: Use of CRAR after end of lease

380. This section deals with the use of CRAR after a lease has ended. The provisions of this section are intended broadly to reflect the current law governing the availability of distress for rent after a lease has ended. Subsection (1) sets out the general rule that, when the lease ends, CRAR will cease to be available. But that is subject to two exceptions.
381. The first exception is set out in subsection (2). This ensures that a landlord who has taken control of goods under CRAR before the lease comes to an end (or under the second exception, below), is not prevented from completing the process by selling those goods.
382. The second exception is set out in subsections (3) and (4) and this is intended to preserve the effect of sections 6 and 7 of the Landlord and Tenant Act 1709 after those provisions are repealed by this Act (see Schedule 14). This exception applies where the tenant remains in occupation after the lease comes to an end. It allows the landlord to use CRAR for no more than six months after the lease has come to an end, provided that the lease was not ended by forfeiture, the landlord and tenant remain the same and, if a new lease has been granted to the tenant, it must be a lease of commercial premises. For this purpose it does not matter whether the new lease of commercial premises is in writing or not because the section only permits the landlord to recover rent due under the expired lease of commercial premises, which must be in writing.
383. Subsection (7) defines when a lease ends for the purposes of this section.

Section 80: Agricultural holdings

384. This section makes a couple of special provisions in relation to the exercise of CRAR where the let premises is an agricultural holding. It is intended to preserve the effect of sections 16 and 17 of the Agricultural Holdings Act 1986 for the purposes of CRAR. (Sections 16 to 19 of that Act will be repealed by this Act; see Schedule 14).
385. First, there is a limitation on the rent that can be recovered by a landlord of an agricultural holding because CRAR cannot be used to recover rent that became due more than one year before the notice of enforcement is given. Second, any compensation that is due to the tenant under the Agricultural Holdings Act 1986 will be a "permitted deduction" for the purposes of CRAR, provided that the amount of compensation has been ascertained (for the meaning of "permitted deductions", see section 77(7)).

Section 81: Right to rent from sub-tenant

386. This section makes provision for a landlord who is entitled to use CRAR against his immediate tenant to instead serve a notice on any sub-tenant requiring that sub-tenant to pay his rent directly to him, instead of paying it to his own landlord in the usual way. Its purpose is to allow the landlord to recover, from a sub-tenant, arrears of rent that are due to him from the immediate tenant.
387. The section is intended to preserve the effect of sections 3 and 6 of the Law of Distress Amendment Act 1908 (which will be repealed by this Act, see Schedule 14) in a form that is consistent with the other provisions of CRAR.
388. Where a notice is given to a sub-tenant under this section, it must set out the amount of the arrears owed to the landlord (the superior landlord) by the immediate tenant. The notice must also require the sub-tenant to pay his rent directly to the superior landlord instead of paying it to his own landlord, until the amount of arrears specified in the notice have been paid off, or rent ceases to be payable by the sub-tenant (for example, if he moves on), or the notice is replaced or withdrawn by the superior landlord.
389. Subsection (5) enables regulations to determine when a notice given by the landlord on a sub-tenant under this section takes effect.
390. For as long as the notice has effect, the superior landlord will effectively stand in place of the sub-tenant's landlord for the purpose of recovering, receiving or discharging any rent payable by the sub-tenant under the notice, but only for that purpose. This means that the superior landlord can recover from the sub-tenant the amount stated in the notice by using CRAR. But the superior landlord cannot recover that sum from the sub-tenant by serving another section 81 notice on an inferior sub-tenant (see section 84).
391. The superior landlord may serve more than one notice under this section, but any later notice replaces an earlier one and where the landlord serves a later notice on a different sub-tenant he must withdraw the earlier one (see section 83). This ensures that only one notice has effect at any one time.

Section 82: Off-setting payments under a notice

392. This section applies where a landlord has given notice to a sub-tenant under section 81.
393. Any sums that the sub-tenant pays under the notice to the superior landlord will be deductible from the amount of rent he would otherwise have had to pay to his own landlord. So, if the sub-tenant is required to pay £250 a month to the superior landlord under a notice (i.e., until the stated arrears are paid off), then he is entitled to deduct £250 a month from his own rent for as long as he is required to continue making payments under that notice. If there is a hierarchy of sub-leases and the landlord serves notice on an inferior sub-tenant, then this diversion of rent may be passed up the hierarchy of superior sub-tenants until ultimately it is deducted from rent payable to the (defaulting) immediate tenant. For example, where the notice is served on sub-tenant C, he may deduct any sums paid to the superior landlord from rent due to his own landlord (sub-tenant B). Sub-tenant B may then deduct an equivalent amount from his landlord (sub-tenant A) and sub-tenant A may deduct an equivalent amount from his landlord (the immediate tenant).
394. Payments under a section 81 notice will continue to be deductible from rent in this way, even after the arrears stated in the notice have been paid or the notice has been replaced by one served on another sub-tenant, unless the sub-tenant is aware of those facts. So a payment under a section 81 notice will not be deductible from rent if, at the time it is made:
- the landlord has already withdrawn the notice;

- the paying sub-tenant has already made payments under the notice that total an amount at least equal to the arrears stated in that notice;
 - the paying sub-tenant knows that the arrears stated in the notice have already been paid off by some other means (e.g., by the immediate tenant).
395. Similarly, part of a payment under a section 81 notice will not be deductible from rent if, at the time it was made, that part of the payment, when added together with earlier payments made by the sub-tenant, at least equal the arrears stated in the notice.

Section 83: Withdrawal and replacement of notices

396. If a landlord gives a section 81 notice to a sub-tenant, but subsequently gives another section 81 notice to the same or another sub-tenant for the same amount of arrears (or an amount including all or part of it) then the later notice will automatically replace the earlier notice. This ensures that, for any amount of arrears, there is no more than one notice in force at any one time. (There is an exception to this rule as explained in the next paragraph).
397. There may be cases where, for instance, a landlord (A) lets premises to tenant (B) and tenant (B) geographically divides the premises by letting, say, the ground floor to sub-tenant (C) and the first floor to sub-tenant (D). The rent owed to B in respect of the premises is, therefore, shared between C and D. Under the provisions of this section, were B to default on rent owed to A, A will be able to serve notices on both C and D since they are not inferior or superior to one another (see subsection 83(2)(b)) in the hierarchy of tenancies. However, in the scenario described above, if C and D were superior or inferior to one another in the hierarchy of sub-tenancies, A would have to decide whether to serve a notice either on C or on D but not on both of them.
398. A section 81 notice will cease to have effect when the amount of arrears stated in the notice has been paid off, or when the notice is replaced by a subsequent notice (see section 81). A paying sub-tenant will always know that a section 81 notice has ceased to have effect when he himself pays an amount equal to the stated amount of arrears. But he may not necessarily know, for example, that the immediate tenant has paid off the arrears, or that the landlord has served a replacement notice on another sub-tenant. For that reason, this section requires the landlord to withdraw a section 81 notice when that notice is replaced by another one, and when the amount in arrears is paid (unless it is paid wholly by the paying sub-tenant). This will ensure that the paying sub-tenant is fully informed about the status of the notice that has been given to him.

Section 84: Recovery of sums due and overpayments

399. Subsections (1) and (2) deal with the recovery of sums due from a sub-tenant under a section 81 notice. If a notice has been given to a sub-tenant, but that sub-tenant fails to pay the amount of arrears stated in the notice, then the superior landlord can recover that amount from him and he may use CRAR to do so. But the superior landlord cannot recover that sum from the paying sub-tenant by giving another section 81 notice to an inferior sub-tenant (see section 84).
400. Subsections (3) and (4) deal with overpayments to the superior landlord under a section 81 notice which has ceased to have effect, for example, because the stated amount of arrears have been paid off or the landlord has given a replacement notice. These provisions ensure that any amount paid to the superior landlord under a section 81 notice will always count as if it were rent paid by the defaulting tenant (the immediate tenant). So any payment towards the stated amount of arrears will reduce those arrears and any overpayment (i.e. in excess of the stated amount of arrears) will constitute a credit against future rent due from the immediate tenant. If the immediate tenant has moved on, such that no future rent is due from him, then any overpayment under the notice will be treated as if it had been paid by him by mistake so that he may recover

that payment from the superior landlord. But this does not affect any claim that the paying sub-tenant may have under the general law to recover or set-off the amount that he overpaid.

Section 85: Contracts for similar rights to be void

401. This section ensures that any contractual provision which gives a landlord a power to recover rent (or other similar types of payment) by taking control of, or selling, goods or which modifies a landlord's right to commercial rent arrears recovery (CRAR), will be void, i.e., have no legal effect. A contractual provision that seeks to do any of these things will accordingly be unenforceable. But contracts will be valid and enforceable to the extent that they prevent or restrict the use of CRAR. For example, a contract may provide that:

- the landlord may not use CRAR to recover arrears of rent under the lease, whether during a particular period or at all; or
- he may use CRAR, but if he does so he may not take control of certain goods (which he would otherwise be entitled to take control of under paragraphs 3(1) and 9 of Schedule 12).

402. This section is accordingly intended to prevent a landlord from making contracts to enlarge his power to take control of goods by CRAR or side-step the abolition of rent distress. For example, it will prevent a landlord from including any of the following provisions in a contract:

- a provision that gives a power to distrain for rent arrears, e.g., in relation to a lease of residential premises;
- a provision that extends the right to use CRAR, e.g. in relation to payments that are not 'rent' for the purposes of CRAR;
- a provision that modifies the procedures applying to CRAR, e.g. by dispensing with the need to give an enforcement notice.

Section 86: Amendments

403. This section introduces the minor and consequential amendments relating to this Chapter that are contained in Schedule 14. These include amendments to abolish statutory powers to distrain for rentcharges (conferred by, for example, section 121(2) of the Law of Property Act 1925).

404. It is not considered necessary to make any amendment to the Lodgers' Goods Protection Act 1871. Although there has been some doubt as to the extent of its repeal under section 8 of the Law of Distress Amendment 1908, it is considered that the Act is now wholly repealed by virtue of that enactment and section 132 of, and Schedule 6 to, the Judgements (Enforcement) Act (Northern Ireland) 1969. In any event, if not wholly repealed, the Lodgers' Goods Protection Act 1871 would now be superseded by the abolition of the common law to distrain for rent arrears under section 71.

Section 88: Abolition of Crown preference

405. This section abolishes the rule that distraint for debts owed to the Crown takes priority over enforcement of other debts by seizure and sale of goods. This builds upon previous similar changes abolishing priority being given to debts owed to the Crown above other debts in matters of bankruptcy and insolvency.

Section 89: Application to the Crown

406. This section provides that Part 3 of the Act applies to the Crown (so that the Crown is able to recover debts due to it by using the new procedure under Part 3, and may not

*These notes refer to the Tribunals, Courts and Enforcement Act
2007 (c.15) which received Royal Assent on 19th July 2007*

use the old law of distress where Part 3 abolishes it) but that the enforcement powers created by Part 3 cannot be used to recover debts due from the Crown, to take control of or sell Crown goods or to enter premises which the Crown occupies.

Section 90: Regulations

407. This section contains definitions for “prescribed” and “regulations”, under which powers to make regulations under Part 3 are exercisable by the Lord Chancellor. It sets out the parliamentary scrutiny applying to regulations under this Part, and provides for the power to make regulations to include power to make supplementary, consequential or transitional provision. Parliamentary scrutiny will be by way of the negative resolution procedure, other than for those powers contained at paragraphs 24(2) and 31(5) of Schedule 12, which will be by way of the affirmative resolution procedure.