

EXPLANATORY STATEMENT

Fair Work (Norfolk Island) Rule 2016

Issued by the authority of the Minister for Employment

The *Fair Work Act 2009* (Cth) (Fair Work Act) and the *Fair Work Regulations 2009* (Fair Work Regulations) provide the legislative framework underpinning the national workplace relations system, which covers the majority of Australian workplaces.

Before 1 July 2016, the Fair Work Act and Fair Work Regulations did not apply to employers and employees on Norfolk Island. The *Territories Legislation Amendment Act 2016* (Cth) (Territories Act) and associated Rules make Norfolk Island a non-self-governing territory of Australia and extend relevant Commonwealth legislation to Norfolk Island. Accordingly, the Territories Act extends the Fair Work Act to Norfolk Island on 1 July 2016. The Territories Act also inserts a rule-making power into the Fair Work Act (new section 32A) on 1 July 2016. New section 32A enables the Minister for Employment (the Minister), by legislative instrument, to prescribe modifications of the Fair Work Act and the Fair Work Regulations for their application in relation to Norfolk Island.

The *Fair Work (Norfolk Island) Rule 2016* (the Rule) prescribes appropriate transitional arrangements to allow Norfolk Island employers and employees to transition to the national workplace relations system. The Rule takes effect on 1 July 2016.

These measures in the Rule include:

- increasing minimum wages for Norfolk Island award/agreement free employees to the national level through a stepped transition by:
 - increasing the minimum wage to 85% of the national minimum wage or applicable special minimum wage on 1 July 2016; and
 - increasing the minimum wage to 100% of the national minimum wage or applicable special minimum wage on 1 July 2017;
- modern awards will apply on Norfolk Island from 1 July 2018 (but can cover employers and employees and organisations from 1 July 2016);
- Norfolk Island employees will retain accrued (but unused) entitlements as at 1 July 2016, including “annual holidays” and “sick leave” accrued under the *Employment Act 1988* (NI) (Employment Act);
- the minimum period of notice of termination or payment in lieu of notice will commence from 1 July 2016. Service on Norfolk Island before 1 July 2016 is not counted as service for this provision;
- redundancy pay entitlement will commence from 1 July 2016. Service before 1 July 2016 is not counted as service for this provision, unless employees had an entitlement under their terms and conditions of employment;
- prior service before 1 July 2016 will be recognised for the minimum employment period for the protection from unfair dismissal;
- existing Norfolk Island employment contracts under the Employment Act, enterprise agreements under the *Public Service Act 2014* (NI) (Public Service Act) and public sector wage determinations under the *Public Sector Remuneration Tribunal Act 1992* (NI)

(Public Sector Remuneration Act) will continue as “transitional NI instruments” under the Fair Work Act until 1 July 2018 (unless terminated prior to that time):

- the Fair Work Commission (FWC) will have powers to vary or terminate transitional NI instruments in limited specified circumstances;
- the FWC will have the power to make on application a “take-home pay order” from 1 July 2018 to ensure that the transition to the modern awards framework does not result in a Norfolk Island employee having a reduction in their pay;
- employees and employers will be able to make enterprise agreements from 1 July 2016. In determining whether a proposed agreement would result in employees being better off overall compared with a relevant modern award, the FWC will consider the modern award that covers the employees;
- the Fair Work Ombudsman (FWO) will be able to publish alternate or supplementary information to the Fair Work Information Statement, to assist Norfolk Island employers and employees understand the modified application of the Fair Work Act;
- references to terms in the Fair Work Act that are defined in the *Corporations Act 2001* (Cth) (Commonwealth Corporations Act) will be read as if that Act extends to Norfolk Island on 1 July 2016:
 - the Commonwealth Corporations Act will not extend to Norfolk Island on 1 July 2016. Rather, the *Companies Act 1985* (NI) (Norfolk Companies Act) will continue to apply on Norfolk Island on 1 July 2016; and
- the definition of ‘national system employer’ (and the corresponding meaning of ‘national system employee’) will exclude the NSW Government and its public sector employees working on Norfolk Island.

As new section 32A does not commence until 1 July 2016, this instrument relies on section 4 of the *Acts Interpretation Act 1901* (Cth) (AIA) (as in force on 25 June 2009 in accordance with section 40A of the Fair Work Act) to enable a legislative instrument to be made so that it is operational on 1 July 2016. Section 4 provides that the legislative instrument-making power may be exercised before 1 July 2016 for the purposes of bringing the instrument into effect.

Details of the Rule are provided at [Attachment A](#).

A Statement of Compatibility with Human Rights has been completed for the Rule, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). The Statement’s assessment is that the measures in the Rule are compatible with human rights. A copy of the Statement is at [Attachment B](#).

The Rule is a legislative instrument for the purpose of the *Legislation Act 2003* (Cth).

Consultations took place with the Norfolk Island Administration and community in August 2015 and April 2016. The phased approach set out in the Rule reflects the preferences of the Norfolk Island community, particularly the need to allow sufficient time for employers and employees to transition to the new arrangements.

The Minister for Employment also consulted with the States and Territories under the Intergovernmental Agreement for a National Workplace Relations System for the Private Sector.

Details of the *Fair Work (Norfolk Island) Rule 2016*

Section 1 – Name of instrument

This section sets out the name of the Rule as the *Fair Work (Norfolk Island) Rule 2016*.

Section 2 – Commencement

This section provides that the instrument commences on 1 July 2016. This is the day that the Fair Work Act will extend to Norfolk Island, by virtue of the Territories Act.

Section 3 – Authority

This section provides that the instrument is made under section 32A of the Fair Work Act. As new section 32A does not commence until 1 July 2016, this instrument relies on section 4 of the AIA (as in force on 25 June 2009 in accordance with section 40A of the Fair Work Act) to enable a legislative instrument to be made so that it is operational on 1 July 2016. Section 4 provides that the legislative instrument-making power may be exercised before 1 July 2016 for the purposes of bringing the instrument into effect.

Section 4 – Prescribed modifications of the Fair Work legislation for its application in relation to Norfolk Island

This section prescribes the modifications to the Fair Work Act and the Fair Work Regulations in relation to Norfolk Island, as per the applicable items of the Schedules to the Rule.

Schedule 1 – Ongoing modifications of the Fair Work Act 2009 relating to Norfolk Island

Fair Work Act 2009

Schedule 1 makes a number of ongoing modifications to the Fair Work Act relating to Norfolk Island.

Item 1 – Section 12 (after paragraph (ca) of the definition of *eligible State or Territory court*)

Item 2 – Section 12

Item 3 – Section 12 (definition of *reduction in take-home pay*)

Item 4 – Section 12 (definition of *take-home pay*)

Item 5 – Section 12 (definition of *take-home pay order*)

The Fair Work Act confers a number of functions on an *eligible State or Territory court*. Item 1 modifies the definition in relation to Norfolk Island, to insert a new paragraph (cb) into the definition. This will enable the Court of Petty Sessions of Norfolk Island to exercise functions conferred on such courts.

Item 2 modifies section 12 of the Fair Work Act to introduce a definition of *Norfolk Island employment*. The definition relates to employment of an employee in connection with an activity carried on in Norfolk Island. The definition has limited application and is not intended to relate

to activities undertaken in another state or territory jurisdiction (such as in New South Wales), for the benefit of Norfolk Island. This definition is a key concept used in this Rule.

Items 3, 4 and 5 further modify section 12 of the Fair Work Act by expanding the definitions of *reduction in take-home pay*, *take-home pay*, and *take-home pay order*, respectively, to incorporate a definition relating to *Norfolk Island employment*. These definitions are relevant to the effect of amendments to Part 2-3 below.

Item 6 – At the end of section 14

This item modifies section 14 by inserting new subsections 14(8) and (9) into the Fair Work Act. Subsection 14(8) provides that an employer, within the meaning of the *Industrial Relations Act 1996* (NSW), is not a national system employer merely because they employ, or usually employ, a public sector employee within the meaning of that Act, in connection with an activity carried on in Norfolk Island. This new subsection will ensure that the NSW Government and its public sector employees working on Norfolk Island are not covered by the Fair Work Act, despite the operation of paragraph 14(1)(f) of the Fair Work Act.

The *Industrial Relations Act 1996* (NSW) currently defines a public sector employee as including ‘an employee of a public authority and a member of the Public Service, the NSW Police Force, the NSW Health Service or the Teaching Service.’

To avoid doubt, new subsection 14(9) of the Fair Work Act makes clear that new subsection 14(8) does not prevent certain employers from being national system employers – that is, the Norfolk Island Regional Council and any body established for a public purpose by or under a law in force in Norfolk Island (other than under a New South Wales law which is an applied law under section 18A the *Norfolk Island Act 1979*).

Item 7 – At the end of Division 4 of Part 1-2

A number of provisions of the Fair Work Act cross-refer to concepts in the *Corporations Act 2001* (Cth) (Corporations Act). For example, the *associated entity*, *franchise* and *related body corporate* definitions in section 12 of the Fair Work Act. The operation of the Corporations Act, with the exception of Chapter 5, will not extend to Norfolk Island on 1 July 2016.

This item amends the Fair Work Act through the inclusion of section 23B which provides for terms within the Fair Work Act that are defined by reference to their meaning in the Corporations Act, to continue to be defined in that way in relation to Norfolk Island employment.

Item 8 – At the end of Part 2-2

Part 2-2 of the Fair Work Act provides for the National Employment Standards (NES). This item amends Part 2-2 in relation to Norfolk Island employment to insert a new Division 14.

Division 14 – Operation of the National Employment Standards in relation to Norfolk Island employment

Subdivision A – What service counts for entitlements

Section 131A - Counting service before 1 July 2016 for non-accruing entitlements

This section provides that generally an employee's service with a Norfolk Island employer prior to 1 July 2016 will count as service when that employee's entitlements are calculated under the NES. However, this period will not count as service in relation to the accrual of paid annual leave, paid personal/carer's leave, or the calculation of the period of notice of termination or payment in lieu of notice. These entitlements are addressed separately below.

This section also provides that if, prior to 1 July 2016, an employee has already received an entitlement that was calculated by reference to a period of service, the employee cannot have this period used again for the calculation of the same type of entitlement under the NES. This is to prevent an employment receiving the benefit of an entitlement twice in relation to the same period of service.

Finally, this section provides that subsection 131A(1) does not apply in relation to the entitlement to redundancy pay if the employee was not entitled to receive redundancy pay under the terms and conditions of their employment immediately prior to 1 July 2016. The entitlement to redundancy pay under the NES can be found in Subdivision B of Division 11 of the Fair Work Act. This is to prevent an employer incurring on 1 July 2016 a contingent liability to pay redundancy pay to an employee based on service prior to that date when they have not previously been required to make provision for any such entitlement.

Section 131B - Counting service only on or after 1 July 2016 for accrual of certain entitlements under the National Employment Standards

This section provides that in relation to paid annual leave, paid personal/carer's leave and the calculation of the period of notice of termination or payment in lieu of notice under the NES, a Norfolk Island employee will only accrue these entitlements under the NES based on service on or after 1 July 2016.

Subsection 131B(2) provides that paragraphs 131B(1)(a) and (b) will not limit any provision of Subdivision B of these rules (which deals with leave accrued and started before 1 July 2016).

Section 19 of the Employment Act provides that an employer must (subject to specified exceptions) provide 7 days' notice of termination, or pay the employee wages and entitlements accrued (and if applicable the value of board and lodging) during the week up to the last day, being the employee's date of termination. If an employee does not provide 7 days' notice of resignation, the employer can withhold an amount for those wages and entitlements attributable to the final week up to termination.

Accordingly this section does not result in a Norfolk Island employee having an entitlement to a lesser period of notice of termination after 1 July 2016 than they had before 1 July 2016. Under section 117 of the Fair Work Act the minimum notice period is 1 week (for employees with less than 1 year of continuous service). After a year of continuous service the minimum notice period increases under the Fair Work Act.

The Employment Act does not provide a right to redundancy pay.

Subsection 131B(3) provides that only service by a Norfolk Island employee on or after 1 July 2016 will count towards the calculation of the employee's entitlement to redundancy pay

under the NES. Subsection 131B(4) however qualifies this to provide that if the employee's terms and conditions contained a right to redundancy immediately before 1 July 2016, then the employee's entire period of service can be used in the calculation of the entitlement to redundancy pay under the NES.

Subdivision B – Leave accrued or started before 1 July 2016

Section 131C - Paid annual leave accrued immediately before 1 July 2016

Section 15 of the Employment Act provides employees that have continuously served an employer during the preceding year with 3 weeks of paid "annual holiday" leave, based on their ordinary hours of work.

Subsection 131C(1) provides that paid annual leave that was accrued by a Norfolk Island employee before 1 July 2016 in relation to employment that continued after that day (and that had not been taken or cashed out prior to 1 July 2016) will be treated as if it had accrued under the NES. As such the provisions of the NES will apply as a minimum standard in relation to that annual leave. This section preserves only accrued but 'unused' entitlements ensuring there is not a "double dip" of the entitlement.

For clarity, if a common law contract or industrial instrument provides for greater entitlements than 3 weeks annual holidays, the accrued leave will be treated in the same way as the leave accrued under the Employment Act.

To ensure that Norfolk Island employees whose year of employment commences on a date after 30 June 2015 (including employees who commence new employment) are not disadvantaged, the employee will be taken to have accrued annual leave in accordance with the formula provided in subsections 131C(2) and (3). The employee will receive the benefit of the pro-rata portion of the year of service. The period for the calculation of this annual leave will commence from either the employee's most recent anniversary of the commencement of their employment or, if the employment started on or after 1 July 2015, the day the employee commenced employment. The period will end at the end of 30 June 2016.

Subsection 131C(4) provides that if before 1 July 2016 an employer had paid the employee the full entitlement for a period of annual leave, the NES do not apply to require the employer to pay for that leave. This provision ensures that an employee cannot "double dip" and receive payment twice for a period of annual leave.

Section 131D - Paid personal/carer's leave accrued immediately before 1 July 2016

Section 17 of the Employment Act provides employees with sick leave, which accrues at 1/50th of the sum of the period worked by the employee during the period of employment.

Section 131D provides that leave that was accrued by a Norfolk Island employee before 1 July 2016 and that was available for absence from work for ill health, or for purposes described in paragraph 97(a) or (b) of the Fair Work Act in relation to employment that continued after that day (and that had not been taken or cashed out prior to 1 July 2016) will be treated as if it had accrued under the NES. As such the provisions of the NES relating to taking or cashing out paid personal/carer's leave will apply as a minimum standard in relation to that leave.

For clarity, if a common law contract or industrial instrument provides for greater entitlements than under the Employment Act, the accrued leave will be treated in the same way as the leave accrued under the Employment Act.

Section 131E - Continuation of leave started before 1 July 2016

This section provides that if, immediately before 1 July 2016, a Norfolk Island employee is taking a period of leave where there is an equivalent type of leave under the NES, the employee can continue on leave of that equivalent type for the remainder of their period of leave.

This section also provides that for a Norfolk Island employee who continues on leave in the way allowed by subsection 131E(1), the employee is able to make adjustments to that leave in accordance with the NES. As such, the employee is able to adjust the amount of leave to be taken, the time at which it will be taken and any arrangements for its taking.

This section further provides that a Norfolk Island employee may, on or after 1 July 2016, be absent from their employment for community service leave under the NES. This includes situations where the period of absence began prior to 1 July 2016.

Subsection 111(5) of the Fair Work Act provides that an employer is required to pay an employee for the first 10 days of leave taken for jury service under the NES. For the purposes of applying subsection 111(5) in relation to Norfolk Island employees on a period of community service leave as described in subsection 131E(3), the reference to the first 10 days in subsection 111(5) will be taken to be a reference to the first 10 days of absence on or after 1 July 2016.

Section 131F - Continuation of steps taken before 1 July 2016 for leave on or after that day

Subsection 131F(1) provides that if prior to 1 July 2016 a Norfolk Island employee has taken a step required of them to take leave on or after 1 July 2016, and there is an equivalent type of leave under the NES, and there is a requirement to complete an equivalent step under the NES in relation to that equivalent type of leave, then the employee will be considered to have already taken the step under the NES.

Subsection 131F(2) provides that if an employee is considered to have taken a step under subsection 131F(1), the employee may adjust the step consistently with the provisions of the NES in relation to the equivalent type of leave.

Subsections 131F(3) and (4) have equivalent provisions to subsections 131F(1) and (2) recognising steps taken by employers so that employees can take leave.

Subdivision C – Application of National Employment Standards about notice of termination and redundancy pay

Section 131G – Application of National Employment Standards about notice of termination

Subsection 131G(1) provides that the NES notice of termination provisions (Subdivision A of Division 11) apply only to terminations of employment occurring on or after 1 July 2016. Subsection 131G(2) limits the operation of subsection 131G(1) to provide that the NES notice of

termination provisions also do not apply if notice of the termination was given before 1 July 2016.

This means that if an employee's employment is terminated, or the employee is given notice of termination of their employment prior to 1 July 2016 (even if the actual date of termination falls after 1 July 2016), the employer is not required to provide notice under the NES.

Section 131H – Application of National Employment Standards about redundancy pay

Section 131H provides that the entitlement to redundancy pay under the NES (Subdivision B of Division 11) applies to terminations of employment due to an employee's position being made redundant that occur on or after 1 July 2016, even if notice of termination was given before that date. This means that even where an employee is given notice of termination under the Employment Act prior to 1 July 2016, an employer may still be liable to pay redundancy pay (to an eligible employee) under the NES if the date of termination falls on or after 1 July 2016.

To aid the reader, a note explains that this Subdivision C may be affected by the operation of section 131A which deals with service (see above).

Subdivision D – Transfers of employment occurring before 1 July 2016

Section 131J – Treatment of transfers of employment occurring before 1 July 2016 for later operation of National Employment Standards

The purpose of section 131J is to make clear that references to 'transfer of employment' in the NES and in subsections 22(5) and (6) do not include an employee becoming employed by a second employer in Norfolk Island before 1 July 2016. This is because neither the first or second employer in Norfolk Island would have been a national system employer for the purposes of the Fair Work Act before 1 July 2016.

Item 9 – At the end of Part 2-3

This item modifies Part 2-3 of the Fair Work Act to insert new Divisions 9 and 10.

As set out in the explanatory notes to item 6 of Schedule 2 below, minimum pay rates for Norfolk Island employees will be phased in progressively from 1 July 2016. This includes:

- increasing Norfolk Island minimum wages to 85% of the national minimum wage or applicable special minimum wage for Norfolk Island award/agreement free employees will apply from 1 July 2016;
- increasing Norfolk Island minimum wages to 100% of the national minimum wage or applicable special minimum wage for Norfolk Island award/agreement free employees will apply from 1 July 2017; and
- modern award minimum wages (and the modern award framework more generally) will apply from 1 July 2018.

Generally speaking, the transition to the Fair Work Act is expected to see employees better off. However, it is possible that some Norfolk Island employees' take home pay under their existing transitional NI instrument may be less than that provided by the relevant modern award when it starts to apply.

Division 9 – Avoiding reductions in take-home pay from modern awards applying to Norfolk Island employment

Section 168M – Application of modern awards to Norfolk Island employment not intended to reduce take-home pay

This item modifies Part 2-3 of the Fair Work Act in relation to Norfolk Island, to insert a new Division 9. This Division provides a mechanism for avoiding reductions in take-home pay as a result of modern awards applying in Norfolk Island. This Division provides for remedial orders (take-home pay orders) and is modeled on Part 3 of Schedule 5 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (TPCA Act), which provided for take-home pay orders in the transition to modern awards under the *Workplace Relations Act 1996*. The scope for take-home pay orders is tightly constrained.

Subsection 168M(1) provides that the transition to the application of modern awards on Norfolk Island on 1 July 2018 is not intended to result in an employee who is subject to a transitional NI instrument suffering a reduction in take-home pay.

The mechanism in new Division 9 is not intended to allow the FWC to review entitlements in modern awards generally. Rather, the intention is to allow the FWC to deal with cases in which an employee suffers a reduction in take-home pay, for working the same hours or performing the same quantity of work, as a result of the application of modern awards on Norfolk Island.

Subsection 168M(2) provides that an employee's *take-home pay* refers to the pay comprising wages, incentive-based payments, and additional amount such as allowances and overtime. Any permitted deductions made under section 324 of the Fair Work Act (such as might occur under a salary sacrifice arrangement) are to be disregarded in coming to that pay figure.

Subsection 168M(3) provides that *a reduction in take-home pay* for an employee can only occur if each of the following requirements is met:

- on 30 June 2018 a transitional NI instrument applies to the employee under Schedule 1A;
- from 1 July 2018 a modern award applies to the employee;
- from 1 July 2018 the employee is employed in the same or comparable position as immediately before 30 June 2018:
 - this makes clear that take-home pay orders are not intended when a person changes jobs, or where working arrangements change;
- the amount of the employee's take-home pay for working particular hours, or producing a quantity of work is less on 1 July 2018 than it would have been immediately before 1 July 2018; and
- the reduction in the employee's take-home pay is attributable to the termination of the transitional NI instrument and the application of the modern award.

For clarity, the take-home pay mechanism does not apply during the period of 1 July 2016 until 30 June 2018. The reason for this is because transitional NI instruments will continue under Schedule 1A during that period, and modern awards will not apply.

Section 168N – Orders remedying reductions in take-home pay

Section 168N will enable the FWC to make a take-home pay order it considers appropriate where a modern award applies and there is a reduction in take-home pay. This can be to an

employee, or class of employees. A take-home pay order will be for the payment of an amount of money.

An employee, an organization representing an employee, or a person acting on behalf of a class of employees will be able to make an application for a take-home pay order (subsection 168N(2)).

The FWC will be able to dismiss an application for a take-home pay order that has already been made relating to the same employee or class of employees (subsection 168N(3)).

Section 168P – Ensuring that take-home pay orders are confined to the circumstances for which they are needed

Section 168P is intended to ensure that take-home pay orders are only ordered where required. The FWC must decline to make an order where it considers a reduction in take-home pay is minor or insignificant.

The FWC must also decline to make an order where it is satisfied that the employee is compensated in other ways. For example, the FWC may consider that an order is not warranted where an employee is compensated with significantly more beneficial annual leave entitlements than they previously enjoyed.

The FWC is required to ensure that a take-home pay order is expressly confined to an employee that has actually suffered a reduction of take-home pay (paragraph 168P(2)(a)).

The FWC is also required to ensure that a take-home pay order is expressed so that future increases in take home pay under modern awards (for example from FWC annual wage reviews) lead to a reduction in the amount payable under a take-home pay order (paragraph 168P(2)(b)). The take home pay order is intended to supplement the modern award until a point is reached where the take home pay of the employee under the modern award equals the take home pay of the modern award and the take home pay order at the time the take home pay order commenced to operate.

Section 168Q – Contravening a take-home pay order

Section 168Q provides that a person must not contravene a term of a take-home pay order that applies to that person.

There are two notes to this provision. The first notes that section 168Q is a civil remedy provision. The second notes that a civil penalty cannot be imposed for contravention of a term of a take-home pay order. (This is consistent with paragraph 32A(2)(a) of the Fair Work Act that provides that the rules may not create an offence or civil penalty). The reader is referred to sections 545 and 546, which provide for orders that can be made regarding contraventions of civil remedy provisions, and which have been modified to prevent civil penalties from being applied to a contravention of a take home pay order.

Section 168R – Take-home pay order continues to have effect so long as modern award continues to cover the employee or employees

Section 168R provides that a take-home pay order will continue for as long as a modern award covers the employee, or class of employees, even if an enterprise agreement starts to apply to the employee, or class of employee. This is intended to ensure that an employee can receive the benefit of a take-home pay order for as long as needed (i.e. until the take home pay of the employee equals the take home pay of the modern award and the take home pay order at the time the take home pay order commenced to operate. This is the effect of the combination of this section, paragraph 168P(2)(b) and section 168R.

Section 168S – Inconsistency between enterprise agreements and take-home pay orders and modern awards

Section 168S provides that an enterprise agreement has no effect to the extent that it is less beneficial to an employee than the combination of a take-home pay order that applies to the employee and the relevant modern award.

Division 10 – Operation of modern awards made before 1 July 2016 in relation to Norfolk Island

Section 168T – References to Australia in modern awards made before 1 July 2016

Section 168T clarifies that references to *Australia* in a modern award made before 1 July 2016 have the same meaning as references to Australia in the Fair Work Act on and after that day. For example, where a modern award is expressed to cover employees in Australia this will include Norfolk Island employees on and after 1 July 2016, by virtue of the meaning of Australia that will be inserted into section 12 of the Fair Work Act under the Territories Act.

This new provision operates in respect of modern awards that are also modern enterprise awards or State reference public sector modern awards.

Item 10 – At the end of Division 2 of Part 2-7

Part 2-7 of the Fair Work Act enables the FWC to make equal remuneration orders.

This item modifies Part 2-7 in relation to Norfolk Island from 1 July 2016. New section 306A clarifies that references to *Australia* in an equal remuneration order made before 1 July 2016 have the same meaning as references to Australia in the Fair Work Act on and after that day. For example, where an equal remuneration order is expressed to cover specified employees in Australia this will include Norfolk Island employees on or after 1 July 2016, by virtue of the meaning of Australia that will be inserted into section 12 of the Fair Work Act under the Territories Act.

Item 11 - Subsection 539(2) (after table item 5)

Item 11 modifies the table at subsection 539(2) of the Fair Work Act in relation to Norfolk Island, to include the new civil remedy provision in respect of take-home pay orders (see Schedule 1, clause 168Q). This table identifies who has standing to apply for an order; the courts to which an application for an order may be made; and the maximum penalty that may be imposed by a court. No penalty can be applied by the court for contravention of clause 168Q, consistent with paragraph 32A(2)(a) of the rule making power. The definition of *eligible State or Territory court* will include the Court of Petty Sessions of Norfolk Island pursuant to Item 1.

Item 12 - After paragraph 541(3)(b)

Item 12 modifies subsection 541(3) with an additional paragraph (ba), so that inspectors can also apply to a court for an order in relation to a contravention of a term or provision of a take-home pay order.

Item 13 - After subsection 545(5)

Item 13 modifies section 545 of the Fair Work Act to include a provision that a court cannot make an order that amounts to a civil penalty that relates to a contravention of a take-home pay order. This is consistent with paragraph 32A(2)(a) of the Fair Work Act that provides that the rules may not create an offence or civil penalty.

Item 14 - After subsection 546(5)

Item 14 modifies section 546 of the Fair Work Act to include new subsection 546(6) that a court cannot make a pecuniary penalty order for a contravention of a take-home pay order. This is consistent with paragraph 32A(2)(a) of the Fair Work Act that provides that the rules may not create an offence or civil penalty.

This modification is separate from the modification of section 546 made by item 16 in Schedule 2 to this Rule. This is done for clarity because schedule 2 will be repealed at the start of 2 July 2018 (see Schedule 2, Part 2).

Schedule 2 – Transient modifications of the Fair Work legislation relating to Norfolk Island

Part 1 – Modifications

Fair Work Act 2009

Part 1 of Schedule 2 makes a number of transient modifications of the Fair Work Act and the Fair Work Regulations in relation to Norfolk Island.

Item 1 – Section 29 (heading)

Item 2 – Subsections 29(1), (2) and (3)

Item 3 – Subsection 29(3)

These items amend section 29 of the Fair Work Act to provide for the interaction between transitional NI instruments (as defined in Schedule 1A to the Act) with State and Territory laws.

Item 4 – After subsection 47(2)

This item inserts new subsections 47(2A) and (2B) after subsection 47(2) of the Fair Work Act. New subsection 47(2A) provides that a modern award does not apply to an employee employed, or usually employed, in Norfolk Island employment (or to an employer, or an employee organisation, in relation to the employee) in the period starting at the start of 1 July 2016 and ending at the end of 30 June 2018. Similarly, new subsection 47(2B) provides that a modern

award does not apply to an outworker entity in the period starting at the start of 1 July 2016 and ending at the end of 30 June 2018 in relation to an outworker performing work in Norfolk Island.

The effect of these new subsections is that, despite the Fair Work Act commencing operation in relation to Norfolk Island employment on 1 July 2016, a modern award does not give a person an entitlement or impose an obligation on a person, unless and until it starts to apply to the person at the start of 1 July 2018.

While a modern award does not start applying to an employee in Norfolk Island employment (or an employer, or an employee organisation, in relation to the employee) or to an outworker entity in relation to an outworker performing work in Norfolk Island until the start of 1 July 2018, the legislative notes to new subsections 47(2A) and (2B) make clear that a modern award can still cover the relevant employee or outworker entity during the period from 1 July 2016 to 30 June 2018. This means that a modern award can still cover those employees or outworker entities where:

- a NI transitional instrument covers and applies to the employee or outworker entity under Schedule 1A (which can only be until the end of 30 June 2018); or
- an enterprise agreement applies (on or from 1 July 2016).

A consequence of having a modern award cover but not apply to an employee, employer, employee organisation or outworker entity in relation to an outworker during the period from 1 July 2016 to 30 June 2018, is that the FWC can assess an enterprise agreement made during that period against the relevant modern award for the purposes of determining whether it passes the better off overall test, as described in section 193 of the Fair Work Act.

Item 5 – At the end of Division 12 of Part 2-2

Division 12 of Part 2-2 of the Fair Work Act relates to the Fair Work Information Statement. This item modifies the Division in relation to Norfolk Island, by inserting a new section 125A. This section provides that an employer in Norfolk Island is required to provide the Fair Work Information Statement to any new employee who commences employment on or after 1 July 2016. A Norfolk Island employer is not required to provide the Fair Work Information Statement to any employee who commences on or before 30 June 2016.

Subsection 125A(2) provides that the FWO can publish a special statement of information regarding the matters described in subsection 124(2) and any matters prescribed by the Fair Work Regulations pursuant to subsection (4) of the Fair Work Act in relation to Norfolk Island. If the FWO does publish such a special statement then subsection 125A(3) provides that this special statement is then to be provided to employees under section 125. This mechanism is complementary to the education and advice role the FWO is undertaking to assist Norfolk Island employers and employees understand their rights and obligations under the Fair Work Act.

Item 6 - At the end of Part 2-6

Part 2-6 of the Fair Work Act provides for minimum wages. This item modifies the Part in relation to Norfolk Island, by inserting a new Division 5, containing section 299A. That section provides that the national minimum wage and “special national minimum wages 1-5” (for junior, trainees/apprentices and employees with a disability) will be increased on Norfolk Island by phasing it from the start of 1 July 2016. Between 1 July 2016 and 30 June 2017, award and

agreement free employees in Norfolk Island will be entitled to an increase in minimum wages to 85% of the national minimum wage or relevant special national minimum wage.

From 1 July 2017 the full national minimum wage and special national minimum wages will apply to award and agreement free employees in Norfolk Island.

Casual Norfolk Island employees will be entitled to the full 25% casual loading as specified in the national minimum wage order. For the period 1 July 2016 until 30 June 2017, the relevant 25% casual loading would be applied to the Norfolk Island transitional minimum wage (which will be increased to 85% of the relevant national system minimum wage from 1 July 2016, and a further increase to 100% of the relevant minimum wage on 1 July 2017).

The phasing in of minimum wage increases to the national level is designed to provide Norfolk Island employers with time to adjust to the transition to the Fair Work Act.

For illustrative purposes, the minimum wage on Norfolk Island prior to 1 July 2016 was \$406.60 (based on a 38 hour working week), or \$10.70 per hour. The decision in *Annual Wage Review 2015–16* [2016] FWCFB 3500 has the effect that the national minimum wage for an award/agreement free employee for the period 1 July 2016 until the end of 30 June 2017 is \$672.70 (based on a 38 hour working week), or \$17.70 per hour. The casual loading remains at 25%. This is the relevant minimum wage that applies to an employee that is not a junior employee, a person on a training arrangement, an apprentice, or an employee with a disability. For this same year, the relevant national minimum wage on Norfolk Island would be \$571.80 (based on a 38 hour working week), or \$15.05 per hour. A casual employee would therefore be entitled to \$18.81 per hour (as a result of including the casual loading). From 1 July 2017, the full national minimum wage and special national minimum wages will apply to award and agreement free employees in Norfolk Island.

Item 7 – At the end of Division 1 of Part 3-2

Item 8 – After subsection 384(1)

Part 3-2 of the Fair Work Act provides for the unfair dismissal regime.

Item 7 modifies Division 1 of Part 3-2 in relation to Norfolk Island by inserting a new section 381A. For clarity, this provision provides that Part 3-2 applies prospectively in relation to a dismissal that occurs on or after 1 July 2016.

Subsection 384(1) of the Fair Work Act provides the general rule for determining an employee's *period of employment* with an employer. Under sections 382 and 383 an employee must relevantly have served a *minimum employment period* to be protected from unfair dismissal.

Item 8 modifies section 384 in relation to Norfolk Island to insert a new subsection 384(1A). This provision ensures that prior service is recognized in determining the period of employment – rather than that period of employment simply being the period commencing on 1 July 2016. This is intended to avoid the possibility of an employer terminating an employee's employment shortly after 1 July 2016 to in effect avoid the unfair dismissal regime, where the employee would otherwise satisfy the relevant six or twelve month period in section 383.

Item 9 - Subsection 539(2) (at the end of the table)

Item 9 adds civil remedy provisions to the table at subsection 539(2) of the Fair Work Act in respect of transitional NI instruments (see Schedule 1A, Part 5, clause 24). It provides that proceedings in relation to transitional NI instruments are subject to rules regarding standing, jurisdiction and penalties as set in the additional table items. The additional table items 38A and 38B provide at column 4 that no civil penalties will be applied consistent with paragraph 32A(2)(a) of the rule-making power.

Item 10 - Paragraph 540(3)(a)

Item 11 – Subparagraph 540(3)(b)(ii)

Item 12 – Paragraph 540(4)(b)

Section 540 of the Fair Work Act limits when a person or entity referred to in column 2 of the table at subsection 539(2) has standing to bring proceedings. Item 10 modifies paragraph 540(3)(a) so that standing to bring proceedings about transitional NI instruments are not included in the limitations in subsection 540(2), which is about the standing of employee organisations and registered employee associations to bring proceedings.

Item 11 modifies subparagraph 540(3)(b)(ii) so that standing to bring proceedings about a term of a transitional NI instrument that would be an outworker term in a modern award is not included in the limitations in subsection 540(2), which is about the standing of employee organisations and registered employee associations to bring proceedings.

Item 12 modifies paragraph 540(4)(b) so that an employee organisation may only bring a proceeding in relation to a term of a transitional NI instrument that would be an outworker term in a modern award, if the organisation is entitled to represent the industrial interests of an outworker relating to the term.

These items are consistent with who may bring proceedings in relation to enterprise agreements.

Item 13 - At the end of subsection 541(3)

Section 541 provides that where an inspector applies to a court for an order in relation to a contravention or proposed contravention of a provision or term referred to in subsection 541(3), the inspector will also be able to apply for an order, on behalf of an employee, in relation to an employee's safety net contractual entitlements.

Item 13 modifies subsection 541(3) so that an inspector can apply to a court for an order in relation to an employee's safety net contractual entitlements when the inspector is applying for an order in relation to a contravention of a provision or a term of a transitional NI instrument.

Item 14 - Paragraph 545(3)(a)

Item 14 modifies paragraph 545(3)(a) of the Fair Work Act so that an eligible State or Territory court may order an employer to pay an amount to, or on behalf of, an employee of the employer if the court is satisfied that the employer was required to pay the amount under a transitional NI instrument. Item 1 of Schedule 1 modifies the definition of *eligible State or Territory court* to include the Court of Petty Sessions of Norfolk Island.

Item 15 - At the end of section 545

Item 15 modifies section 545 of the Fair Work Act to include a new subsection 545H so that a court cannot make an order that amounts to a civil penalty relating to a contravention of a transitional NI instrument. This is consistent with paragraph 32A(2)(a) of the Fair Work Act that provides that the rules may not create an offence or civil penalty.

Item 16 - At the end of section 546

Item 16 modifies section 546 of the Fair Work Act to include a provision that a court cannot make a pecuniary penalty order for a contravention of a transitional NI instrument. This is consistent with paragraph 32A(2)(a) of the Fair Work Act that provides that the rules may not create an offence or civil penalty.

Item 17 - Subsection 547(1)

Section 547 deals with interest up to judgment on amounts that a person is required to pay to another person under the Fair Work Act or a fair work instrument. Item 17 modifies subsection 547(1) so that an order regarding an amount payable under a transitional NI instrument is included in the scope of this provision.

Item 18 - Subparagraph 548(1A)(a)(i)

Item 18 modifies subparagraph 548(1A)(a)(i) of the Fair Work Act so that plaintiffs may choose a small claims procedure in order to pursue claim for an amount under a transitional NI instruments.

Item 19 - Paragraph 559(1)(a)

Item 19 modifies paragraph 559(1)(a) of the Fair Work Act so that transitional NI instruments are included in section 559. Section 559 is about unclaimed money. Subsection 559(1) provides that where an employer was required to pay an amount, under the Fair Work Act or a fair work instrument to an employee, and the employee cannot be located, then the employer can pay the amount to the Commonwealth as a sufficient discharge, as against the employee, for the amount paid.

Item 20 – Before Schedule 1

This item inserts new Schedule 1A before Schedule 1 to the Fair Work Act. New Schedule 1A contains provisions dealing with:

- the creation of transitional NI instruments from certain Norfolk Island instruments and contracts (Part 2 of this Schedule);
- the variation and termination of transitional NI instruments (Part 3 of this Schedule); and
- interaction between transitional NI instruments, the NES, enterprise agreements, workplace determinations and other provisions of the Fair Work Act (Part 4 of this Schedule).

Part 1—Preliminary

Clause 1 - Meanings of employee and employer

This clause provides that the terms *employee* and *employer* in this Schedule relate to Norfolk Island employment (as defined in Item 2 of Schedule 1) and have their ordinary meaning.

This clause provides that the term *transitional NI instrument* means an *NI collective instrument* or an *NI transitional contract*. The term *NI collective instrument* has the meaning given by subclause 2(1) and the term *NI transitional contract* has the meaning given to it by at subclause 2(2).

Part 2—Creation of transitional NI instruments from certain Norfolk Island instruments and contracts

Clause 2 – Creation of transitional NI instruments

This clause provides for the creation of NI collective instruments and NI transitional contracts as transitional NI instruments.

The significance of an instrument being a transitional NI instrument is that it is subject to the provisions set out in this Schedule regarding its operation, variation and termination. The notes to subclauses 2(1) and (4) make clear that NI collective instruments and NI transitional contracts, respectively, may be varied in accordance with Part 3 of this Schedule and terminate on or before 30 June 2018 in accordance with that Part.

NI collective instruments

Subclause 2(1) provides that, despite the repeal of the *Public Sector Remuneration Tribunal Act 1992* (Norfolk Island) and the *Public Service Act 2014* (Norfolk Island), the following instruments become an NI collective instrument at the start of 1 July 2016,

- a determination that had effect under the *Public Sector Remuneration Tribunal Act 1992* (Norfolk Island) immediately before 1 July 2016;
- an enterprise agreement, within the meaning of the *Public Service Act 2014* (Norfolk Island), that was in operation under Part 11 of that Act immediately before 1 July 2016.

NI transitional contracts

Subclause 2(2) provides for the creation of a distinct *NI transitional contract* that is taken to come into operation at the start of 1 July 2016 for each written ‘employment contract’, as defined in section 10 of the Employment Act, that, immediately before that time, was in force and complied with the standards and requirements imposed by the Employment Act. The note to subclause 2(2) states that each transitional contract is separate from the employment contract that gave rise to it (i.e. the underpinning contract of employment made by the employer and employee). That employment contract continues in force independently of the NI transitional contract.

The NI transitional contract is taken to include the same terms as were in the written employment contract under section 10 of the Employment Act immediately before 1 July 2016 (subclause 2(3)). It continues in existence in accordance with this Schedule (subclause 2(4)).

Clause 3 – Employees, employers etc. who are covered by a transitional NI instrument and to whom it applies

This clause sets out the employees, employers and other persons who are covered by a transitional NI instrument and to whom it applies.

Subclause 3(1) provides that an NI collective instrument covers, and applies to, the same employees, employers and other persons that it would have covered (however described in the instrument) if the *Public Sector Remuneration Tribunal Act 1992* (Norfolk Island) and the *Public Service Act 2014* (Norfolk Island) had not been amended or repealed. The note to subclause 3(1) states that, depending on the terms of an NI collective instrument, the instrument's coverage may extend to people who become employees after the instrument becomes an NI collective instrument, that is, after 1 July 2016.

Subclause 3(2) provides that an NI transitional contract covers, and applies to, the same employee and employer as the written employment contract that gave rise to the NI transitional contract.

Subclause 3(3) provides that this clause has effect subject to:

- the variation or termination of transitional NI instruments as referred to in clause 6; and
- subclause 19(1) which deals with the cessation of coverage by an NI collective instrument if an enterprise agreement or workplace determination starts to apply under the Fair Work Act.

Clause 4 – References in transitional NI instruments to the Employment Conciliation Board or the Employment Tribunal

Where a transitional NI instrument includes a provision which confers a power or function on the Employment Conciliation Board or the Employment Tribunal (however described) referred to in the Employment Act, clause 4 provides that the provision has effect on or after 1 July 2016 as if those references were instead references to the FWC.

Clause 5 – No loss of accrued rights or liabilities when transitional NI instrument terminates or ceases to apply

This clause preserves accrued rights, liabilities when a transitional NI instrument terminates or ceases to apply to an employee and allows investigations and legal proceedings to occur in relation to those rights or liabilities.

Part 3—Variation and termination of transitional NI instruments

Clause 6 – Transitional NI instruments can only be varied or terminated in limited circumstances

Subclause 6(1) provides that a transitional NI instrument can only be varied under a provision of this Part or in accordance with clause 17 which deals with resolving difficulties with the interaction between NI transitional instruments and the NES.

Subclause 6(2) provides that a transitional NI instrument can only be terminated by or under a provision of this Part.

Clause 7 – Variation of transitional NI instruments to remove ambiguities etc.

Subclause 7(1) provides that a person covered by a transitional NI instrument can apply to the FWC to vary the instrument:

- to remove an ambiguity or uncertainty in the instrument; or
- to remove terms that are inconsistent with Part 3-1 of the Fair Work Act (which deals with general protections).

This subclause includes a note that cross-references clause 17 which deals with a variation of a transitional NI instrument to resolve any uncertainty or difficulty in relation to the interaction between the instrument and the NES.

Subclause 7(2) provides that a variation of a transitional NI instrument operates from the day specified in the determination, which may be a day before the determination is made.

Clause 8 – NI collective instruments: termination by agreement

This clause provides that Subdivision C of Division 7 of Part 2-4 of the Fair Work Act (which deals with termination of enterprise agreements by employers and employees) applies in relation to a NI collective instrument as if a reference to an enterprise agreement included a reference to a NI collective instrument.

Clause 9 – NI collective instruments: termination by the FWC

Subclause 9(1) provides that Subdivision D of Division 7 of Part 2-4 of the Fair Work Act (which deals with termination of enterprise agreements after their nominal expiry date) applies in relation to a NI collective instrument as if a reference to an enterprise agreement included a reference to a NI collective instrument.

Subclause 9(2) provides that the nominal expiry date for a NI collective instrument is taken to be the end of the period specified in the instrument as being the period for which it is to have effect (however described), or if the instrument does not specify such a period, 1 July 2016.

Clause 10 – NI transitional contracts: termination by agreement

This clause provides for the termination of a NI transitional contract by written agreement between the employer and employee covered by the instrument. Subclause 10(2) provides that a termination agreement has no effect unless it has been approved by the FWC.

The employer or employee must make an application to the FWC for the approval of a termination agreement within 14 days after the agreement was made, or within such further period as the FWC allows if it considers it fair to extend that period in all the circumstances (subclause 10(3)).

Before terminating a NI transitional contract, the FWC must be satisfied that the formal requirements at subclause 10(1) have been complied with, and that there are no other reasonable grounds for believing that the employee has not agreed to the termination (subclause 10(4)).

The formal requirements at subclause 10(1) state that the termination agreement must be signed by the employee and the employer and, where the employee is under 18, it must also be signed by a parent or guardian of the employee. All signatures must be witnessed.

Subclause 10(5) provides the termination of a NI transitional contract operates from the day specified in the decision to approve the termination.

Clause 11 – NI transitional contracts: termination at end of employment

This clause provides that if an employee covered by an NI transitional contract ceased to be employed under the employment contract that gave rise to the NI transitional contract, the NI transitional contract terminates at that time.

Clause 12 – NI transitional contracts: termination conditional on enterprise agreement

This clause provides that an employee or employer covered by a NI transitional contract can make an instrument, known as a conditional termination, which has the effect of terminating the NI transitional contract where an enterprise agreement is made that covers the employee and employer and that agreement comes into operation. The significance of an employee being covered by a conditional termination is that they may fully participate in the bargaining process for an enterprise agreement.

The conditional termination must accompany any application to the FWC for approval of the enterprise agreement under section 185 of the Fair Work Act.

If the conditional termination is signed by the employer, they must give the employee a copy of the conditional termination.

The conditional termination must be in writing and signed by either the employee or the employer. Where the employee is under 18 and signs, it must also be signed by a parent or guardian. The signature of the employer or the employee must be witnessed. If these requirements have been complied with, the NI transitional contract terminates when the enterprise agreement comes into operation (subclause 12(6)).

Clause 13 – Termination of all transitional NI instruments at the end of 30 June 2018

This clause provides that any transitional NI instrument that has not already been terminated before the end of 30 June 2018 will terminate at the end of 30 June 2018. From 1 July 2018, modern awards will apply to employees in NI employment which completes the transition to the Fair Work Act.

Clause 14 - Effect of termination

Subclause 14(1) provides that once a transitional NI instrument terminates, it ceases to cover and apply (and can never again cover or apply) any employees, employers or other persons.

Subclause 12(2) provides that despite subclause 12(1), the termination of a transitional NI instrument does not terminate the employment of an employee by the employer. The note to this subclause provides that after the termination of a transitional NI instrument, the terms of the

employee's employment will continue to be subject to the NES, national minimum wage orders and any enterprise agreement that applies to the employee and employer.

Part 4 – Other effects of transitional NI instruments

Division 1 – Interaction between transitional NI instruments and the National Employment Standards

Clause 15 – The no-detriment rule

The NES provides minimum standards for key entitlements for employees in the national system. Subclause 15(1) provides the general rule that to the extent that a term of a transitional NI instrument is detrimental to an employee compared with an entitlement under the NES it has no effect.

Subclause 15(2) has the effect that in resolving a dispute about whether term is detrimental, the FWC (in an application made under clause 17 as referred to below below) is afforded broad discretion to consider entitlements on the basis of either or both of the following:

- “line-by-line”;
- “like-by-like”.

This flexibility for the FWC will help ensure terms that have a detrimental effect will have no effect to the extent of that detriment. That is, the NES entitlement will continue to apply and prevail over the corresponding entitlement in the transitional NI instrument to the extent that the term or entitlement in the transitional NI instrument is detrimental to an employee in comparison to the NES.

Subclause 15(3) provides an exception to the general rule in subclause 15(1), for terms permitted by clause 16.

Clause 16 – Provisions of the National Employment Standards that allow instruments to contain particular kinds of terms

Clause 16 ensures that certain provisions of the NES have effect as if a reference to a modern award or enterprise agreement included a reference to a transitional NI instrument. The relevant provisions of the NES are identified in paragraphs 16(1)(a) to (h).

Subclause 16(2) provides for the requirements set out in subsections 93(2) and 101(2) are taken to be included in the transitional NI instrument.

The intention of this clause is to ensure the continued application, subject to the no detriment test, of terms in a transitional NI instrument that provide for matters that are similar to these NES provisions. For example, this rule would enable the continued operation of a term in a transitional NI instrument for the cashing out of paid annual leave, but subject to the protections set out in subsection 93(2) of the Fair Work Act, by virtue of subclause 16(2). Therefore, in order to cash out annual leave under the provision in the transitional NI instrument, the employee must retain a minimum balance of four weeks' leave, the agreement to cash out must be a separate written agreement and the cashed out leave must be paid at the full amount the employee would have received had the employee taken the leave forgone.

Clause 17 – Resolving difficulties about application of this Division

Clause 17 enables a person covered by a transitional NI instrument to apply to the FWC to resolve any difficulties about the application of the rules about the interaction between transitional NI instruments and the NES set out in this Division. The FWC may vary the instrument to resolve uncertainty or difficulty relating to the interaction between the instrument and the NES, or to make the instrument operate effectively with the NES.

Any variation of the instrument operates from the day specified in the determination (which may be a day before the determination is made).

Clause 18 – Division does not affect transitional NI instruments before 1 July 2016

Clause 18 clarifies that new Division 9 (including a determination made under clause 17) does not affect the operation of a transitional NI instrument at any time before 1 July 2016. This Division operates prospectively from the extension of the Fair Work Act to Norfolk Island on that date.

Division 2 – Interaction between transitional NI instruments and enterprise agreements or workplace determinations under this Act

Clause 19- Enterprise agreements or workplace determinations under this Act, and transitional NI instruments

This clause provides for the interaction between transitional NI instruments and enterprise agreements and workplace determinations.

NI collective instruments

Subclause 19(1) provides that where an enterprise agreement or workplace determination made under the Fair Work Act starts to apply to an employee, or an employer or other person in relation to the employee, then an NI collective instrument ceases to cover (and can never again cover) the employee, or the employer or other person in relation to the employee. The note makes it clear that an NI collective instrument can be replaced by an enterprise agreement at any time.

NI transitional contracts

Subclause 19(2) provides while an NI transitional contract applies to an employee, or to an employer in relation to the employee, an enterprise agreement or workplace determination (under the Fair Work Act) does not apply to an employee, or to an employer in relation to the employee.

Division 3 – Other general provisions about how this Act applies in relation to transitional NI instruments

Clause 20 – Employee’s ordinary hours of work

The concept of an employee’s *ordinary hours of work* is central to the accrual and payment rules for a number of entitlements under the NES. Therefore, it is essential that rules are in place to ensure an employee’s ordinary hours of work can be identified.

Subclause 20(2) provides that where a transitional NI instrument applies to an employee's employment, that employee's ordinary hours of work for the purposes of the Fair Work Act are determined by the transitional NI instrument.

Subclause 20(3) provides that where there are no ordinary hours specified in the transitional NI instrument, the ordinary hours of work are the hours agreed between the employee and their employer.

Subclause 20(4) provides that where there is no such agreement and the employee's ordinary hours are not specified in the transitional NI instrument, a full-time employee's ordinary hours are 38 hours a week and the ordinary hours for an employee who is not a full-time employee are either 38 hours a week or their usual weekly hours (whichever is lower).

Subclause 20(5) provides that where the transitional NI instrument does not specify an employee's ordinary hours of work and the agreed hours for an employee who is not a full-time employee are less than the employee's usual hours, the ordinary hours of work for that employee shall be the lesser of 38 hours or the employee's usual weekly hours of work.

Subclauses 20(6) to (8) provide a mechanism for determining ordinary hours of work where an employee who is a part-time employee and who does not have usual weekly hours of work.

If a part-time employee has worked for at least 4 weeks, the employee's ordinary hours of work are the average hours in the previous 4 weeks.

If a part-time employee has worked less than 4 weeks, the employee's ordinary hours of work are the average hours for the number of completed weeks. For example, if a part-time employee has worked 3 weeks, the employee's ordinary hours are the number of hours completed during that period divided by 3.

Clause 21 – National minimum wages

Clause 21 sets out rules to clarify the interaction between a transitional NI instrument and a national minimum wage order as it applies in Norfolk Island, as affected by section 299A (dealing with wages for the 2016-17 financial year).

Subclause 21(2) provides that if the transitional NI instrument provides for base rate of pay less than the relevant national minimum wage, the employer must pay the relevant national minimum wage. This subclause clarifies that relevant Norfolk Island employees are entitled to the benefit of the safety net minimum wage if the instrument provided for a lesser wage.

On the other hand, subclause 21(3) provides that if the transitional NI instrument provides for base rate of pay of at least the relevant national minimum wage, the employer must pay the relevant wage specified in the instrument. This subclause clarifies that relevant Norfolk Island employees will not see a reduction in their wage, where the transitional NI instrument provides for a higher amount than the relevant national minimum wage.

Subclause 21(4) sets out the casual loading that a casual Norfolk Island employee is to receive. The applicable casual loading will be the higher of:

- the percentage specified in the order (i.e. 25%); or
- the percentage specified in the transitional NI instrument.

For example, if a transitional NI instrument provided for a casual loading of 15%, the casual employee would be entitled to a casual loading of 25%, as specified in the order.

By way of counter example, if a transitional NI instrument provided for a casual loading of 30%, the casual employee would be entitled to retain this loading, as it exceeds the 25% casual loading specified in the order.

Subclause 21(5) clarifies that a minimum wage order does not affect any terms of a transitional NI instrument dealing with certain specified matters. These specified matters are consistent with the items specified for the *full rate of pay* in subsection 18(1) of the Fair Work Act.

Clause 22 – Payment of wages

Clause 22 provides that Division 2 of Part 2-9 of the Fair Work Act (which deals with payment of wages) applies as though the term *enterprise agreement* included a reference to a *transitional NI instrument*. This enables, for example, a transitional NI instrument to specify a method of payment of wages (see paragraph 323(2)(d) of the Fair Work Act).

Clause 23 – Application of unfair dismissal provisions

Clause 23 ensures that a person is covered by a transitional NI instrument in relation to their employment is a ‘person be protected from unfair dismissal’, for the purposes of subparagraph 382(b)(ii) of the Fair Work Act.

This clause also ensures that the requirement to consult about genuine redundancy under paragraph 389(1)(b) of the Fair Work Act also applies if there is an obligation to consult about the redundancy in a transitional NI instrument.

Part 5 – Compliance with transitional NI instruments

Clause 24 – Compliance with transitional NI instruments

Clause 24 provides that a person must not contravene a term of a transitional NI instrument that applies to the person.

There are two notes to this provision. The first notes that clause 24 is a civil remedy provision. The second notes that a civil penalty cannot be imposed for contravention of a term of a transitional NI instrument. This is consistent with paragraph 32A(2)(a) of the Fair Work Act that provides that the rules may not create an offence or civil penalty. The reader is referred to sections 545 and 546, which are about orders that can be made about contraventions of civil remedy provisions, and which have been modified to prevent civil penalties from being applied.

Fair Work Regulations 2009

Item 21 – Regulation 1.15 (heading)

Item 22 – At the end of subparagraph 1.15(a)(iii)

Item 23 – After subparagraph 1.15(a)(iii)

Item 24 – At the end of paragraph 1.15(b)

Item 25 – Regulation 1.15 (note)

Item 26 – Regulation 1.15 (note)

These items make consequential amendments to Regulation 1.15 of the Fair Work Regulations to provide for the interaction between transitional NI instruments with State and Territory laws for the purposes of subsection 29(3) of the Fair Work Act.

Part 2 – Repeal of this Schedule

Item 27 – Repeal of Schedule

Part 1 of Schedule 2 modifies the Fair Work Act and the Fair Work Regulations in relation to Norfolk Island for specified transient matters for the period 1 July 2016 to 1 July 2018. From 1 July 2018 the transitional period for applying the Fair Work act and Fair Work Regulations to Norfolk Island will have been completed.

This item accordingly repeals Schedule 2 at the start of 2 July 2018.

Statement of Compatibility with Human Rights

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

Fair Work (Norfolk Island) Rule 2016

The *Fair Work Act 2009* (Cth) (Fair Work Act) is intended to provide a balanced framework for cooperative and productive workplaces that promotes national economic prosperity and social inclusion for all Australians.

Before 1 July 2016, the Fair Work Act and the associated *Fair Work Regulations 2009* (Fair Work Regulations) did not apply to employers and employees on Norfolk Island. The *Territories Legislation Amendment Act 2016* (Cth) (Territories Act) extends the Fair Work Act to Norfolk Island on 1 July 2016. The Territories Act also inserts a rule-making power into the Fair Work Act (new section 32A) on 1 July 2016. New section 32A enables the Minister for Employment (the Minister), by legislative instrument, to prescribe modifications of the Fair Work Act and the Fair Work Regulations in relation to Norfolk Island.

As new section 32A does not commence until 1 July 2016, this instrument relies on section 4 of the *Acts Interpretation Act 1901* (Cth) (AIA) (as in force on 25 June 2009 pursuant to section 40A of the Fair Work Act) to enable a legislative instrument to be made so that it is operational on 1 July 2016. Section 4 provides that the legislative instrument-making power may be exercised before 1 July 2016 for the purposes of bringing the instrument into effect.

The *Fair Work (Norfolk Island) Rule 2016* (the Rule) prescribes appropriate transitional arrangements to allow Norfolk Island employers and employees to transition to the national workplace relations system. The Rule takes effect on 1 July 2016.

These measures in the Rule include:

- increasing minimum wages for Norfolk Island award/agreement free employees to the national level through a stepped transition by:
 - increasing the minimum wage to 85% of the national minimum wage or applicable special minimum wage on 1 July 2016; and
- increasing the minimum wage to 100% of the national minimum wage or applicable special minimum wage on 1 July 2017;
- modern awards will apply on Norfolk Island from 1 July 2018 (but can cover employers and employees and organisations from 1 July 2016);
- Norfolk Island employees will retain accrued (but unused) entitlements as at 1 July 2016, including “annual holidays” and “sick leave” accrued under the *Employment Act 1988* (NI) (Employment Act);
- the minimum period of notice of termination or payment in lieu of notice under the NES will commence from 1 July 2016. Service before 1 July 2016 does not count as service for this provision;
- redundancy pay entitlements under the NES will commence from 1 July 2016. Service before 1 July 2016 does not count as service for this provision, unless employees had an entitlement under their terms and conditions of employment;

- service prior to 1 July 2016 will be recognised for the minimum employment period for the protection from unfair dismissal;
- existing Norfolk Island employment contracts under the Employment Act, enterprise agreements under the *Public Service Act 2014* (NI) (Public Service Act) and public sector wage determinations under the *Public Sector Remuneration Tribunal Act 1992* (NI) (Public Sector Remuneration Act) will continue as “transitional NI instruments” under the Fair Work Act until 1 July 2018 (unless terminated prior to that time):
 - the Fair Work Commission (FWC) will have powers to vary or terminate transitional NI instruments in limited specified circumstances;
- the FWC will have the power to make on application a “take-home pay order” from 1 July 2018 to ensure that the transition to the modern awards framework does not result in a Norfolk Island employee suffering a reduction in their take home pay;
- employees and employers will be able to make enterprise agreements from 1 July 2016. In determining whether a proposed agreement would result in employees being better off overall compared with a relevant modern award, the FWC will consider the modern award that covers the employees ;
- the Fair Work Ombudsman (FWO) will be able to publish alternate or supplementary information to the Fair Work Information Statement, to assist Norfolk Island employers and employees understand the modified application of the Fair Work Act;
- references to terms that are defined in the *Corporations Act 2001* (Cth) (Commonwealth Corporations Act) in the Fair Work Act will be read as if that Act extends to Norfolk Island on 1 July 2016:
 - the Commonwealth Corporations Act will not extend to Norfolk Island on 1 July 2016. Rather, the *Companies Act 1985* (NI) (Norfolk Companies Act) will continue to apply on Norfolk Island on 1 July 2016; and

Human Rights Implications

The Rule engages the right to work.

The right to work

Article 6(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) recognises the right to work, which includes the right of everyone to the opportunity to gain his or her living by work which he or she freely chooses or accepts. Under this Article, State Parties undertake to take appropriate steps to safeguard this right. A similar right is found in Article 27 of the *Convention on the Rights of Persons with Disabilities* (CRPD). Under Article 2(1) of ICESCR, a country is obliged to take steps “to the maximum of its available resources, with a view to achieving progressively the full realisation” of the rights recognised in ICESCR. Additionally, Article 11 of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) requires States Parties to ‘eliminate discrimination against women in the field of employment’.

Article 7 of ICESCR recognises the ‘right of everyone to the enjoyment of just and favourable conditions of work’. The United Nations Committee on Economic, Social and Cultural Rights has stated that this right encompasses the right to fair wages and equal remuneration for work of

equal value, safe and healthy working conditions, and rest, leisure and reasonable limitation of working hours, among other elements.

Accrued entitlements at the end of 30 June 2016

The Rule promotes the enjoyment of just and favourable conditions of work with respect to accrued (but unused) entitlements at the 30 June 2016. From 1 July 2016, Norfolk Island employees will retain any accrued (but unused) entitlements, including in relation to:

- “sick leave”, such as accrued under the Employment Act:
 - from 1 July 2016 this will be paid personal/carer’s leave under the NES; and
- “annual holidays”, such as accrued under the Employment Act:
 - from 1 July 2016 this will be annual leave under the NES;

From 1 July 2016, Norfolk Island employees will accrue and be able to access the more generous leave entitlements under the NES.

National minimum wage for Norfolk Island employees

For the period 1 July 2016 to 30 June 2017, Norfolk Island award/agreement free employees will be entitled to an increase to minimum wages that applied on Norfolk Island prior to 1 July 2016 up to 85% of the relevant national minimum wage. From 1 July 2017, Norfolk Island award/agreement free employees will be entitled to 100% of the relevant national minimum wage (see item 199A of Part 1 of Schedule 2 to the Rule).

From 1 July 2018, 100% of minimum wages in modern awards will apply to award covered Norfolk Island employees.

The modified application of the national minimum wage framework does not limit the right to work and the enjoyment of just and favourable conditions of work. Firstly, the current minimum wage in Norfolk Island under the Employment Act is \$10.70. From 1 July 2016, the national minimum wage (as it will apply on Norfolk Island) at \$15.05 per hour will be more generous than the existing Norfolk Island minimum wage. The 85% applicable rate is temporary for one year to help employers adjust to the transition to the Fair Work Act.

Secondly Norfolk Island employees working as casuals will be entitled to the 25% loading from 1 July 2016.

Thirdly, during the transitional period of 1 July 2016 until 30 June 2018, existing NI industrial instruments will continue as transitional NI instruments under the Fair Work Act (see Schedule 1A to the Rule). If an instrument provides for a higher rate of pay or casual loading compared with the minimum, the employee is entitled to be paid the higher rate in the instrument. Conversely, if a transitional NI instrument provides for a rate of pay or casual loading less than the relevant national minimum wage (as it applies in Norfolk Island), the employee is entitled to the higher rate in the relevant national minimum wage (see clause 21 of Schedule 1A to the Rule).

Fourthly, from 1 July 2018 transitional NI instruments that are still in force will terminate to coincide with modern awards applying on Norfolk Island. The Rule contains a mechanism for

Norfolk Island employees to obtain take-home pay orders from the FWC. The orders are intended to remedy any reduction in take-home pay as a result of modern awards applying from 1 July 2018 (see item 168M of Division 9 of Part 2-3 inserted by Schedule 1 to the Rule).

These combined safeguards will ensure that the transition to the Fair Work Act will result in improved pay and conditions for the vast majority, if not all Norfolk Island employees.

Extension of modern award coverage on 1 July 2018

As part of the phased transition to the Fair Work Act, modern awards will not cover Norfolk Island employees and outworkers until 1 July 2018 (see item 4 of Part 1 of Schedule 2 to the Rule). Modern awards typically deal with a range of employment terms and conditions, in addition to the safety net elements of the NES and the relevant national minimum wage.

The delayed extension of modern awards is temporary to enable time for Norfolk Island employers and employees to adjust to the Fair Work Act framework.

Separately, the *Norfolk Island Continued Laws Amendment (2016 Measures No. 2) Ordinance 2016* ensured that sections 18 and 18A of the Employment Act (as amended), relating to a continuous rest period and the provision of a staff uniform in specified circumstances are retained until 1 July 2018. This provides a key protection in the transition to modern awards. Rest periods and staff uniform requirements are typically addressed in modern awards.

Also, the delayed extension of modern awards will not prevent Norfolk Island employers and employees from making an enterprise agreement under Part 2-4 of the Fair Work Act. Any enterprise agreements made would still need to satisfy the requirements of the “better off overall test” in Division 4 of Part 2-4 from 1 July 2016. In general terms, this means that the proposed enterprise agreement would need to result in the employees being better off compared with the relevant modern award, including the minimum wages specified in the award. This safeguard prevents Norfolk Island employees from being locked in to an agreement that would not satisfy the better off overall test.

Conclusion

The Rule is compatible with human rights because it does not limit human rights.