**EXPLANATORY STATEMENT**

###### Issued by the authority of the Assistant Minister for Regional Development and Territories, Parliamentary Secretary to the Deputy Prime Minister and Minister for Infrastructure, Transport and Regional Development

*Norfolk Island Continued Laws Ordinance 2015*

***Norfolk Island Continued Laws Amendment (Coronavirus Economic Response Measures) Rules (No. 2) 2020***

*Authority*

Section 6 of the *Norfolk Island Continued Laws Ordinance 2015* (the Ordinance) provides that the Minister may, by legislative instrument, make rules amending this Ordinance so as to amend or repeal a continued law; or to make application, saving or transitional provisions in relation to any amendments or repeals of continued laws.

The *Norfolk Island Continued Laws Amendment (Coronavirus Economic Response Measures) Rules (No. 2) 2020* (the Rules) are made under section 6 of the Ordinance.

The Rules amend the Ordinance with the effect of extending the temporary Coronavirus economic response measures contained in two continued Norfolk Island laws, specifically the *Bankruptcy Act 2006* (NI) (the NI Bankruptcy Act) and the *Companies Act 1985* (NI) (the NI Companies Act). These measures are extended to match the same time periods as the equivalent Commonwealth Coronavirus economic response measures.

Under section 17 of the *Norfolk Island Act 1979*, Norfolk Island laws continued in force under either section 16 or 16A of the Act may be amended or repealed by an Ordinance made under section 19A.

*Purpose and operation*

The *Coronavirus Economic Response Package Omnibus Act 2020* (the Act) received assent on 24 March 2020 and, as part of a broader legislative package, implemented the Australian Government’s economic response to the spread of the Coronavirus. The Act included changes to the *Bankruptcy Act 1966* (the Bankruptcy Act) and the *Corporations Act 2001* (the Corporations Act) intended to provide temporary relief for individuals and businesses in financial distress as a result of the Coronavirus pandemic. Amendments to the Corporations  Act also established a temporary mechanism to provide short-term regulatory relief to classes of persons that, due to the Coronavirus, are unable to meet their obligations under the Corporations Act or the *Corporations Regulations 2001*. Accordingly, the Treasurer made the *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* (the Determination) under section 1362A of the Corporations Act on 5 May 2020. The Determination deals with provisions about meetings and document signatures that are not compatible with public health requirements for social distancing during the Coronavirus pandemic.

The Bankruptcy Act and the Corporations Act do not currently extend to Norfolk Island and these matters are still regulated under ‘continued laws’ enacted by the former Legislative Assembly of Norfolk Island, namely the NI Bankruptcy Act and the NI Companies Act. These Acts contain similar regulatory requirements to the Bankruptcy Act and Corporations Act.

The *Norfolk Island Continued Laws Amendment (Coronavirus Economic Response Measures) Rules 2020* (the original Rules), which commenced on 21 July 2020, amended the Ordinance to amend the NI Bankruptcy Act and the NI Companies Act respectively to implement, as appropriate, equivalent Coronavirus economic response measures to the Commonwealth measures described above.

Specifically, the amendments to the NI Bankruptcy Act temporarily increased the minimum amount of debt required to be owed before a creditor can initiate involuntary bankruptcy proceedings against a debtor from $2,000 to $20,000. The amendments to the NI Bankruptcy Act also temporarily provided debtors more time to respond to a bankruptcy notice: the period was extended from 21 days to six months.

Amendments to the NI Companies Act also increased the statutory minimum for a creditor to issue a demand to a debtor company from $1,000 to $20,000. This raised the thresholds for creditor demands that can push businesses into insolvency and also temporarily provided Norfolk Island companies more time to respond to a statutory demand: the period was extended from 21 days to six months.

Other amendments to the NI Companies Act were based on the temporary ‘safe harbour’ provisions in the Commonwealth measures. These amendments provide that the offence of incurring debts when there are reasonable grounds to expect that a company is insolvent does not apply to company directors and other managers with respect to debts incurred in the ordinary course of the company’s business during the ‘COVID-19 period’. The ‘COVID-19 period’ being the period commencing on 21 July 2020, the day on which the original Rules commenced, and ending on 25 September 2020.

The amendments to the NI Companies Act also dealt with provisions about meetings and document signatures that are not compatible with public health requirements for social distancing during the Coronavirus pandemic. The amendments facilitated alternative methods that meant Norfolk Island businesses can keep operating consistently with public health requirements. These amendments also gave companies, external administrators and other classes of persons certainty about how they can meet their legal obligations during the ‘COVID-19 period’.

These measures, which commenced on 21 July 2020, were intended to apply for the same time periods as the relevant Commonwealth economic response measures.

The Treasurer announced on 31 July 2020 that the temporary regulatory relief for Corporations Act companies in respect of online meetings and electronic document execution would be extended for a further six months, that is, until the end of 21 March 2021.

The Treasurer and the Attorney-General subsequently announced on 7 September 2020 that the Commonwealth measures extending the temporary insolvency and bankruptcy protections would be extended until the end of 31 December 2020.

The Rules accordingly amend the Ordinance with the effect of extending the temporary Coronavirus economic measures contained in the two continued Norfolk Island laws, specifically the NI Bankruptcy Act and the NI Companies Act, to match the same time periods as the equivalent Commonwealth Coronavirus economic response measures.

*Consultation*

In order to continue the urgent economic relief to the Norfolk Island community consistent with the Commonwealth measures implemented throughout the rest of Australia, community consultation has not been undertaken.

The Rules are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Rules commence the day after registration on the Federal Register of Legislation.

## Statement of Compatibility with Human Rights

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

***Norfolk Island Continued Laws Amendment (Coronavirus Economic Response Measures) Rules 2020***

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### Overview of the Ordinance

The *Coronavirus Economic Response Package Omnibus Act 2020* (the Act) received assent on 24 March 2020 and, as part of a broader legislative package, implemented the Australian Government’s economic response to the spread of the Coronavirus. The Act included changes to the *Bankruptcy Act 1966* (the Bankruptcy Act) and the *Corporations Act 2001* (the Corporations Act) intended to provide temporary relief for individuals and businesses in financial distress as a result of the Coronavirus pandemic. Amendments to the Corporations Act also established a temporary mechanism to provide short-term regulatory relief to classes of persons that, due to the Coronavirus, are unable to meet their obligations under the Corporations Act or the *Corporations Regulations 2001*. Accordingly, the Treasurer made the *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* (the Determination) under section 1362A of the Corporations Act on 5 May 2020. The Determination deals with provisions about meetings and document signatures that are not compatible with public health requirements for social distancing during the Coronavirus pandemic.

The Bankruptcy Act and the Corporations Act do not currently extend to Norfolk Island and these matters are still regulated under ‘continued laws’ enacted by the former Legislative Assembly of Norfolk Island, namely the *Bankruptcy Act 2006* (NI) (the NI Bankruptcy Act) and the *Companies Act 1985* (NI) (the NI Companies Act). These Acts contain similar regulatory requirements to the Bankruptcy Act and Corporations Act.

The *Norfolk Island Continued Laws Amendment (Coronavirus Economic Response Measures) Rules 2020* (the original Rules), which commenced on 21 July 2020, amended the Ordinance to amend the NI Bankruptcy Act and the NI Companies Act respectively to implement, as appropriate, equivalent Coronavirus economic response measures to the Commonwealth measures described above.

Specifically, the amendments to the NI Bankruptcy Act temporarily increased the minimum amount of debt required to be owed before a creditor can initiate involuntary bankruptcy proceedings against a debtor from $2,000 to $20,000. The amendments to the NI Bankruptcy Act also temporarily provided debtors more time to respond to a bankruptcy notice: the period was extended from 21 days to six months.

Amendments to the NI Companies Act also increased the statutory minimum for a creditor to issue a demand to a debtor company from $1,000 to $20,000. This raised the thresholds for creditor demands that can push businesses into insolvency and also temporarily provided Norfolk Island companies more time to respond to a statutory demand: the period was extended from 21 days to six months.

Other amendments to the NI Companies Act were based on the temporary ‘safe harbour’ provisions in the Commonwealth measures. These amendments provide that the offence of incurring debts when there are reasonable grounds to expect that a company is insolvent does not apply to company directors and other managers with respect to debts incurred in the ordinary course of the company’s business during the ‘COVID-19 period’. The ‘COVID-19 period’ being the period commencing on 21 July 2020, the day on which the original Rules commenced, and ending on 25 September 2020.

The amendments to the NI Companies Act also dealt with provisions about meetings and document signatures that are not compatible with public health requirements for social distancing during the Coronavirus pandemic. The amendments facilitated alternative methods that meant Norfolk Island businesses can keep operating consistently with public health requirements. These amendments also gave companies, external administrators and other classes of persons certainty about how they can meet their legal obligations during the ‘COVID-19 period’.

These measures, which commenced on 21 July 2020, were intended to apply for the same time periods as the relevant Commonwealth economic response measures.

The Treasurer announced on 31 July 2020 that the temporary regulatory relief for Corporations Act companies in respect of online meetings and electronic document execution would be extended for a further six months, that is, until the end of 21 March 2021.

The Treasurer and the Attorney-General subsequently announced on 7 September 2020 that the Commonwealth measures extending the temporary insolvency and bankruptcy protections would be extended until the end of 31 December 2020.

The Rules accordingly amend the Ordinance with the effect of extending the temporary Coronavirus economic measures contained in the two continued Norfolk Island laws, specifically the NI Bankruptcy Act and the NI Companies Act, to match the same time periods as the equivalent Commonwealth Coronavirus economic response measures.

**Human Rights implications**

*Presumption of innocence*

The Rules do not limit any of the human rights and freedoms, but in a limited way engage Article 14(2) of the International Covenant on Civil and Political Rights. Article 14(2) recognises that all persons shall be presumed innocent until proven guilty according to the law.

Article 14(2) is engaged because section 645A of the NI Companies Act, as extended by the Rules, provides that the offence of incurring debts when there are reasonable grounds to expect that a company is insolvent does not apply to company directors and other managers with respect to debts incurred in the ordinary course of the company’s business during the relevant period. Directors and managers wishing to rely on the new provision in a proceeding in which the unlawful incurring of debt is alleged bear an evidential burden in relation to that matter.

These amendments are consistent with Article 14(2) because *evidential burden* is defined to mean the burden of adducing or pointing to evidence that suggests a reasonable possibility that some matter exists or does not exist.

In particular, a director or a manager wishing to rely on the new provisions must point to or adduce some evidence that suggests a reasonable possibility that:

* the debt incurred was in the ordinary course of the company’s business;
* the debt was incurred during the ‘COVID-19 period’, being the period beginning on 21 July 2020 and ending on 31 December 2020 (as amended by the Rules); and
* no administrator or liquidator was appointed, within the COVID-19 period, before the debt was incurred.

Consistent with the *Guide to Framing Commonwealth Offences,* it is appropriate for the evidential burden to fall on the director or manager seeking to rely on the new provisions because:

* matters such as whether the debt incurred was in the ordinary course of the company’s business, whether and when the debt was incurred or a liquidator or administrator was appointed are peculiarly within the knowledge of the company director or manager; and
* it is significantly more difficult and costly for the prosecution to disprove the fact than for a company director or a manager – that the debt incurred was within the ordinary course of the company’s business, the period in which the debt was incurred and whether an administrator or liquidator was appointed before the debt was incurred.

The question of whether certain actions, such as the incurring of debts, fall within the ‘ordinary course of the company’s business’ are matters peculiarly within the knowledge of the directors and managers of the company. It would be very difficult for the complainant or the prosecution to disprove these matters which require a detailed knowledge of the internal financial affairs of the company concerned. In particular, the knowledge of whether a debt has been incurred in the ordinary course of the company’s business is knowledge which would be significantly more difficult and costly for the prosecution to disprove than for the defendant (a director or manager of the company), who has easy access to the financial and other records of the company, to establish. The prosecution would require access to the company’s financial records and to subpoena company officers and employees to disprove these matters would be significantly more difficult and costly for the prosecution than for the defendant to establish the contrary, as well as more intrusive upon those affected.

*Right to health*

The Rules also engage Article 12 of the International Covenant on Economic, Social and Cultural Rights (the ICESCR): the right to health.

Article 12 of the ICESCR protects the right of all individuals to enjoy the highest attainable standards of physical and mental health. This includes the application of measures for the prevention, treatment and control of epidemic, endemic, occupational and other diseases.

The Rules, in extending these measures, promote the right to health by assisting to control the spread of communicable diseases that may cause serious harm to human health. The NI Companies Act normally requires or permits companies to hold certain meetings at physical venues. The Rules extend the amendments of the NI Companies Act so that companies are permitted to hold meetings using one or more technologies. This allows meetings to proceed, without contributing to the spread of communicable diseases that can occur when large numbers of people gather together.

The Rules are otherwise compatible with human rights as they do not engage or otherwise limit any of the applicable human rights and freedoms.

**Conclusion**

The Disallowable Legislative Instrument is compatible with human rights because, in so far as it engages any of the applicable human rights and freedoms, it promotes the protection of a human right, namely the right to health, and does not limit any of the applicable human rights and freedoms, namely the presumption of innocence.

**Assistant Minister for Regional Development and Territories,**

###### **Parliamentary Secretary to the Deputy Prime Minister and Minister for Infrastructure, Transport and Regional Development**

**The Hon Nola Marino MP**

**ATTACHMENT**

**Norfolk Island Continued Laws Amendment (Coronavirus Economic Response Measures) Rules (No. 2) 2020**

**Section 1 – Name**

This section provides that the title of the Rules is the *Norfolk Island Continued Laws Amendment (Coronavirus Economic Response Measures) Rules (No. 2) 2020.*

**Section 2 – Commencement**

This section provides for the Rules to commence the day after registration on the Federal Register of Legislation.

**Section 3 – Authority**

This section provides that the Rules are made under section 6 of the *Norfolk Island Continued Laws Ordinance 2015* (the Ordinance).

**Section 4 – Schedules**

This section provides that each instrument that is specified in a Schedule to the Rules is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Rules has effect according to its terms.

**Schedule 1 – Amendments**

**Part 1—Amendment of the Bankruptcy Act 2006 (Norfolk Island)**

Part 1 of Schedule 1 to the Rules amends the *Norfolk Island Continued Laws Ordinance 2015* (the Ordinance) with the effect of amending the *Bankruptcy Act 2006* (NI) (the NI Bankruptcy Act).

***Norfolk Island Continued Laws Ordinance 2015***

**Item [1] – Item 22BD of Schedule 1 (definition of *COVID-19 period* in section 3)**

Item 1 amends item 22BD of Schedule 1 to the Ordinance with the effect of amending the definition of ‘COVID-19 period’ in section 3 of the NI Bankruptcy Act. The effect of this amendment is to extend the ‘COVID-19 period’ until the end of 31 December 2020. The amendment also reflects the fact that the day the ‘COVID-19 period’ commenced, the day the *Norfolk Island Continued Laws Amendment (Coronavirus Economic Response Measures) Rules 2020* commenced, was 21 July 2020. The ‘COVID-19 period’ is the period in which the temporary insolvency and bankruptcy protections are in force.

**Item [2] – Item 22F of Schedule 1 (note after paragraph 8)**

Item 2 amends item 22F of Schedule 1 to the Ordinance with the effect of amending the note inserted after paragraph 8 of Form 2 in the Schedule to the NI Bankruptcy Act. Form 2 is the ‘Bankruptcy Notice’ form for the purposes of section 25 of the NI Bankruptcy Act. The note is amended to substitute all existing references to “26 September 2020” with “1 January 2021”. This note describes the meaning of ‘statutory minimum’ and ‘statutory period’ during the COVID-19 period and afterwards, and this amendment is consequential to the extension of the ‘COVID-19 period’ until the end of 31 December 2020.

**Part 2—Amendment of the Companies Act 1985 (Norfolk Island)**

Part 2 of Schedule 1 to the Rules amends the Ordinance with the effect of amending the *Companies Act 1985* (NI) (the NI Companies Act).

***Norfolk Island Continued Laws Ordinance 2015***

**Item [3] – Item 38A of Schedule 1 (definition of *COVID-19 period* in section 6)**

Item 3 amends item 38A of Schedule 1 to the Ordinance with the effect of amending the definition of ‘COVID-19 period’ in section 6 of the NI Companies Act. The effect of this amendment is to extend the ‘COVID-19 period’ until the end of 31 December 2020. The amendment also reflects the fact that the day the ‘COVID-19 period’ commenced, the day the *Norfolk Island Continued Laws Amendment (Coronavirus Economic Response Measures) Rules 2020* commenced, was 21 July 2020. The ‘COVID-19 period’ is the period in which the temporary insolvency and bankruptcy protections are in force.

**Item [4] – Item 42AB of Schedule 1 (section 678)**

Item 4 amends item 42AB of Schedule 1 to the Ordinance with the effect of amending section 678 of the NI Companies Act.

Section 678 of the NI Companies Act, as originally inserted into this Act, provided that Part 30 of this Act is repealed at the start of 6 November 2020. Part 30 of the NI Companies Act, ‘Coronavirus economic response measures’, contains the temporary regulatory relief in respect of online meetings and electronic documents. The effect of this amendment is to change the date of repeal of Part 30 of the NI Companies Act from the start of 6 November 2020 to the start of 22 March 2021. This is consistent with the extension of the equivalent Commonwealth Coronavirus economic response measures made under the Corporations Act.

**Part 3—Transitional provisions**

Part 3 of Schedule 1 to the Rules makes some minor amendments to the transitional provisions arising from the amendments to the NI Bankruptcy Act and the NI Companies Act containing the Coronavirus economic response measures.

***Norfolk Island Continued Laws Ordinance 2015***

**Item [5] – Division 19 of Part 2 of Schedule 1 (heading)**

This item substitutes a new heading to Division 19 of Part 2 of Schedule 1 to the Ordinance, ‘Transitional provisions relating to the Coronavirus Economic Response Measures’. This Division contains the transitional provisions dealing with the application of the amendments to the NI Bankruptcy Act and the NI Companies Act containing the Coronavirus economic response measures, and this amendment is consequential to the amendments made to these measures by the Rules.

**Item [6] – Item 410 of Schedule 1**

This item amends item 410 of Schedule 1 to the Ordinance, which is a savings provision dealing with the repeal of section 677 of the NI Companies Act by section 678 (which was to be repealed at the start of 6 November 2020). This amendment is consequential to the amendment made by item 4 to section 678 of the NI Companies Act, which changes the date of repeal of Part 30 of the NI Companies Act to the start of 22 March 2021. Item 410 is a savings provision which provides that despite the repeal of section 677 of the NI Companies Act by section 678 (now to occur on 22 March 2021), this provision continues to apply in relation to acts or omissions that occurred before its repeal.