

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. 3) 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. 3) 2020* (the Rules) are made under section 6 of the Ordinance.

The Rules amend the Ordinance with the effect of amending 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).

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Island Act 1979*, Norfolk Island laws continued in force under either section 16 or 16A of the Act may be amended or repealed by an ordinance made under section 19A.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 Omnibus 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 Omnibus 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. These measures included:

- a temporary increase in the threshold for a creditor to initiate bankruptcy proceedings and an increase in the time period for debtors to respond to a bankruptcy notice;
- a temporary increase in the threshold at which creditors can issue a statutory demand on a company and the time companies have to respond to statutory demands; and
- temporary relief for directors from any personal liability for trading while insolvent.

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 dealt with provisions about meetings and document signatures that are not compatible with public health requirements for social distancing during the Coronavirus pandemic. These measures were later extended by the *Corporations (Coronavirus Economic Response) Determination (No. 3) 2020*. Specifically, this regulatory

relief facilitates online or virtual meetings for companies and the electronic execution of company documents.

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 the Corporations Act.

The *Norfolk Island Continued Laws Amendment (Coronavirus Economic Response Measures) Rules 2020*, 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 mentioned above. These measures were intended to apply for the same time periods as the relevant Commonwealth economic response measures and were subsequently extended by the *Norfolk Island Continued Laws Amendment (Coronavirus Economic Response Measures) Rules (No. 2) 2020* when the Commonwealth measures were also extended. Accordingly, the temporary relief for individuals and businesses in financial distress will end on 31 December 2020 and the measures dealing with online or virtual meetings for companies and the electronic execution of company documents will end on 21 March 2021.

The Government has decided that from 1 January 2021 the minimum amount of debt required to be owed before a creditor can initiate involuntary bankruptcy proceedings against a debtor under the Bankruptcy Act would be permanently increased to \$10,000 from \$2,000.

Similarly, the Government is considering whether to make permanent changes to the Corporations Act in relation to online or virtual meetings and electronic document execution. By modernising the Corporations Act and associated regulations through these reforms, companies would have the opportunity to utilise technology to satisfy their legal obligations. These reforms would make the temporary relief permanent allowing companies to continue to hold meetings online or virtually, send meeting-related materials electronically and validly execute documents electronically.

The Rules accordingly amend the Ordinance with the effect of amending the NI Bankruptcy Act to permanently increase to \$10,000 from \$2,000 the minimum amount of debt required to be owed before a creditor can initiate involuntary bankruptcy proceedings against a debtor. This is consistent with the new arrangements under the Bankruptcy Act applying from 1 January 2021 at the Commonwealth level.

To give greater certainty to companies and other stakeholders, the Rules also amend the Ordinance with the effect of amending the NI Companies Act to remove the sunset of the provisions providing for online or virtual meetings and electronic document execution. This will mean that Norfolk Island companies can continue to hold meetings virtually, send meeting-related materials electronically and validly execute documents electronically.

Finally, the Rules will also amend the Ordinance with the effect of amending the NI Companies Act to permanently increase to \$2,000, from \$1,000, the statutory minimum for a creditor to issue a demand to a debtor company. A statutory minimum of \$2,000, rather than \$1,000, is consistent with the relevant arrangements under the Corporations Act.

Consultation

In order to continue the urgent economic relief to the Norfolk Island community consistent with Commonwealth measures implemented throughout the rest of Australia, community consultation has not been undertaken. The proposal to make permanent changes to the Corporations Act in relation to online or virtual meetings and electronic document execution have been subject to public consultation. Pursuant to amendments recently passed by the

Commonwealth Parliament, Norfolk Island companies will transition to the Corporations Act in the second half of 2021.

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 (No. 3) 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 Omnibus 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 Omnibus 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. These measures included:

- a temporary increase in the threshold for a creditor to initiate bankruptcy proceedings and an increase in the time period for debtors to respond to a bankruptcy notice;
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- temporary relief for directors from any personal liability for trading while insolvent.

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 dealt with provisions about meetings and document signatures that are not compatible with public health requirements for social distancing during the Coronavirus pandemic. These measures were later extended by the *Corporations (Coronavirus Economic Response) Determination (No. 3) 2020*. Specifically, this regulatory relief facilitates online or virtual meetings for companies and the electronic execution of company documents.

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 the Corporations Act.

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Similarly, the Government is considering whether to make permanent changes to the Corporations Act in relation to online or virtual meetings and electronic document execution. By modernising the Corporations Act and associated regulations through these reforms, companies would have the opportunity to utilise technology to satisfy their legal obligations. These reforms would make the temporary relief permanent allowing companies to continue to hold meetings online or virtually, send meeting-related materials electronically and validly execute documents electronically.

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To give greater certainty to companies and other stakeholders, the Rules also amend the Ordinance with the effect of amending the NI Companies Act to remove the sunseting of the provisions providing for online or virtual meetings and electronic document execution. This will mean that Norfolk Island companies can continue to hold meetings virtually, send meeting-related materials electronically and validly execute documents electronically.

Finally, the Rules will also amend the Ordinance with the effect of amending the NI Companies Act to permanently increase to \$2,000, from \$1,000, the statutory minimum for a creditor to issue a demand to a debtor company. A statutory minimum of \$2,000, rather than \$1,000, is consistent with the relevant arrangements under the Corporations Act.

Human Rights implications

Right to health

The Rules do not limit any of the human rights and freedoms, but in a limited way 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 continuing to allow companies to hold meetings online, send meeting-related materials electronically and validly execute documents electronically, 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 in person 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 types of technology. 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 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.

**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

Norfolk Island Continued Laws Amendment (Coronavirus Economic Response Measures) Rules (No. 3) 2020

Section 1 – Name

This section provides that the title of the instrument is the *Norfolk Island Continued Laws Amendment (Coronavirus Economic Response Measures) Rules (No. 3) 2020* (the Rules).

Section 2 – Commencement

This section provides for the Rules to commence the day after the instrument is registered 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).

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Item [1] – Item 22BD of Schedule 1 (paragraph (b) of the definition of *statutory minimum* in section 3)

Item 1 amends item 22BD of Schedule 1 to the Ordinance with the effect of amending paragraph (b) of the definition of ‘statutory minimum’ in section 3 of the NI Bankruptcy Act. The effect of this amendment is that the ‘statutory minimum’ for the purposes of the NI Bankruptcy Act will be \$10,000, rather than \$2,000, when the ‘COVID-19 period’ ends on 31 December 2020. The ‘COVID-19 period’ is the period in which the temporary insolvency and bankruptcy protections are in force. From 1 January 2021, the minimum amount of debt required to be owed before a creditor can initiate involuntary bankruptcy proceedings against a debtor will decrease from \$20,000 to \$10,000 and the period debtors will have to respond to a bankruptcy notice will return to 21 days. These arrangements are consistent with the arrangements which will apply under the Commonwealth *Bankruptcy Act 1966* from 1 January 2021.

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 the reference to “\$2,000” with “\$10,000”. 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 amendment of the definition of ‘statutory minimum’ by item 1 above.

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).

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Item [3] – Item 38A of Schedule 1 (paragraph (b) of the definition of *statutory minimum* in section 6)

Item 3 amends item 38A of Schedule 1 to the Ordinance with the effect of amending the definition of ‘statutory minimum’ in section 6 of the NI Companies Act. The effect of this amendment is that the ‘statutory minimum’ for the purposes of the NI Companies Act will be \$2,000, rather than \$1,000, when the ‘COVID-19 period’ ends on 31 December 2020. The ‘COVID-19 period’ is the period in which the temporary insolvency and bankruptcy protections are in force. From 1 January 2021, the statutory minimum for a creditor to issue a demand to a debtor company will decrease from \$20,000 to \$2,000 and the period a debtor company will have to respond to a statutory demand will return to 21 days. A statutory minimum of \$2,000, rather than \$1,000, is consistent with the relevant arrangements under the Commonwealth *Corporations Act 2001*.

Item [4] – Item 42AB of Schedule 1 (Part 30 (heading))

This item substitutes a new heading to Part 30 of the NI Companies Act, ‘Meetings and company documents’. This Part contains the regulatory relief in respect of online meetings and electronic documents, and this amendment is consequential to the repeal of section 678 by item 5. Section 678 previously provided that these measures, as temporary Coronavirus economic response measures, would sunset at the start of 22 March 2021.

Item [5] – Item 42AB of Schedule 1 (section 678)

Item 5 amends item 42AB of Schedule 1 to the Ordinance with the effect of repealing section 678 of the NI Companies Act.

Section 678 of the NI Companies Act provided that Part 30 of this Act is repealed at the start of 22 March 2021. Part 30 of the NI Companies Act contains regulatory relief in respect of online meetings and electronic documents and the effect of this amendment is to remove the automatic sunset of these measures.

Part 3— Consequential amendment

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

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Item [6] – Item 410 of Schedule 1

This item repeals item 410 of Schedule 1 to the Ordinance, which is a saving provision dealing with the repeal of section 677 of the NI Companies Act by section 678. The repeal of section 678 of the NI Companies Act by item 5 above means that this item is no longer required.