

EXPLANATORY STATEMENT

Ordinance No. 9, 2016

Issued by the authority of the Minister for Territories, Local Government and Major Projects

Norfolk Island Act 1979

Norfolk Island Applied Laws Ordinance 2016

Authority

The *Norfolk Island Act 1979* (the Act) provides for the Government of the Territory of Norfolk Island. It defines the roles, responsibilities and powers of the Governor-General, the responsible Commonwealth Minister, the Administrator of Norfolk Island, and the Executive Director of Norfolk Island.

Section 19A of the Act provides that the Governor-General may make Ordinances for the peace, order and good government of the Territory of Norfolk Island.

The *Norfolk Island Applied Laws Ordinance 2016* is made under section 19A of the Act.

Purpose and operation

Subsection 18A(1) of the *Norfolk Island Act 1979* (Cth) provides that laws in force in New South Wales (NSW) are also in force on Norfolk Island. Subsection 18A(2) provides that a law in force in the Territory under subsection 18A(1) may be incorporated, amended or repealed under a section 19A Ordinance or a law made under such an ordinance. Subsection 18A(3) provides that a section 19A Ordinance can suspend the operation of a law in force in the Territory for such period as is specified in the Ordinance.

Accordingly, the Ordinance provides for the suspension of most applied NSW laws for six months, ending on 1 January 2017, and amends some of the applied NSW laws that will commence operation on Norfolk Island from 1 July 2016. In particular:

- it lists the NSW legislation which will commence operation (ie NSW legislation that is *not* suspended) on Norfolk Island on 1 July 2016
- it amends the *Interpretation Act 1987* (NSW)(NI) (ie the *Interpretation Act 1987* (NSW) as in force in Norfolk Island) to modify the way applied NSW laws are to be interpreted in relation to Norfolk Island
- it amends a number of other NSW laws in their application to Norfolk Island.

The suspension of most applied NSW laws for six month is intended to allow time for further negotiations with the NSW government for its officers and employees to perform functions and provide services in relation to Norfolk Island. It would also enable further consideration to be given to transitional arrangements which will need to be in place before more extensive application of NSW applied laws to Norfolk Island can occur.

The Ordinance amends the *Health Services Act 1997* (NSW)(NI) as appropriate for its application to Norfolk Island. These modifications dis-apply provisions not currently relevant to Norfolk Island, cause the Norfolk Island Health and Residential Aged Care Service to be an affiliated health organisation for the purposes of that Act, and cause the Norfolk Island Health Residential Aged Care Service to be part of the area in respect of which the South Eastern Sydney Local Health District is constituted.

The Ordinance also modifies the *Interpretation Act 1987* (NSW)(NI), in order to change the way that applied NSW laws are interpreted in relation to Norfolk Island. These are technical modifications that are required to reflect the fact that applied NSW laws are, in a constitutional sense, laws of the Commonwealth in force in Norfolk Island. For example, a reference to the ‘Crown’ would be taken to mean the Crown in right of the Commonwealth rather than the Crown in right of NSW.

The Ordinance also contains modifications to certain NSW laws which are to apply on Norfolk Island from 1 July 2016. In particular there are a number of modifications to the *Local Government Act 1993* (NSW)(NI) (the LGA), along with measures necessary to retain Norfolk Island’s existing waste management levy and allow a non-value based land rates system to be used for a period of up to two years. There are also a number of transitional amendments made to the LGA, including for example:

- amendments to constitute the council that is declared by the *Norfolk Island Regional Council Declaration Ordinance 2016* to be the Norfolk Island Regional Council (the Regional Council)
- amendments to provide the Regional Council with reasonable timeframes to adopt key documents during the transitional period
- amendments to make provision for staff that transfer from the Administration of Norfolk Island to the Regional Council.

The Ordinance also amends the application of the *Long Service Leave Act 1955* (NSW) to Norfolk Island in order to extend long service leave arrangements to Norfolk Island.

Consultation

The Norfolk Island Advisory Council, a body established under the *Norfolk Island Act 1979* (Cth), considered and provided advice on the results of community engagement on the applied law framework, including the establishment of the Regional Council and the health and employment frameworks.

As the amendments to the *Interpretation Act 1987* (NSW)(NI) are machinery in nature, consultation on those amendments was not undertaken.

Details of the Ordinance are set out in the Attachment.

The Ordinance is a legislative instrument for the purposes of the *Legislation Act 2003*.

The Ordinance commences on 1 July 2016.

Statement of Compatibility with Human Rights

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

Norfolk Island Applied Laws Ordinance 2016

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 Disallowable Legislative Instrument

This Ordinance establishes the applied law framework for Norfolk Island, and makes modifications to the way NSW laws apply on Norfolk Island. It does this by: suspending the majority of NSW laws for a period of six months; changing the way that NSW laws are interpreted in the Territory; and making amendments to specific Norfolk Island laws including the *Local Government Act 1993* (NSW) and the *Health Services Act 1997* (NSW).

The actual NSW laws in question are in force on Norfolk Island under section 18A of the *Norfolk Island Act 1979* (Cth), not this instrument. This Statement of Compatibility with Human Rights is therefore limited to considering the human rights implications of the specific modifications to NSW laws, rather than of the NSW laws themselves.

Human rights implications

This Disallowable Legislative Instrument engages the following right:

- Fair trial and fair hearing rights, as set out in Article 14 of the International Covenant on Civil and Political Rights. See also Article 40 of the Convention on the Rights of the Child and Article 13 of the Convention on the Rights of Persons with Disabilities.

The Territory of Norfolk Island has its own system of courts and tribunals. The Supreme Court of Norfolk Island exists under the *Norfolk Island Act 1979* (Cth). In addition, Norfolk Island continued laws have established both the Norfolk Island Court of Petty Sessions and the Norfolk Island Administrative Review Tribunal.

The *Local Government Act 1993* (NSW) and the *Health Services Act 1997* (NSW), which are in force on Norfolk Island from 1 July 2016 under section 18A of the *Norfolk Island Act 1979* (Cth), each make provision for both merits and judicial review in relation to certain matters. As these are laws of NSW, they provides for NSW Courts and Tribunals to undertake these review functions.

To ensure review rights continue in relation to Norfolk Island, both item 1 in Schedule 2 and item 6 in Schedule 3 to the *Norfolk Island Applied Laws Ordinance 2016* (Cth) operate to clarify that in matters which arise under the *Local Government Act 1993* (NSW) and the *Health Services Act 1997* (NSW), review options are vested in the relevant Norfolk Island court or tribunal.

Whilst this instrument changes review rights on Norfolk Island, by directing review mechanisms to Norfolk Island courts and tribunals instead of NSW courts and tribunals, it does not reduce or limit appeal rights. Accordingly, the instrument may be considered to promote human rights by ensuring that access to justice for Norfolk Islanders is protected under applied NSW laws.

Conclusion

The Disallowable Legislative Instrument is compatible with human rights because it promotes the protection of human rights.

Norfolk Island Applied Laws Ordinance 2016

Section 1 – Name

This section provides that the title of the Ordinance is the Norfolk Island Applied Laws Ordinance 2016.

Section 2 – Commencement

This section provides that the whole of the Ordinance commences on 1 July 2016.

Section 3 – Authority

This section provides that the Ordinance is made under section 19A of the *Norfolk Island Act 1979*.

Section 4 – Simplified outline of this Ordinance

This section contains the simplified outline of the Ordinance

Section 5 – Definitions

This section defines ‘applied law’ to mean a law of NSW as in force in the Territory under section 18A of the *Norfolk Island Act 1979* (Cth). As provided in the simplified outline, the term ‘applied law’ is used throughout the Ordinance to refer to NSW laws in their character as laws of the Territory.

Section 6 – Interpretation Act

Subsection 6(1) provides that the *Interpretation Act 1979* (NI) does not apply to this Ordinance. Rather the *Acts Interpretation Act 1901* (Cth) applies instead. The *Interpretation Act 1979* (NI) applies to all ‘enactments’ as defined in that Act, subject to any contrary intention appearing in the enactment. Although this Ordinance is an ‘enactment’ as defined, section 5 of this Ordinance expresses a contrary intention to that Act.

Subsection 6(2) provides that the *Interpretation Act 1987* (NSW), as it applies in the Territory from time to time, applies in relation to an applied law as amended by this Ordinance. It should be noted that Schedule 3 to this Ordinance amends the *Interpretation Act 1987* (NSW) as it applies in Norfolk Island.

Section 7 – Rules

Subsection 7(1) provides the responsible Commonwealth Minister with the power to make rules amending this Ordinance. A rule made for this purpose would be a ‘legislative instrument’ within the meaning of the *Legislation Act 2003*, and therefore would be ‘a law made under a section 19A Ordinance’ as mentioned in the *Norfolk Island Act 1979* (Cth).

Paragraph 7(1)(a) provides that the rules, by way of amending this Ordinance, may amend or repeal an applied law. This is consistent with subsection 18A(2) of the *Norfolk Island Act 1979* (Cth), which provides that an applied law may be incorporated, amended or repealed by a law made under a section 19A Ordinance.

Paragraph 7(1)(b) provides that a rule made under subsection 7(1) may make application, saving or transitional provisions in relation to any amendments or repeals of applied laws.

Subsection 7(2) is a standard provision which sets out the things the rules may not do such as create an offence or civil penalty, or provide powers of arrest, detention, entry search or seizure, or impose a tax. This subsection would prevent, for example, a rule from inserting a new offence into an applied law where the offence does not exist in the corresponding NSW

law. However it would not prevent a rule amending this Ordinance where it merely revives an existing offence under an applied law which has previously been repealed by this Ordinance. This is because such an offence would have been ‘created’ for the Territory by subsection 18A(1) of the *Norfolk Island Act 1979* (Cth) in applying the relevant NSW law to the Territory. The rule itself would not create any offence in such a case.

Similarly, subsection 7(2) would not preclude a rule reviving a power of arrest or detention, a power of entry, search or seizure, or the imposition of a tax, where the power or tax already exists in the corresponding NSW law.

Section 8 – Schedules

Subsection 8(1) provides that each applied NSW law that is specified in a schedule is amended or repealed as set out in the applicable items in the schedule, whilst any other item in a schedule has effect according to its terms.

Subsection 8(2) provides that the amendments, repeals and other items set out in the Schedules to this Ordinance continue in effect according to their terms from time to time. This provision is intended to acknowledge the fact that NSW laws in force on Norfolk Island under s18A of the *Norfolk Island Act 1979* (Cth) are in force as they exist from time to time, which means as they are amended in NSW, the amendments will also extend to Norfolk Island. This section makes clear that the amendments in this Ordinance continue to apply according to their own terms, even if the corresponding NSW law (and hence the applied law) is amended.

Subsection 8(3) provides that where an item in a schedule amends, suspends, repeals or otherwise affects an applied law, and the item is subsequently amended or repealed, then to the extent the corresponding law remains in force in NSW, the applied law also continues in force in NSW in accordance with section 18A of the *Norfolk Island Act 1979* (Cth) and this Ordinance as amended. This subsection is intended to make clear that the amendments, repeals, suspensions and other modifications set out in the schedules to this Ordinance are themselves subject to amendments and repeals as well, and that the application of the applied laws would be affected accordingly. For example, if an item in a schedule contains a modification of a NSW law, but the item is subsequently repealed, then the modification would cease to have effect and the relevant NSW law would be in force in the Territory without the modification.

Schedule 1—Suspensions

Item 1 – Suspensions

Subitem 1(1) provides that the operation of all legislation of NSW is suspended for a period ending immediately before 1 January 2017, other than those Acts which are specified in the table in subitem 1(1) and legislation made under those Acts.

The Acts specified in the table under subitem 1(1) are those which are not suspended on Norfolk Island from the final transition time by virtue of section 18A of the *Norfolk Island Act 1979* (Cth).

Subitem 1(2) provides that subitem (1) operates to suspend all NSW legislation that is not named in the table under subitem 1(1), regardless of whether that legislation is in operation at the time of suspension or whether it comes into operation in NSW at any time before 1 January 2017. In other words, if a new NSW law commences in NSW after the final transition time (but before 1 January 2017), and comes into force for Norfolk Island at the

same time due to subsection 18A(1) of the *Norfolk Island Act 1979* (Cth), subitem (1) would immediately suspend that law until 1 January 2017.

Item 2 – References to suspended law in law that is not suspended

Subitem 2(1) provides that the suspension of a law of NSW in the Territory by this Schedule does not affect any reference to that law in a provision of a law of NSW, the operation of which is not suspended in the Territory. This is intended to make it clear that applied NSW laws which are not suspended in the Territory are still able to incorporate, by reference, provisions of NSW laws, the operation of which is suspended in the Territory.

Common examples include where a non-suspended law defines a particular term by reference to the definition provided in a suspended law. In such a case, the definition would have effect as if it were part of the non-suspended law. Similarly, if a provision in a non-suspended law provides that a person has the same powers as those of another person under a specified suspended law, then the first mentioned person will have those powers as if they were set out in the non-suspended law itself. In these situations, the non-suspended law is capable of operating on the basis of the relevant definition or powers even if the law that sets out that definition or powers is not itself operative.

The above is to be contrasted with situations where the operation of a provision in a non-suspended law relies on the operation of a suspended law. In such circumstances, subitem 2(1) does not enliven the suspended law in order to enable the relevant provision of the non-suspended law to operate. For example, if a provision of a non-suspended law permits a person to do something only if the person has received a particular authorisation under a suspended law, subitem 2(1) would not enliven the provision of the suspended law that allows authorisation to be granted.

While item 2(1) makes clear that an operating applied law may effectively incorporate by reference the provisions of a suspended applied law, there may also be cases where the applied law intends to incorporate provisions of the NSW law as in force and operating *in NSW*, rather than the suspended applied law (ie rather than the law as in force but suspended in Norfolk Island). In this regard, it should be noted that the main difference between the two is that an applied law is interpreted according to the *Interpretation Act 1987* (NSW)(NI) as modified by Schedule 3 to this Ordinance, whereas a law as in force in NSW is not subject to those interpretational modifications.

Regarding the issue of whether a law being incorporated by reference in a particular case is the law as in force and operating in NSW or the law as in force but suspended in Norfolk Island, subitem 2(2) refers to new subsection 21D(3) of the *Interpretation Act 1987* (NSW)(NI), which would be inserted into that Act by Schedule 3 to this Ordinance. Subsection 21D(3) would provide that ‘a reference in an applied law to the short title of a NSW Act is taken to be a reference to the corresponding applied law’. This provision generally applies where there is no indication at the end of the reference to the law as to whether the reference is to the law as in force in NSW or is to the law as in force in Norfolk Island (eg, ‘(NSW)’ or ‘(NSW)(NI)’).

Subitem 2(2) means that the general rule provided in s 21D(3) does *not* apply where the law being incorporated by reference is suspended for Norfolk Island. In these circumstances, the question whether the reference is to the law in force in NSW or to the law in as in force (but suspended) in Norfolk Island must be determined according to the relevant context.

Schedule 2—Amendment of the Health Services Act 1997 (NSW)

Health Services Act 1997 (NSW)

Schedule 2 Overview

These items provide for modifications of the *Health Services Act 1997* as appropriate for its application to Norfolk Island. These modifications dis-apply provisions not currently relevant to Norfolk Island, cause the Norfolk Island Health and Residential Aged Care Service to be taken to be an affiliated health organisation for the purposes of that Act, and cause the Norfolk Island Health Residential Aged Care Service to be taken to be part of the area in respect of which the South Eastern Sydney Local Health District is constituted. The Norfolk Island Health and Residential Aged Care Service is a body continued in existence by the *Norfolk Island Health Residential Aged Care Service Act 1985* (NI).

Item 1

This item inserts new section 5A at the end of Chapter 1 of the *Health Services Act 1997* (NSW)(NI). Subsection 5A(1) provides that only the provisions of that Act listed in subsection 5A(2) apply in relation to Norfolk Island. Subsection 5A(2) lists the relevant provisions. Subsection 5A(3) confers certain jurisdiction on the Court of Petty Sessions of Norfolk Island. This is jurisdiction in matters arising under the *Health Services Act 1997* (NSW)(NI) in which the Local Court has jurisdiction under the *Health Service Act 1997* (NSW).

Item 2

This item adds new subsection 18(4) to the *Health Services Act 1997* (NSW)(NI). Subsection 18(4) provides that the Territory of Norfolk Island is taken to be a local government area in respect of which the South Eastern Sydney Local Health District is constituted, and that the table in Schedule 1 is taken to have been amended accordingly.

Item 3

This item adds new subsection 62(6) to the *Health Services Act 1997* (NSW)(NI). Subsection 62(6) provides that the Norfolk Island Health and Residential Aged Care Service (within the meaning of the *Norfolk Island Health and Residential Aged Care Service Act 1985*(NI)) is taken to be an affiliated health organisation in respect of its recognised establishment, the Norfolk Island Health and Residential Aged Care Service Facility (within the meaning of the *Norfolk Island Health and Residential Aged Care Act 1985*(NI)), and that the table in Schedule 3 is taken to have been amended accordingly.

Schedule 3—Amendment of the Interpretation Act 1987 (NSW)

Interpretation Act 1987 (NSW)

Item 1

Section 4 of the *Interpretation Act 1987* (NSW) as in force in NSW (NSW IA) is expressed to bind the Crown in the right of NSW as well as ‘the Crown in all its other capacities’. In the case of the *Interpretation Act 1987* (NSW)(NI) as a law in force in the Territory (NSW IA (NI)), there is no need to specifically refer to the Crown in right of NSW. Therefore, the amendment provided at item 1 deletes the reference to the Crown in right of NSW so that section 4 simply provides for the Act to bind the Crown ‘in each of its capacities’.

Item 2

This item would have the effect that references to ‘the Crown’ in applied NSW laws would be read as references to the Crown in right of the Commonwealth. This reflects the fact that, in the context of a law in force in an external Territory such as Norfolk Island, the Crown is the Crown in right of the Commonwealth and not the Crown in right of NSW.

Items 3 to 10 (inclusive)

These items insert definitions into the NSW IA (NI) which are generally relevant to the correct operation of applied NSW laws on Norfolk Island.

Item 11

This item contains provisions which explain the meaning of the citation of a law as to whether it refers to the law as in force in NSW or whether it refers to the law as in force in the Territory, based on whether the citation ends with ‘(NSW)’ or ‘(NSW)(NI)’. It also provides a general rule, at new subsection 21D(3), for interpretation of a reference to a law where the reference itself does not indicate whether it refers to the law as in force in NSW or the law as in force in the Territory (ie where the reference does not end with either ‘(NSW)’ or ‘(NSW)(NI)’).

Item 12

This item inserts a number of new provisions in the NSW IA (NI).

New section 38A relates to a situation where a provision of an applied law refers to a document made, approved or published under that or another applied law. For example, a provision of an applied Act might require a decision to be made having regard to guidelines made under another provision of that (or another) Act. If these guidelines are not of a legislative character, they will not automatically be applied, as Norfolk Island law, by s 18A of the *Norfolk Island Act 1979*.

In this situation, s 38A(a) recognises that a document of the kind in question may be made specifically for the *applied* law (ie for the application of the law on Norfolk Island). However, if this has not been done, s 38A(b) has the effect that the applicable document for the NSW law (as the law applies in NSW) is also the applicable document for Norfolk Island.

So for example, if an applied law requires a decision to be made having regard to guidelines made by ‘the Minister’, then the decision-maker would need to have regard to any guidelines made for the purposes of the applied law by the Commonwealth Minister. However, if that Minister has not made any such guidelines, then the decision-maker would need to have regard to the guidelines made by the relevant NSW Minister, in their current form, for the purposes of the law as it applies in NSW.

New section 38B has the effect that where an applied law provides that a recommendation or an approval is a prerequisite for taking particular action, and the responsible Commonwealth Minister has the function of taking that action because of section 18B of the *Norfolk Island Act 1979* (Cth), the Commonwealth Minister is able to take the action without satisfying that prerequisite. It should be noted that where the Commonwealth Minister himself or herself is also vested with the function to give the recommendation or approval due to section 18B of the *Norfolk Island Act 1979* (Cth), new section 38C (see below) would apply to remove the need for the Commonwealth Minister to interact with himself / herself. However, there may also be situations where it is unclear whether section 38C applies. For example, an applied NSW law may require the involvement of a NSW Minister that administers another NSW law referred to in the first mentioned applied NSW law. Depending on the terms and context of the relevant provision, it may not always be clear whether the Commonwealth Minister is taken to have the role of the other NSW Minister as well (due to section 18B of the

Norfolk Island Act 1979 (Cth)), and hence whether the situation can be dealt with by new section 38C. Proposed new section 38B is intended to address this.

New section 38C has the effect that where under an applied law the Norfolk Island Minister would be required to interact with himself or herself, the Norfolk Island Minister is not required to comply with that requirement.

New section 38D contains special rules relating to references in applied laws to the NSW Parliament. The section will mean that the requirement to do something in relation to the NSW Parliament does not need be complied with, and a failure to comply with such a requirement does not affect the validity of an act or thing which is done.

Item 13

This item inserts a new section 53B into the NSW IA (NI), which provides that an applied law that is expressed to establish or require the establishment or appointment of a statutory body (eg a committee) is not taken to establish, or require the establishment or appointment of, such a body in relation to Norfolk Island. This reflects the fact that establishing these bodies for Norfolk Island is not necessarily appropriate to the scale of the Territory.

Item 14

Section 58 of the NSW IA defines ‘laws of the State’ specifically for the purposes of Part 10 of that Act regarding application of State laws to coastal waters. In the NSW IA (NI), the expression ‘a law of the State’ would be defined under subsection 21(1) for the purposes of all applied NSW laws (see item 6), and so the definition in section 58 would no longer be necessary. Accordingly, this item repeals that definition.

Item 15

This item enables requirements to publish a document in the gazette to be satisfied through publication in the Commonwealth Gazette or the Territory Gazette.

Schedule 4—Amendment of the Local Government Act 1993 (NSW)

***Local Government Act 1993* (NSW)**

Item 1

Item 1 inserts new provisions at the end of Chapter 1 of the *Local Government Act 1993* (NSW) (the LGA).

New section 6A contains modifications for Norfolk Island relevant to courts, tribunals and Regional Council elections.

New subsection 6A(1) has the effect that where a matter arising under the *Local Government Act 1993* (NSW) would be dealt with by a court of NSW, jurisdiction is instead conferred, to the extent permitted by the Constitution of the Commonwealth, on a Norfolk Island Court, as provided in paragraphs 6A(1)(a), (b) and (c).

New paragraph 6A(1)(a) means that where the Supreme Court of New South Wales has jurisdiction for a kind of matter in relation to NSW, the Supreme Court of Norfolk Island has jurisdiction for that kind of matter in relation to Norfolk Island.

New paragraph 6A(1)(b) means that if the Local Court of NSW has jurisdiction for a kind of matter in relation to NSW, the Court of Petty Sessions of Norfolk Island has jurisdiction for that kind of matter in relation to Norfolk Island.

New paragraph 6A(1)(c) means that where the Land and Environment Court of NSW has jurisdiction in NSW in relation to a matter arising under Chapter 17 of the LGA, the Supreme Court of Norfolk Island has jurisdiction for that kind of matter in relation to Norfolk Island. Chapter 17 of the LGA contains a number of provisions providing for judicial review of decisions.

It is arguable new subsection 6A(1) is not required, as the existing Norfolk Island courts are already provided with original jurisdiction in respect of Norfolk Island under the terms of the legislation establishing the courts. However, the subsection has been included to clarify which Norfolk Island courts have jurisdiction. Further, the provision being inserted by this Ordinance makes it clear that jurisdiction vests in the Norfolk Island Courts under paragraphs 6A(1)(a), (b) and (c), irrespective of any limitations which may exist under Norfolk Island continued law legislation which would otherwise prevent a Norfolk Island Court from having jurisdiction on one of the above matters.

New subsection 6A(2) provides that, to the extent permitted by the Constitution, where a power or function is conferred on the Civil and Administrative Tribunal of NSW, that power or function, in relation to Norfolk Island, is conferred on the Administrative Review Tribunal of Norfolk Island.

New subsection 6A(3) provides that, to the extent permitted by the Constitution, where a power or function is conferred on the Land and Environment Court of NSW (other than under Chapter 17 which deals with judicial review), that power or function, in relation to Norfolk Island, is conferred on the Administrative Review Tribunal of Norfolk Island.

The limitation of the conferral of jurisdiction and powers to the extent permitted by the Constitution recognises that the powers exercisable by the relevant NSW courts and tribunal may be a mixture of judicial and non-judicial powers. The express limitation provided in subsections 6A(1), (2) and (3) clarifies that these provisions do not purport to confer powers on Norfolk Island bodies where it would infringe the doctrine of separation of power as enshrined in the Constitution.

New subsection 6A(4) modifies a number of provisions in the LGA which require things to be done within a period of time determined by reference to the date of an ‘ordinary election’. The provisions listed in new subsection 6A(4) would create anomalous outcomes in the Regional Council’s first term if the election held under the *Norfolk Island Preparatory Election Ordinance 2016* were to be considered an ordinary election for the purpose of those provisions. The modifications made by new subsection 6A(4), together with modification of the provisions mentioned in that subsection, will avoid such anomalies. After the Regional Council’s first term, those provisions will apply in the normal way for the second and subsequent local government elections.

Item 2

Item 2 inserts a new division to Chapter 6 of the LGA, which operates to suspend Part 2 of Chapter 6 for two years until 1 July 2018. Part 2 relates to the treatment by councils of public land. This suspension is intended to give the Regional Council a reasonable timeframe to classify public land, prepare the necessary documents and make the required declarations.

Item 3

Item 3 inserts a new subsection 1A into section 68 of the LGA.

New paragraph 68(1A)(a) provides that section 68 does not apply to a ‘development activity’ within the meaning of the *Planning Act 2002* (NI). This provision is included to ensure the existing planning regime continues on Norfolk Island, and that there is no

duplicate requirement to receive planning approval under both the LGA and the *Planning Act 2002* (NI).

New paragraph 68(1A)(b) provides that planning activities that are prohibited by the *Planning Act 2002* (NI) would remain subject only to the prohibition under that Act and not the prohibition under the LGA, and that activities that are lawful without the need for specific approval under the *Planning Act 2002* (NI) would remain lawful without having to comply with the requirements of the LGA.

Item 4

This item inserts new section 204A to constitute Norfolk Island as an area for the purposes of the LGA. Subsection 204A(2) provides that the provision constituting Norfolk Island as an area has effect regardless of any requirements in the LGA or any other law in force on Norfolk Island. This means that Norfolk Island is considered an ‘area’ for the purposes of the LGA even if the legal requirements that ordinarily apply to the constitution of areas (including but not limited to those relating to process and procedures) have not been met.

Items 5 and 6

These items modify section 219 of the LGA to ensure that the Regional Council is established by operation of section 219 despite section 53B of the NSW IA (NI). Section 53B is inserted by this Ordinance into that Act to provide a general interpretive rule that where an applied law provides for automatic establishment of a statutory body by operation of that law, that body is not automatically taken to be established in relation to Norfolk Island. Items 5 and 6 are included to express a contrary intention to section 53B to ensure that Norfolk Island is in fact constituted as a council for the purposes of the LGA.

Items 7 and 8

These items amend section 220 of the LGA, which relates to the legal status of councils. In particular, these items remove references to the ‘State’ to reflect the fact that the Regional Council is not a body politic of ‘the State’. It should be noted that the status of the Regional Council as a ‘body politic’ rather than a ‘body politic of the State’ does not mean the Regional Council is a part of the Commonwealth. Rather, the council constituted under the LGA would be a separate and distinct entity from the Commonwealth.

As provided in subsection 220(1), the Regional Council will be a body politic with perpetual succession and the legal capacity and powers of an individual both within and outside of the Territory of Norfolk Island. Further, as provided in subsection 220(2), the Regional Council will not be a body corporate. The above aligns with the legal status of local councils in NSW at the time when this Ordinance is made. However, should the *Local Government Act 1993 (NSW)* as in force in NSW be amended in the future to provide that NSW councils are bodies corporate, that change would also extend to the Regional Council as a result of subsection 18A of the *Norfolk Island Act 1979 (Cth)* (which provides that a NSW law as in force in NSW from time to time is in force also in Norfolk Island), unless the LGA as in force in Norfolk Island is modified so as to retain the body politic status of the Regional Council.

Item 9

This item is included to provide that the name of the area constituted is the Norfolk Island Regional Council, notwithstanding the naming requirements contained in section 221 of the LGA.

Item 10

This item would insert a note which makes it clear the persons elected in the election provided for by the Preparatory Election Ordinance become councillors of the Regional Council at the final transition time under the *Norfolk Island Regional Council Declaration Ordinance 2016*.

Item 11

This item includes a provision which provides, subject to other requirements in the Act that a Norfolk Island councillor will hold office for 4 years and 3 months, which is the expected term of the inaugural Regional Council councillors, subject to another election being provided for under the LGA or some other law in force on Norfolk Island.

Item 12

This item repeals Division 4 of Part 2 of Chapter 9, which provides for the establishment of the Local Government Remuneration Tribunal and confers certain functions on that tribunal in relation to the determination of the remuneration for the mayor and the other councillors. Given the scale of the Territory, and since the determinations made by the NSW Local Government Remuneration Tribunal under section 214 of the *Local Government Act 1993 (NSW)* as in force in NSW can readily be utilised by the Regional Council for this purpose (see items 13 to 17 below), it is not necessary for a separate tribunal to be established specifically for Norfolk Island.

Items 13 to 17

These items amend sections 248 and 249 of the LGA to provide that, in relation to Norfolk Island, the mayor and the other councillors are to be paid fees in accordance with the 'remuneration determination' as if the Regional Council were placed in the 'rural' category. New section 249A would define 'remuneration determination' to mean the determination made by the NSW Local Government Remuneration Tribunal for the current year, under section 214 of the *Local Government Act 1993 (NSW)* as in force in NSW, for NSW councillors. Should that tribunal ever cease to make determinations in relation to the rural category, these provisions of the LGA (as in force for Norfolk Island) will be revisited at that time.

Items 18 and 19

These items provide that the next ordinary election for the Regional Council is to be held in 2020, on the same day as local government elections are to be held in NSW in that year.

Item 20

This item dis-applies minimum requirements regarding responsibilities and accountabilities and pay rates for senior staff who are engaged before 1 January 2017. In recognition that there are employment negotiations occurring in respect of senior staff of the Regional Council, the above requirements are dis-applied so as not to pre-empt those negotiations.

Item 21

This item is a transitional provision which provides that the Chief Executive Officer of the Administration of Norfolk Island becomes at the final transition time the General Manager of the Regional Council.

Item 22

This item provides that the requirements in section 338 around appointment of a General Manager do not apply to the person who becomes General Manager under

section 334(3) as part of the transition from the old governance arrangement to the new arrangements commencing on 1 July 2016. However, section 338 would apply to subsequent appointments of General Managers.

Item 23

This item provides that, in relation to any employees transferring from the Administration of Norfolk Island to the Regional Council, the Regional Council is taken to have complied with any provision in the LGA which imposes a requirement in connection with the appointment of the employee.

It should be noted that subsection 18A(4) of the *Norfolk Island Act 1979* (Cth) provides that an applied law can only apply to the extent it is not inconsistent with a Commonwealth law or an 'enactment' (for example, a law made by the now abolished Norfolk Island Legislative Assembly, and which is continued in force by the *Norfolk Island Act 1979* (Cth)). This means the employment provisions in the LGA will apply only to the extent that they are not inconsistent with the *Fair Work Act 2009* (Cth) and the *Employment Act 1988* (NI).

Items 24, 25, 26 and 27

These items relate to the various plans which local governments are generally required to have in place, and the timeframes within which this must be done. The requirements in these provisions operate by reference to the date on which NSW local government elections are ordinarily held. As 2016 is an election year for NSW local governments, and the Regional Council will only come into existence on 1 July 2016, the timeframes imposed by these provisions are not appropriate for the Regional Council's first term. These items amend sections 402, 403, 404 and 405 of the LGA so that the timeframes within which the Regional Council will be required to have the plans in place are as follows:

- The Community Strategic Plan required by section 402 – by 1 October 2016
- The Resourcing Strategy required by section 403 – by 1 January 2017
- The Delivery Program required by section 404 – by 1 January 2017
- The Operational Plan required by section 405 – 1 October 2016

Item 28

This item adds a note to make it clear that the councillors elected under the *Norfolk Island Preparatory Election Ordinance 2016* are to become the councillors for the Regional Council on 1 July 2016 under the *Norfolk Island Regional Council Declaration Ordinance 2016*.

Item 29

This item provides that the Regional Council is taken to have satisfied the requirement in subsection 496(1) to levy a waste management charge for such time as a levy is imposed under section 8 of the *Waste Management Act 2003* (NI). This is to allow the continuation of the existing waste management levy on Norfolk Island.

Item 30

This item inserts a new subsection to section 497 to allow the Regional Council to levy ordinary land rates consisting only of a base amount for the 2016-17 and 2017-18 financial years. This is in recognition of the fact that there is no widespread land valuation regime on Norfolk Island. Until land on Norfolk Island can be valued it is not possible to have an ad valorem component. However, there is nothing in the Ordinance or the LGA as amended by this Ordinance which would prevent the Regional Council from moving towards an ad valorem land rates system earlier than 1 July 2018.

Items 31, 32 and 33

These items are consequential to item 30, and are intended to allow the Regional Council to levy ordinary land rates consisting only of a base amount for the 2016-17 and 2017-18 financial years.

Item 34

This item is consequential to item 29, and provides that section 504 does not apply to the Regional Council for so long as the waste levy under section 8 of the *Waste Management Act 2003* (NI) is in force. This provision is dis-applied to give the Regional Council flexibility in how it funds its waste management obligations.

Item 35

This item sets out the minimum amounts of ordinary rates the Regional Council must levy. It provides that in year one (i.e. until 30 June 2017) the Regional Council must levy at least \$500,000. In subsequent years the Regional Council must levy at least \$1 million.

Items 36 and 37

These items expand the range of considerations to which the Regional Council may have regard in determining subcategories for the purposes of levying land rates. In particular, it provides the Regional Council may have regard to the size of the parcel of land and the kind of business for the purposes of determining rates. These additional considerations provide flexibility for the Regional Council in light of the unique circumstances of Norfolk Island, including the absence of a widespread land valuation regime and the resulting difficulty in including an ad valorem component in the land rates for the first two years of the Regional Council's operation.

Items 38 and 39

These items dis-apply, for the first year of the Regional Council's operation, the requirement that the council give public notice of the draft operational plan before levying a rate or charge.

Items 40 and 41

These items dis-apply, for the first year of the Regional Council's operation, the deadline for the Regional Council to make a rate or charge before 1 August of the relevant year. This change is in recognition of the fact the Regional Council has until 1 October 2016 to make its draft operational plan in which land rate amounts will be set out.

Item 42

This item dis-applies requirements for the Regional Council to consider matters relating to ad valorem rates for any year in which an ad valorem component is not being levied. This amendment is consequential to item 30.

Items 43 and 44

These items dis-apply, for a year in relation to which section 500 does not apply, paragraph 537(1)(b) which requires a council to specify, by resolution, matters relating to an ad valorem component in accordance with section 500.

Item 45

This item amends section 610F of the LGA to provide that in relation to the 2016-17 financial year, the Regional Council is not required to give public notice of a proposed fee in conformity with that section. Rather, notice is to be given under section 705 for a period of at least 28 days.

Item 46

This item would repeal Schedule 1, which contains provisions on the appointment of the office of the Local Government Remuneration Tribunal and the assessors. With the repeal of Division 4, Part 2 of Chapter 9 in accordance by item 12, Schedule 1 of the LGA is no longer necessary.

Item 47

This item inserts the definitions of the terms ‘final transition time’ and ‘Preparatory Election Ordinance’, which are used in the provisions of the LGA as it applies on Norfolk Island.

Item 48

This item amends the definition of ‘Remuneration Tribunal’ in the Dictionary, so that references to the Remuneration Tribunal are references to the Local Government Remuneration Tribunal established by the LGA in force in NSW. With the repeal of Division 4, Part 2 of Chapter 9 of the LGA as an applied law, such a tribunal would not be established for Norfolk Island.

Schedule 5—Amendment of the *Long Service Leave Act 1955* (NSW)

***Long Service Leave Act 1955* (NSW)**

Item 1

This item expands the definition of ‘Agreement’ in subsection 3(1) to include certain instruments, agreements and determinations relevant to Norfolk Island.

Item 2

This item expands the definition of ‘Award’ to include certain instruments relevant to Norfolk Island.

Item 3

This item amends the definition of ‘Employer’ so that it continues to include the NSW Government. The Commonwealth is not an employer for the purposes of the *Long Service Leave Act 1955* (NSW)(NI); it is covered by the *Long Service Leave (Commonwealth Employees) Act 1976* (Cth).

Item 4

Subsection 3(1) of the *Long Service Leave Act 1955* (NSW) defines *Inspector* to mean an inspector appointed under the *Industrial Relations Act 1996*. The operation of the *Industrial Relations Act 1996* (NSW)(NI) is suspended by this Ordinance. This item repeals the definition of *Inspector* and replaces it with a definition under which *Inspector* means a person appointed under section 8A of the *Long Service Leave Act 1955* (NSW)(NI).

Item 5

This item inserts into subsection 3(1) definitions of ‘Norfolk Island employment contract’, ‘Norfolk Island enterprise agreement’ and ‘Norfolk Island wage determination’.

Item 6

This item inserts new section 3A, which modifies the *Long Service Leave Act 1955* (NSW) in its application to Norfolk Island.

Subsection 3A(1) provides for the powers and functions conferred by the *Long Service Leave Act 1955* (NSW) on the NSW Industrial Relations Commission. To the extent permitted by

the Commonwealth Constitution, these powers and functions are conferred by the *Long Service Leave Act 1955* (NSW)(NI) on the Fair Work Commission, which is continued in existence under the *Fair Work Act 2009* (Cth).

However, subsection 3A(2) provides that subsection (1) does not apply to a power or function conferred by section 12 (under which the Industrial Relations Commission in Court Session may make orders directing an employer to make certain long service leave payments).

Subsections 3A(3) and (4) provide that a reference to an industrial organisation or an industrial organisation of employees includes, respectively (in addition to the meaning of those terms within the *Industrial Relations Act 1996*), an ‘organisation’ or an ‘organisation of employees’ registered under the *Fair Work (Registered Organisations) Act 2009* (Cth).

Subsection 3A(5) provides for the powers and functions conferred by the *Long Service Leave Act 1955* (NSW) on the Local Court. To the extent permitted by the Commonwealth Constitution, these powers and functions are conferred by the *Long Service Leave Act 1955* (NSW)(NI) on the Court of Petty Sessions of Norfolk Island.

Item 7

Sections 4A and 4B require certain notifications to be made to the Long Service Leave Corporation. As the operation of the *Long Service Leave Corporation Act 2010* (NSW)(NI) is suspended by this Ordinance, sections 4A and 4B are repealed.

Item 8

This item inserts new section 8A concerning the appointment of inspectors. It is referred to in the definition of *Inspector*, inserted by item 4 of this Schedule.

Section 8A permits the Commonwealth Minister to appoint eligible persons as inspectors for the purposes of the *Long Service Leave Act 1955* (NSW)(NI) and provides for the persons who are eligible to be appointed as inspectors, the functions of inspectors, inspectors’ certificates of authority, and other related matters.