EXPLANATORY STATEMENT

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

Norfolk Island Legislation Amendment Act 2015

Norfolk Island Legislation (Migration) Transitional Rule 2016

Authority

The *Norfolk Island Legislation (Migration) Transitional Rule 2016* (Transitional Rule) is made under item 357 of Schedule 2 to the *Norfolk Island Legislation Amendment Act 2015*(NILA Act).

Sub-item 357(1) of Schedule 2 of the NILA Act provides that the responsible Commonwealth Minister may, by legislative instrument, make rules prescribing matters of a transitional nature (including prescribing any saving or application provisions) relating to the amendments or repeals made by Part 1 of Schedule 2. Sub-item 357(2) provides limitations on the rule making power.

Purpose and operation

The purpose of the Transitional Rule is to transition residents of Norfolk Island and those holding unrestricted entry permits, temporary entry permits or general entry permits under the *Immigration Act 1980* (Norfolk Island) to an equivalent status under the *Migration Act 1958* on 1 July 2016. From 1 July 2016, Norfolk Island will be integrated into the Australian migration zone and the *Immigration Act 1980* (Norfolk Island) will no longer apply. Therefore, anyone living on Norfolk Island will need to be an Australian citizen or hold a visa under the Migration Act.

A Statement of Compatibility with Human Rights is set out at <u>Attachment A</u>.

The Transitional Rule is a legislative instrument for the purpose of the *Legislation Act 2003*.

The Transitional Rule commences on 1 July 2016.

Details of the Rule are set out at <u>Attachment B</u>.

Consultation

The Department of Immigration and Border Protection is represented on the whole-of-government Norfolk Island Reform Taskforce chaired by the Department of Infrastructure and Regional Development, lead agency for the Norfolk Island governance reforms. Additional consultations have been undertaken (by the Department of Immigration and Border Protection) with:

- the Department of Human Services regarding intended changes to the visa transition model, and possible implications for access to certain government benefits;
- the Attorney-General's Department regarding transitional arrangements for adopted children residing on Norfolk Island;
- the Department of Employment in relation to Norfolk Island employers' access to the Seasonal Worker Programme; and
- the Department of Health regarding foreign nationals' access to health insurance and Medicare.

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The Department of Immigration and Border Protection has also consulted closely with the Administrator of Norfolk Island and Norfolk Island Immigration throughout the development of the visa transition model. Consultation and communication activities have also been undertaken with the Norfolk Island community throughout this process regarding the visa transition model and implications for local businesses.

ATTACHMENT A

Statement of Compatibility with Human Rights

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

Norfolk Island Legislation (Migration) Transitional Rule 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 the Legislative Instrument

From 1 July 2016 the Australian Government will commence delivering essential national functions on Norfolk Island. Responsibility for administering immigration and other border functions will transfer from the Norfolk Island Administration to the Department of Immigration and Border Protection.

Norfolk Island currently regulates its own immigration through the *Immigration Act 1980* (Norfolk Island). On 1 July 2016, this will be repealed and the *Migration Act 1958* (the Migration Act) will be extended to include Norfolk Island in the Australian migration zone.

The objective of this legislative instrument is to provide one part of the necessary regulatory amendments required to put in place arrangements to facilitate the transition of certain Norfolk Island permit holders and foreign national residents to the Australian visa regime as of 1 July 2016.

The changes are also designed to ensure that foreign national permit holders and permanent residents on Norfolk Island, and the island's economy, are not disadvantaged by a change in the immigration status of foreign nationals as a result of the governance reforms; this is being achieved by way of providing comparable rights and benefits to affected Norfolk Island foreign national residents that they are currently afforded.

This instrument achieves one aspect of the transition by providing the legislative mechanism for non-citizen permit holders (except those holding visitor permits) or permanent residents of Norfolk Island to be transitioned onto a comparable Australian visa, and related transitional matters. Broadly, this instrument will provide that:

- non-citizens who have permanent resident status under the *Immigration Act 1980* (Norfolk Island) will be taken to hold a comparable permanent Australian visa (a Subclass 808 (Confirmatory (Residence)) visa);
- non-citizens (other than New Zealand citizens) who hold a temporary entry permit or general entry permit, will be taken to hold a temporary Australian visa (a Subclass 159 (Provisional Resident Return) visa). It will be a condition of this visa that the holder can only live, study and work in Norfolk Island, except for dependent children who can live elsewhere in Australia for the purpose of study ;
- New Zealand citizens who hold an unrestricted entry permit will be taken to hold a Subclass 444 (Special Category) visa, providing them with the same benefits as other New Zealand citizens who hold this visa in Australia;

- all people who are in Norfolk Island on 1 July will be taken to have entered Australia and to be immigration cleared on that day.

Human rights implications

The human rights implications (including the right to work and the right to freedom of movement) relevant to the Norfolk Island reform were addressed as part of the *Norfolk Island Legislative Amendment Act 2015.* However, included within the Subclass 159 (Provisional Resident Return) visa that will be deemed to be held by holders of temporary entry permits or general entry permits, there will be a condition for these persons that the holder can work and live only in Norfolk Island, except for dependent children who can live elsewhere in Australia for the purpose of study. As such this condition engages the right to work under articles 6 and 4 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the right to freedom of movement and freedom to choose residence under article 12 of the International Covenant on Civil and Political Rights (ICCPR).

Article 6 and Article 4 of the ICESCR

Article 6 of ICESCR provides that:

> *The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*

It is the long standing position of the Australian Government that an authority from the Australian Government needs to be granted before a non-citizen is permitted to work. This authority and associated 'work rights' are attached to certain types of visas. A person is not permitted to work in Australia unless work rights have been granted.

The work rights of temporary non-citizens may be conditioned or limited on a case by case basis. Article 4 of ICESCR provides that the State may subject the rights enunciated in the ICESCR:

> *…only to such limitations as are determined by law only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in democratic society.*

The authority from the Australian Government granting work rights and conditions or limitations placed on temporary non-citizens in respect of those work rights is lawful as a matter of domestic law and serves the dual objectives of maintaining the integrity of the migration programme and ensuring that affected persons are not disadvantaged by a change in the immigration status of foreign nationals as a result of the governance reforms. By ensuring that the rationale for the original issuing of the temporary entry permit or general entry permit is maintained will also ensure the services performed by these permit holders will continue to benefit the Norfolk Island community. As such, the proposed amendments are justified in accordance with Article 4 of ICESCR. The condition for these persons that the holder can work only in Norfolk Island does not impact their movement within Australia unrelated to work and does not prevent their ability to apply for other visa subclasses, if eligible.

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Article 12 of the ICCPR

Article 12(1) of the ICCR provides that:

> *Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*

Article 12(3) that the right in 12(1) may be limited on bases that are:

- provided by law,
- necessary to protect national security, public order, or the rights and freedoms of others, and
- are otherwise consistent with the Covenant.

The measure requiring a person deemed to hold a Subclass 159 visa, to live and work only in Norfolk Island is set out in the disallowable legislative Instrument and will therefore have a lawful domestic basis and mirrors the restrictions placed on permit holders under the *Immigration Act 1980* (Norfolk Island). As discussed above, ensuring that the rationale for the original issuing of the temporary entry permit or general entry permit is maintained, will ensure the services performed by these permit holders will continue to benefit the Norfolk Island community. Thus the restriction for former permit holders of living only in Norfolk Island under the Subclass 159 visa is necessary to support the rights and freedoms of other Norfolk Island residents who benefit from the services that residing permit holders provide in their community. Therefore this limitation on the right to freedom of movement and choice of residence is in accordance with Article 12 (3) of the ICCPR. It is also a reasonable, necessary and proportionate measure directed at maintaining the integrity of the migration programme whilst ensuring that affected persons are not disadvantaged as a result of the governance reforms.

Also as discussed above, the condition for these persons that the holder can work and live only in Norfolk Island does not impact their movement within Australia unrelated to work and residence and does not prevent their ability to apply for other visa subclasses, if eligible.

Conclusion

Schedule 1 of this Disallowable Legislative Instrument is compatible with human rights. To the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

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ATTACHMENT B

<u>*Detailed description of the Transitional Rule*</u>

Part 1 - Preliminary

Section 1 – Name of rule

This section provides that the title of this instrument is the 'Norfolk Island Legislation (Migration) Transitional Rule 2016' (the Transitional Rule).

Section 2 – Commencement

This section provides that the Transitional Rule takes effect on 1 July 2016.

Section 3 – Authority

This section makes clear that the Transitional Rule is made under item 357 of Schedule 2 to the *Norfolk Island Legislation Amendment Act 2015*. This section refers only to item 357 and not also to item 370 of the *Norfolk Island Legislation Amendment Act 2015* because item 370 envisages things being done by transitional rules, a phrase defined to mean rules under item 357.

Section 4 – Definitions

Section 4 defines certain terms that are used in this Transitional Rule.

The definition of ***dependent child*** is necessary in the Transitional Rule as a consequence of subsection 8(5), where there is limited allowance – as described in that subsection – for certain dependent children to live, study and work in Australia (rather than only in Norfolk Island). The meaning of "dependent child" is set out in section 5.

Final transition time is defined, for the purposes of the Transitional Rule, to mean the commencement of Part 1 of Schedule 2 to the *Norfolk Island Legislation Amendment Act 2015*, which is 1 July 2016. The final transition time is referred to throughout the Transitional Rule.

The definition of ***non-citizen*** is included so that it has the same meaning as the definition of "non-citizen" in the *Migration Act 1958* (the Migration Act). The Transitional Rule does not affect Australian citizens, except as outlined in section 12.

The definition of ***parent*** is necessary in the Transitional Rule as a consequence of provisions where a baby's status at the final transition time is dependent on the status of the baby's parent or parents. The meaning of "parent" is set out in section 5.

Section 5 – Determining whether a person is a parent, or a dependent child, of another person

Subsection 5(1) provides that for the purposes of this instrument (ie, the Transitional Rule), whether a person is or was a parent of another person is to be determined in the same way as it is determined for the purposes of the Migration Act.

This is important in potentially limiting claims of parenthood, particularly as once a person is taken to hold a visa under this Transitional Rule, they effectively have a pathway to permanent residence under the Migration Act.

Subsection 5(2) provides that for the purposes of this instrument (ie, the Transitional Rule), whether a person is or was a dependent child of another person is to be determined in the same way as it is determined for the purposes of the Migration Act.

Subsection 8(5) refers to a dependent child in paragraph (b). Subsection 8(5) imposes a condition on Subclass 159 visas that are taken under section 8 to have been granted. The condition is relaxed to a certain extent for certain dependent children. By defining "dependent child" as set out in subsection 5(2) of the Transitional Rule, there is a clear need for the child to be dependent, as set out in the Migration Regulations. The nexus to the Norfolk Island parent is more fully described for subsection 8(5), below.

<u>Part 2 – Visas taken to have been granted immediately after the final transition time</u>

Division 1 – Visas relating to holding of unrestricted entry permits on 30 June 2016

In general, this Division provides for:

- a New Zealand citizen who held an unrestricted entry permit immediately before the final transition time (1 July 2016); and
- a baby who:
  - was born within a restricted timeframe;
  - did not hold an unrestricted entry permit, general entry permit or temporary entry permit under the *Immigration Act 1980* (Norfolk Island);
  - was a New Zealand citizen;
  - was the child of at least one unrestricted entry permit holder; and
  - was present in Norfolk Island immediately before the final transition time

  to be taken to have been granted a Subclass 444 (Special Category) visa under the Migration Act on 1 July 2016.

The reason for this "deeming" of visas is as a consequence of the cessation of Norfolk Island's *Immigration Act 1980* and the extension of the Migration Act to Norfolk Island from 1 July 2016.

This Division also sets out how the "deemed" Subclass 444 visa is taken to come into effect.

Item 370 of Schedule 2 to the *Norfolk Island Legislation Amendment Act 2015* provides for the two ways in which the transitional rules can provide for a person to be *taken to have been granted* a specified type of visa under the Migration Act immediately after the final transition time of 1 July 2016.

Subitem 370(1) provides for the transitional rules to provide for a person to be taken to have been granted a specified type of visa under the Migration Act immediately after the final transition time if they held a specified type of permit immediately before the final transition time of 1 July 2016.

Subitem 370(2) provides for the transitional rules to provide that if, immediately before the final transition time, a person was in specified circumstances, the person is taken to have been granted a specified type of visa under the Migration Act immediately after the final transition time.

Section 6 – Subclass 444 (Special Category) visa taken to have been granted

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Subsection 6(1) provides that a non-citizen is taken to have been granted a Subclass 444 (Special Category) visa under the Migration Act immediately after the final transition time if either subsection (2) or (3) applies to them. Where subsection (2) or (3) applies to the non-citizen, then the non-citizen will be taken to hold a Subclass 444 visa at the final transition time, which is 1 July 2016.

Subsection 6(2) has the effect of "deeming" the grant of a Subclass 444 visa at the final transition time of 1 July 2016 if the non-citizen, immediately before the final transition time, held an unrestricted entry permit and did not hold a permanent visa under the Migration Act.

Prior to 1 July 2016, ie, prior to the date of repeal of the *Immigration Act 1980* (Norfolk Island), a person who was an Australian or New Zealand citizen and who entered Norfolk Island held an unrestricted entry permit, which remained valid until such time as the permit holder left Norfolk Island.

That is, when the holder of the unrestricted entry permit left Norfolk Island, their unrestricted entry permit would cease. Upon their return to Norfolk Island, they would once again hold an unrestricted entry permit.

As subsection 6(2) of the Transitional Rule applies to a *non-citizen* who held an unrestricted entry permit immediately before the final transition time, it therefore only applies in respect of New Zealand citizens, as "non-citizen" is defined in section 4 to mean a person who is not an Australian citizen.

Subclass 444 (Special Category) visas are the most similar product under the Migration Act to unrestricted entry permits under the *Immigration Act 1980* (Norfolk Island) and, as such, Subclass 444 visas will be deemed to be granted to those who held unrestricted entry permits (immediately before the final transition time) upon the cessation of the *Immigration Act 1980* (Norfolk Island) on 1 July 2016.

Subsection 6(3) applies in respect of certain babies born after 30 December 2015.

In most situations, a newborn baby of an unrestricted entry permit holder who is in Norfolk Island immediately before the final transition time would also be an unrestricted entry permit holder pursuant to the *Immigration Act 1980* (Norfolk Island). In such instances, the newborn baby would be "deemed" to hold a Subclass 444 (Special Category) visa on 1 July 2016.

However in some circumstances the baby may not have the appropriate permit status; for example, if a baby with one New Zealand citizen parent and one other foreign national parent (born during the correct period) returned to Norfolk Island prior to 1 July 2016, and the baby did not have evidence of New Zealand citizenship so was granted a visitor permit, and the parents did not or could not apply for a temporary entry permit, the baby would have a visitor permit on 30 June 2016. This means that although both parents would transition (to a Subclass 159 visa and a Subclass 444 visa), the baby would not transition appropriately.

Under these circumstances, the baby should be taken to hold the most advantageous visa of the two parents, ie, the Subclass 444 (Special Category) visa. At this point the baby would have a pathway to permanent residence.

Section 7 – Effect of Subclass 444 visa taken to have been granted

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Subsection 7(1) deals with when a Subclass 444 (Special Category) visa that is taken to have been granted to a non-citizen – by virtue of this Transitional Rule – is then taken to come into effect.

Paragraph 7(1)(a) provides for the Subclass 444 visa to come into effect immediately after the final transition time.

Paragraph 7(1)(b) provides for the situation where a person may have held an unrestricted entry permit under the *Immigration Act 1980* (Norfolk Island) and also a temporary visa under the Migration Act (other than a Subclass 600 (Visitor) visa, a Subclass 601 (Electronic Travel Authority) visa, or a Subclass 651 (eVisitor) visa) at the final transition time.

In relation to why a person would concurrently hold a permit and a visa (prior to the final transition time): persons in Norfolk Island who are not citizens of Australia or New Zealand would be required under the *Immigration Act 1980* (Norfolk Island) to hold an Australian visa valid for the duration of the person's stay in Norfolk Island and an additional 30 days. While New Zealand citizens would not be required to hold an Australian visa to be granted an unrestricted entry permit, they could nonetheless hold one, and if they did, paragraph 7(1)(b) would apply.

The effect of paragraph 7(1)(b) is that where the holder of the unrestricted entry permit also holds a temporary visa under the Migration Act (other than a Subclass 600 visa, Subclass 601 visa or a Subclass 651 visa), the Subclass 444 visa is still granted at the final transition time of 1 July 2016, however it does not come into effect until the cessation of the temporary visa.

Depending on individual circumstances, other temporary visas held by a New Zealand citizen under the Migration Act may be more beneficial to the visa holder than a Subclass 444 visa. For example, an unrestricted entry permit holder could also be a holder of a Subclass 309 (Partner (Provisional)) visa, which leads to a permanent visa and has a shorter residence requirement compared to the requirements for a pathway to permanent residence available to former holders of Norfolk Island Immigration permits. It would be a disadvantage to the visa holder if the Subclass 444 visa took effect and ceased the Subclass 309 visa.

However, where the holder of the unrestricted entry permit also holds a Subclass 600 (Visitor) visa, a Subclass 601 (Electronic Travel Authority) visa, or a Subclass 651 (eVisitor) visa under the Migration Act, then that visa is intended to cease upon grant of the Subclass 444 visa immediately after the final transition time. The Subclass 600, 601 and 651 visas are visitor visas which are less beneficial than a Subclass 444 visa.

Subsection 7(2) makes it clear that a Subclass 444 (Special Category) visa that is taken to have been granted by virtue of the Transitional Rule is not prevented from being cancelled or otherwise ceasing to be in effect under the Migration Act.

Division 2 – Visas relating to holding of general or temporary entry permits on 30 June 2016

In general, this Division provides for:

- a non-citizen who held a Norfolk Island general or temporary entry permit immediately before the final transition time (1 July 2016); and
- a baby who:
    - was born within a restricted timeframe;

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- did not hold an unrestricted entry permit, general entry permit or temporary entry permit under the *Immigration Act 1980* (Norfolk Island);
- was not a resident of Norfolk Island under the *Immigration Act 1980* (Norfolk Island);
- was not a New Zealand citizen;
- was the child of a parent who held an unrestricted entry permit as a New Zealand citizen or held a general entry permit or temporary entry permit under the *Immigration Act 1980* (Norfolk Island);
- did not hold a permanent visa under the Migration Act; and
- was present in Norfolk Island immediately before the final transition time

to be taken to have been granted a Subclass 159 (Provisional Resident Return) visa under the Migration Act on 1 July 2016.

The reason for this "deeming" of visas is as a consequence of the cessation of Norfolk Island's *Immigration Act 1980* and the extension of the Migration Act to Norfolk Island from 1 July 2016.

This Division also sets out the kind of Subclass 159 visa that is taken to have been granted by virtue of the Transitional Rule, the condition that is imposed on these visas, how the "deemed" Subclass 159 (Provisional Resident Return) visa is taken to come into effect, and how the Transitional Rule provisions about the Subclass 159 visa for the Norfolk Island cohort interact with provisions relating to when a Subclass 159 visa is in effect under the *Migration Regulations 1994*.

Item 370 of Schedule 2 to the *Norfolk Island Legislation Amendment Act 2015* provides for the two ways in which the transitional rules can provide for a person to be *taken to have been granted* a specified type of visa under the Migration Act immediately after the final transition time of 1 July 2016.

Subitem 370(1) provides for the transitional rules to provide for a person to be taken to have been granted a specified type of visa under the Migration Act immediately after the final transition time if they held a specified type of permit immediately before the final transition time of 1 July 2016.

Subitem 370(2) provides for the transitional rules to provide that if, immediately before the final transition time, a person was in specified circumstances, the person is taken to have been granted a specified type of visa under the Migration Act immediately after the final transition time.

Section 8 – Subclass 159 (Provisional Resident Return) visa taken to have been granted

Subsection 8(1) provides that a non-citizen is taken to have been granted a Subclass 159 (Provisional Resident Return) visa under the Migration Act immediately after the final transition time if either subsection (2) or (3) applies to them. Where subsection (2) or (3) applies to the non-citizen, then the non-citizen will be taken to hold a Subclass 159 visa at the final transition time, which is 1 July 2016.

Subsection 8(2) has the effect of "deeming" the grant of a Subclass 159 visa at the final transition time of 1 July 2016 if the non-citizen, immediately before the final transition time,

held a general entry permit, or a temporary permit, and did not hold a permanent visa under the Migration Act.

Prior to 1 July 2016, ie, prior to the date of repeal of the *Immigration Act 1980* (Norfolk Island), a temporary entry permit might, in general, have been granted to a person who intended to stay on Norfolk Island for a period exceeding 120 days. A temporary entry permit was in force for one year and was able to be extended up to one year at a time. The permit allowed the permit holder to work, and the permit holder had to concurrently hold a current Australian visa. After holding a temporary entry permit for four out of five years, a temporary entry permit holder could apply for a general entry permit, which was granted for a period of five years and six months. A general entry permit holder who had been ordinarily resident on the island for at least five years during a seven-year period could apply to become a resident (permanent).

There are no comparable visa products to temporary entry permits and general entry permits, however the Subclass 159 (Provisional Resident Return) visa, with necessary amendments, is considered appropriate to cater for the Norfolk Island cohort.

The duration of the Subclass 159 visa of 12 months (for the Norfolk Island cohort) mimics the duration of a temporary entry permit. Before the end of this period, the visa holder will need to apply for a subsequent Subclass 159 visa in order to continue living on Norfolk Island and accessing the pathway to permanent residence. The duration of the subsequent Subclass 159 visa under the *Migration Regulations 1994* is six years and six months, which is similar to the duration of a general entry permit. This will allow the visa holder to meet the residence requirement on Norfolk Island and be eligible for permanent residence under the *Migration Regulations 1994*. Section 10 makes it clear that the duration and conditions specified in Divisions 159.5 and 159.6 of Schedule 2 to the *Migration Regulations 1994* do not apply to the Norfolk Island cohort.

Subsection 8(3) applies in respect of certain babies born after 30 December 2015.

This provision is intended to cover the situation where a mother and/or father lives in Norfolk Island as the holder of an unrestricted entry permit, a general entry permit or a temporary entry permit and a baby is born to either/both Norfolk Island-based parents.

Generally speaking, there are no suitable birthing facilities in Norfolk Island and, as such, it is customary for a mother to depart the Island to give birth. Generally, the mother will go to mainland Australia or New Zealand to give birth.

Where the baby is born after 30 December 2015 and is in Norfolk Island prior to the final transition time of 1 July 2016, the baby may not yet have a permit status, or may only hold a visitor permit until the baby's temporary entry permit or general entry permit status can be resolved. Furthermore, by virtue of the *Norfolk Island Continued Laws Amendment (2016 Measures No. 1) Ordinance 2016*, which amended the Norfolk Island Continued Laws Ordinance 2015, applications for temporary permits or general entry permits during June 2016 are not possible. As such, subsection 8(3) is important so that a baby born after 30 December 2015 who meets the requirements set out in paragraphs (a) to (f) is able to be granted a Subclass 159 visa immediately after the final transition time.

At this point the baby would have a pathway to permanent residence.

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Notably, where the baby is a New Zealand citizen, subsection 6(3) will apply to the baby. However, where the baby is not a New Zealand citizen (even if a parent is a New Zealand citizen), then the baby will be taken to hold a Subclass 159 visa immediately after the final transition time.

Subsection 8(4) sets out the duration of the "deemed" Subclass 159 visa. It will come into effect as specified in section 9, and will end at the end of 30 June 2017, although other usual cessation provisions in the Migration Act such as subsection 82(2) will still continue to apply. Therefore, for example, if another substantive visa comes into effect for the visa holder (except for a special purpose visa), then the "deemed" Subclass 159 visa will cease to be in effect.

Subsection 8(5) imposes a condition on the "deemed" Subclass 159 visa so that while the visa holder is in Australia, the visa holder must live, study and work only in Norfolk Island.

However, there is an exception to the above in relation to certain dependent children – those who meet the requirements of paragraphs 8(5)(a) to (d) are permitted to live, study and work elsewhere in Australia (subject to limitations). This is due to the limited study options available in Norfolk Island. This provision acknowledges that the visa holder will not be physically present in Norfolk Island while studying elsewhere in Australia, therefore, the time spent elsewhere in Australia to study will continue to count as time spent on Norfolk Island for the purpose of meeting the residence requirement for a pathway to permanent residence. Paragraph (b) specifically requires that the person must be a dependent child of a person who is ordinarily resident in Norfolk Island. Work rights are limited by virtue of paragraph (d), which requires the visa holder to meet the requirements mentioned in condition 8105 in Schedule 8 to the *Migration Regulations 1994*.

Section 9 – Effect of Subclass 159 visa taken to have been granted

Subsection 9(1) deals with when a Subclass 159 (Provisional Resident Return) visa that is taken to have been granted to a non-citizen – by virtue of this Transitional Rule – is then taken to come into effect.

Paragraph 9(1)(a) provides for the Subclass 159 visa to come into effect immediately after the final transition time.

Paragraph 9(1)(b) provides for the situation where a person may have held a temporary entry permit or a general entry permit under the *Immigration Act 1980* (Norfolk Island) and also a temporary visa under the Migration Act (other than a Subclass 600 (Visitor) visa, a Subclass 601 (Electronic Travel Authority) visa, or a Subclass 651 (eVisitor) visa) at the final transition time.

Prior to the final transition time – and in relation to why a person would concurrently hold a permit and a visa – persons in Norfolk Island (who are not citizens of Australia or New Zealand) have been required to hold an Australian visa which is valid for the duration of the person's stay in Norfolk Island and an additional 30 days. Provisions in the *Immigration Act 1980* (Norfolk Island) relating to the defined term "prescribed person" in that Act are relevant to this requirement.

The effect of paragraph 9(1)(b) is that where the holder of the temporary entry permit or general entry permit also holds a temporary visa under the Migration Act (other than a Subclass 600 visa, Subclass 601 visa or a Subclass 651 visa), the Subclass 159 visa is still

granted at the final transition time of 1 July 2016, however it does not come into effect until the cessation of the temporary visa.

However, where the holder of the temporary entry permit or the general entry permit also holds a Subclass 600 (Visitor) visa, a Subclass 601 (Electronic Travel Authority) visa, or a Subclass 651 (eVisitor) visa under the Migration Act, then that visa is intended to cease upon grant of the Subclass 159 visa immediately after the final transition time. The Subclass 600, 601 and 651 visas are visitor visas which are less beneficial than a Subclass 159 visa.

Subsection 9(2) makes it clear that the "deemed" Subclass 159 (Provisional Resident Return) visa stays in effect until the end of 30 June 2017 (including where it only comes into effect marginally beforehand).

Subsection 9(3) makes it clear that the "deemed" Subclass 159 visa cannot continue to be in effect past 30 June 2017.

Subsection 9(4) makes it clear that a Subclass 159 (Provisional Resident Return) visa that is taken to have been granted by virtue of the Transitional Rule is not prevented from being cancelled or otherwise ceasing to be in effect under the Migration Act.

Section 10 – This Division has effect despite Divisions 159.5 and 159.6 of Schedule 2 to the *Migration Regulations 1994*

Section 10 provides that Division 2 of the Transitional Rule has effect despite Divisions 159.5 and 159.6 of Part 159 of Schedule 2 to the *Migration Regulations 1994*. Divisions 159.5 and 159.6 relate to when a Subclass 159 visa (for the non-Norfolk Island cohort) is in effect and the conditions on such a visa.

Division 3 – Visas for residents of Norfolk Island on 30 June 2016

This Division provides for:

- a non-citizen who was a resident of Norfolk Island under the *Immigration Act 1980* (Norfolk Island) who did not hold a permanent visa under the Migration Act immediately before the final transition time (1 July 2016); and
- a non-citizen who held a Subclass 834 (Permanent Resident of Norfolk Island) visa under the Migration Act immediately before the final transition time

to be taken to have been granted a Subclass 808 (Confirmatory (Residence)) visa under the Migration Act on 1 July 2016.

The reason for this "deeming" of visas is as a consequence of the cessation of Norfolk Island's *Immigration Act 1980* and the extension of the Migration Act to Norfolk Island from 1 July 2016. In addition, Part 834 of Schedule 2 to the Migration Act will be repealed from 1 July 2016.

This Division also sets out how the "deemed" Subclass 808 visa is taken to come into effect, the kind of Subclass 808 visa that is granted, and to clarify cancellation and cessation matters.

Item 370 of Schedule 2 to the *Norfolk Island Legislation Amendment Act 2015* provides for the two ways in which the transitional rules can provide for a person to be *taken to have been granted* a specified type of visa under the Migration Act immediately after the final transition time of 1 July 2016.

Subitem 370(1) provides for the transitional rules to provide for a person to be taken to have been granted a specified type of visa under the Migration Act immediately after the final

transition time if they held a specified type of permit immediately before the final transition time of 1 July 2016.

Subitem 370(2) provides for the transitional rules to provide that if, immediately before the final transition time, a person was in specified circumstances, the person is taken to have been granted a specified type of visa under the Migration Act immediately after the final transition time.

Section 11 – Subclass 808 (Confirmatory (Residence)) visa taken to have been granted

Subsection 11(1) provides that a non-citizen is taken to have been granted a Subclass 808 (Confirmatory (Residence)) visa under the Migration Act immediately after the final transition time if either subsection (2) or (3) applies to them. Where subsection (2) or (3) applies to the non-citizen, then the non-citizen will be taken to hold a Subclass 808 visa at the final transition time, which is 1 July 2016.

Subsection 11(2) has the effect of "deeming" the grant of a Subclass 808 visa at the final transition time of 1 July 2016 if the non-citizen, immediately before the final transition time, was a resident of Norfolk Island under the *Immigration Act 1980* (Norfolk Island) and did not hold a permanent visa under the Migration Act.

Under the *Immigration Act 1980* (Norfolk Island), foreign nationals who have held a temporary entry permit and general entry permit, or have held an unrestricted entry permit, are eligible to apply for Norfolk Island permanent residency once they have satisfied a residence requirement of five in seven years on Norfolk Island. If this application is approved and the person is issued a 'Certificate of Residency' they are no longer required to hold a permit under the Act. People who hold Norfolk Island residency are not required to hold a concurrent Australian visa once they have attained this status. Norfolk Island permanent residency provides similar rights and benefits on Norfolk Island to the rights and benefits of Australian permanent visa holders.

Consequently, a permanent visa product needs to be provided for residents of Norfolk Island. Subclass 808 (Confirmatory (Residence)) visas are tailored by virtue of this Transitional Rule to smoothly transition non-citizen residents of Norfolk Island to Australia's universal visa system under the Migration Act on and from 1 July 2016 when Norfolk Island's *Immigration Act 1980* will cease.

Subsection 11(3) has the effect of "deeming" the grant of a Subclass 808 visa at the final transition time of 1 July 2016 if the non-citizen, immediately before the final transition time, held a Subclass 834 (Permanent Resident of Norfolk Island) visa under the Migration Act. A Subclass 834 visa is a product that has provided Australian permanent resident status to a foreign national with Norfolk Island permanent residency while the holder remains in Australia. It was created to provide holders of Norfolk Island permanent residency with an equivalent permanent status while they are in Australia, because they are not required to concurrently hold an Australian visa to support this status. Part 834 of Schedule 2 to the *Migration Regulations 1994* will be repealed on 1 July 2016, so the "deeming" of a Subclass 808 visa is intended to smoothly transition holders of permanent Subclass 834 visas to permanent Subclass 808 visas, enabling all foreign nationals holding Norfolk Island permanent residency to remain in Australia with the same visa status.

Subsection 11(4) sets out what type of visa the "deemed" Subclass 808 visa is for the Norfolk Island cohort in terms of when it comes into effect, and what kind of visa it is. This kind of

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Subclass 808 visa will come into effect immediately after the final transition time on 1 July 2016 and is taken to be a permanent visa which will permit the holder to travel to and enter Australia for a period of 5 years. Therefore, the visa is a permanent one while the visa holder remains in Australia, and it has a 5 year travel facility. If the visa holder wishes to travel outside Australia after this period, depending on circumstances there are other options available, such as applying for a resident return visa or citizenship.

Subsection 11(4) also states that it has effect despite Division 808.5 in Part 808 of Schedule 2 to the *Migration Regulations 1994*. Division 808 relates to when a Subclass 808 visa (for the non-Norfolk Island cohort) is in effect.

Subsection 11(5) makes it clear that a Subclass 808 visa that is taken to have been granted by virtue of the Transitional Rule is not prevented from being cancelled or otherwise ceasing under the Migration Act.

Part 3 – Immigration status of persons in Norfolk Island at the final transition time

Section 12 – Immigration status of persons in Norfolk Island at the final transition time

This section deals with the immigration status of people who are in Norfolk Island at the final transition time of 1 July 2016.

This section ensures that where a person is in Norfolk Island at the final transition time, the person:

- is taken to have entered Australia for the purposes of the Migration Act;
- is taken to be immigration cleared (for the purposes of the Migration Act) immediately after the final transition time; and
- is not required to comply with section 166 of the Migration Act merely because he or she is taken to have entered Australia at the final transition time. Amongst other things, section 166 of the Migration Act deals with presenting evidence of identity for the purposes of immigration clearance after entering Australia. While this provision ensures that a person does not need to comply with section 166 because they entered Australia by operation of law at the final transition time, this does not prevent a person being required to comply with section 166 for other reasons.

Part 3 of the Transitional Rule will put beyond doubt the immigration status of all people on Norfolk Island on 1 July 2016. As a person's immigration status enlivens other powers under the Migration Act, it is important that there is clarity around this issue.

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