

## **EXPLANATORY STATEMENT**

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

*Norfolk Island Legislation Amendment Act 2015*

*Norfolk Island Legislation Amendment Act Transitional Rule 2016 (No 1)*

The Minister for Territories, Major Projects and Local Government has made this rule under item 357 of Schedule 2 to the *Norfolk Island Legislation Amendment Act 2015* (the NILA Act).

Subitem 357(1) of Schedule 2 to the 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.

The purpose of the rule is to facilitate the transfer of records, assets, court proceedings and instruments of the Administration of Norfolk Island (ANI) to the Norfolk Island Regional Council (Regional Council), or in some limited circumstances, the Commonwealth. The rule also contains savings provisions to ensure that the existing arrangement for policing services can continue until a new arrangement is in place, and to ensure that the financial statements of the ANI can be audited in relation to the 2015-16 financial year.

A Statement of Compatibility with Human Rights is set out at Attachment A.

As the amendments are machinery in nature, consultation was not undertaken.

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

The rule commences on 1 July 2016.

Details of the rule are set out at Attachment B.

Authority: Item 357 of Schedule 2 to the *Norfolk Island Legislation Amendment Act 2015*.

## **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 Amendment Act Transitional Rule 2016 (No 1)***

The 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 Legislative Instrument**

The *Norfolk Island Legislation Amendment Act Transitional Rule 2016 (No 1)* (the rule) makes a number of transitional arrangements which are consequential to the abolition of the ANI and the Advisory Council and the establishment of the Regional Council.

The purpose of the rule is to facilitate the transfer of records, assets, court proceedings and instruments to the Regional Council, or in some limited circumstances, the Commonwealth. The rule also contains savings provisions to ensure that the existing arrangement for policing services can continue until a new arrangement is in place, and to ensure that the financial statements of the ANI can be audited in relation to the 2015-16 financial year.

#### **Human rights implications**

The Legislative Instrument engages the following rights:

- Privacy

##### ***Privacy***

The rule engages the right to privacy under article 17 of the International Covenant on Civil and Political Rights. Article 17 states:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, not to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

The rule engages this right due to the provisions relating to the transfer of records and documents from the ANI to the Commonwealth. This transfer, which will be authorised by the rule, is related to the need to preserve certain records and documents which are either required for operational reasons or need to be preserved as important historical documents.

Subitem 366(4) of Schedule 2 to the NILA Act provides for how Australian Privacy Principle (APP) 6 will apply to any personal information contained in records which transfer to an APP entity under subitem 366(2) or (3). APP 6 limits the circumstances in which an APP entity may use or disclose personal information. Subitem 366 (4) has the effect that the APP entity to whom records have been transferred may use any personal information contained in those records for the same purpose as the purpose for which the individual concerned would have reasonably expected the information to be used by the agency or organisation that originally collected that information. In other words, the protection of the personal information will remain the same after the transfer. Therefore, while this rule engages the right to Privacy, it does not diminish it.

In conclusion, the rule is compatible with human rights because it does not limit or diminish human rights.

## **ATTACHMENT B**

### ***Norfolk Island Legislation Amendment Act Transitional Rule 2016 (No 1)***

#### **Part 1 - Preliminary**

##### **Section 1**

Section 1 provides the name of the rule as the *Norfolk Island Legislation Amendment Act Transitional Rule 2016 (No 1)*.

##### **Section 2**

Section 2 provides that the rule commences at the same time as Part 1 of Schedule 2 to the *Norfolk Island Legislation Amendment Act 2015*; that is, 1 July 2016.

##### **Section 3**

Section 3 refers to item 357 of Schedule 2 to the *Norfolk Island Legislation Amendment Act 2015* as the legislative authority under which the rule is made.

##### **Section 4**

Subsection 4(1) provides definitions for certain terms used in the rule.

Subsection 4(2) provides for how to interpret the remaining expressions in the rule; that is, the meaning is the same as for those expressions used in the Part 2 of Schedule 2 to the *Norfolk Island Legislation Amendment Act 2015*.

#### **Part 2 – Transitional rule**

##### **Section 5**

Section 5 provides the purpose of Part 2.

##### **Section 6**

Section 6 provides for the transfer of specified records to the Commonwealth. The records specified by this section relate to the Norfolk Island Legislative Assembly and the Advisory Council. These records are transferred to the Commonwealth as they are important historical documents which will be preserved in line with usual Commonwealth arrangements for the handling and storage of records. This section, as well as section 7, covers ‘records’ and ‘documents’ as defined in the *Acts Interpretation Act 1901* (Cth).

By way of background, item 366 of the NILA Act deals with the physical transfer of records, while ownership of assets (including but not limited to records) is dealt with by item 358 of Schedule 2 to the NILA Act and section 8 of this rule. That means, for example, even if a record that was in the ANI’s possession on 30 June 2016 is the property of an Australian Government Department, the record, as a general rule, must still be transferred to the possession of the Regional Council according to item 366 of Schedule 2 to the NILA Act, although its status as a record of an Australian Government Department will remain unchanged.

However, the default position in relation to physical transfer may be changed by a transitional rule that requires the record to be transferred to the Commonwealth instead (irrespective of its ownership on 30 June 2016). Section 6 of this rule is made for this purpose. Specifically, it requires certain records, including records relating to the core business (or routine operational administrative tasks supporting the core business) of the Administration or the Advisory Council to be transferred to the Commonwealth rather than the Regional Council.

It should also be noted that, where a record is owned by the ANI on 30 June 2016, it will become an asset of the Regional Council on 1 July 2016 according to subitem 358(2) of Schedule 2 to the NILA Act. Having become property of the Regional Council, such a record will be a Commonwealth record by virtue of the amendments made to the *Archives Act 1983* (Cth) (Archives Act) by Schedule 2 to the NILA Act, which have the effect of making the Regional Council an authority of the Commonwealth for the purposes of the Archives Act. That means the record will be a Commonwealth record for Archives Act purposes even if it is held by the Regional Council and is not transferred to the Commonwealth under section 6 of this rule. (See also section 8 of this rule in relation to transfer of assets more generally.)

## **Section 7**

Section 7 provides for the transfer of other records to the Commonwealth, in addition to records covered by section 6. Records covered by section 7 are records relating to the performance of government functions concerning immigration, customs and citizenship. These records are required for preservation by the Department of Immigration and Border Protection. The records are also potentially relevant to determining a person's immigration status and entitlements to visa and citizenship. Section 7 also provides for the transfer of 'accountable documents' to the Commonwealth. These are documents prepared for the purposes of immigration, customs or citizenship laws.

## **Section 8**

Section 8 provides for the transfer of certain assets of the ANI to the Commonwealth, as an exception to the general rule provided in item 358 of Schedule 2 to the NILA Act, according to which the ANI's assets are automatically transferred to the Regional Council on 1 July 2016. The assets to which this section applies are those which have been identified as required to read and access the immigration, customs and citizenship records to which section 7 of this rule applies. If these records cannot otherwise be read and accessed by the Commonwealth, and there was no arrangement in place before 1 July 2016 for the information contained in the records to be provided in a form that can be read and accessed by the Commonwealth without the ANI asset, the ANI asset required to read and access the records will be transferred to the Commonwealth.

## **Section 9**

Section 9 provides for references to the ANI in certain instruments to be taken to be references to the Regional Council. The instruments to which this section applies must meet the criteria set out in subsection 9(2). In relation to those instruments to which this provision applies, this provision has the effect of substituting references to the ANI in those instruments with references to the Regional Council.

This is intended, for example, to enable a contract to which the ANI is a party to continue to be in force after 1 July 2016, only with the Regional Council as a party in substitution for the ANI. The Regional Council will take over all the rights and obligations expressed to be those of the ANI in the contract.

## **Section 10**

Section 10 is required for the continuation of an existing arrangement for the Australian Federal Police (AFP) to provide policing services on Norfolk Island (the 1993 AFP arrangement) according to section 13 of this rule. Section 10 does so by providing for references to the ANI in the 1993 AFP arrangement to be taken to be references to the Commonwealth. Specifically, the 1993 AFP arrangement will, from 1 July 2016, be taken to be an arrangement between the responsible Commonwealth Minister (currently the Minister for Territories, Major Projects and Local Government) and the Minister that administers the *Australian Federal Police Act 1979*. This transitional provision is consistent with the fact that, from 1 July 2016, the delivery of policing services to the Territory will be the responsibility of the Australian Government, rather than the ANI or the Regional Council.

## **Section 11**

Section 11 provides for the substitution of the Regional Council for the ANI as a party to specified proceedings pending in any court or tribunal immediately before 1 July 2016. The proceedings specified by this section are proceedings pursuant to the *Goods and Services Tax Act 2007* (NI) and any proceedings to which the ANI became a party after 1 June 2016. The Regional Council will replace the ANI as the party to these proceedings from 1 July 2016.

## **Section 12**

Section 12 provides for the attribution of acts done by or in relation to the ANI before the final transition time. The acts to be attributed by this rule are specified in subsection 12(2) and relate to the ANI's exercise of powers that are in the character of a local government's power. This would mean, for example, that if the ANI had done a thing before 1 July 2016, and that thing was a precondition for a second thing occurring under the *Local Government Act 1993* (NSW) (NI) after 1 July 2016, the first thing would be taken to have been done by the Regional Council and the second thing could occur on that basis.

Paragraph 12(2)(b) relates to acts performed in connection with the Administration's powers under specific laws continued in force by the *Norfolk Island Act 1979* (Cth). These specific laws are the *Electricity Supply Act 1985* (NI), the *Lighthouse Act 1961* (NI) and the *Telecommunications Act 1992* (NI). These three continued laws have been identified because they confer a function on the ANI. The making of this provision means acts done by the ANI or in relation to the ANI in connection with the ANI's exercise of powers under these continued laws will be taken, from 1 July 2016, to have been done by or in relation to the Regional Council.

## **Section 13**

This section is a savings provision for an arrangement made under the *Australian Federal Police Act 1979* (Cth) for the provision of policing services by the AFP on Norfolk Island, ie the 1993 AFP arrangement. This section provides that the 1993 AFP arrangement will continue to have effect despite the repeal of relevant provisions of the *Norfolk Island Act*

1979 (Cth) and the *Australian Federal Police Act 1979*, until a new arrangement under the *Australian Federal Police Act 1979* takes effect.

#### **Section 14**

This section is a savings provision to preserve the existing audit requirements for annual financial statements to be prepared, and audited by the Australian National Audit Office (ANAO), in respect of the ANI and Territory authorities for the 2015-16 financial year. In subsequent years, the Regional Council's financial statements will be prepared and audited in accordance with the relevant provisions in the *Local Government Act 1993* (NSW) (NI).

For the 2015-16 financial year, the role which was previously performed by the Chief Executive Officer (CEO) of the ANI in relation to the ANI's financial statements will be performed by the General Manager of the Regional Council, as the CEO position ceases to exist on 1 July 2016. Similarly, the role of the Administrator appointed under the *Norfolk Island Act 1979* (Cth) will also cease to exist, and the Administrator's role in relation to financial statements will be performed by the Administrator appointed under the *Norfolk Island Administrator Ordinance 2016*.

This savings provision preserves, with modifications, the arrangement for payment of audit fees. In respect of the ANI's financial statements, the Department will be responsible for paying the fees, although there will be no liability or recoverable debt arising, because both the Department and the ANAO are non-corporate Commonwealth entities. Audit fees in respect of financial statements of Territory authorities will continue to be payable by the Territory authorities.

This savings provision also preserves, with modifications, the application of the *Auditor-General Act 1997* (Cth) in accordance with s 48G of the *Norfolk Island Act 1979*, despite the repeal of s 48G, to enable the auditing of annual financial statements for the 2015-16 financial year in relation to the Administration and Territory authorities.

#### **Section 15**

This section is a constitutional safety net to ensure that, to the extent that this rule would result in an acquisition of property from a person otherwise than on just terms contrary to paragraph 51(xxxi) of the Constitution, the Commonwealth will be liable to pay a reasonable amount of compensation to the person.