

## EXPLANATORY STATEMENT

### *Fair Entitlements Guarantee (Norfolk Island) Rule 2016*

#### Issued by the authority of the Minister for Employment

Under the *Fair Entitlements Guarantee Act 2012* (Cth) (FEG Act), the Commonwealth provides financial assistance (called an ‘advance’) to cover certain unpaid employment entitlements to eligible employees who lose their job due to the insolvency or bankruptcy of their employer. After making an advance, the Commonwealth assumes the individual’s right to recover these amounts through the winding up or bankruptcy process of their employer.

The *Fair Entitlements Guarantee Regulation 2012* (FEG Regulation), made under section 50 of the FEG Act, builds upon the FEG Act to create a scheme to allow for financial assistance to be advanced to contract outworkers in the textile, clothing and footwear industry (TCF contract outworkers). The assistance is provided in the event that TCF contract outworker entitlements are unpaid due to the insolvency or bankruptcy of the person who engaged them to carry out the work.

Before 1 July 2016, neither the FEG Act nor the FEG Regulation applied to employers and employees on Norfolk Island. The *Territories Legislation Amendment Act 2016* (Cth) (Territories Act) extends the FEG Act to Norfolk Island on 1 July 2016. The Territories Act also inserts a rule-making power into the FEG Act (new section 9A) on 1 July 2016. New section 9A enables the Minister for Employment (the Minister), by legislative instrument, to prescribe modifications of the FEG Act and FEG Regulation in relation to Norfolk Island.

As new section 9A does not commence until 1 July 2016, this instrument relies on section 4 of the *Acts Interpretation Act 1901* (Cth) (AIA) to enable a legislative instrument to be made so that it is operational on 1 July 2016. Section 4 provides that the legislative instrument-making power may be exercised before 1 July 2016 for the purpose of bringing the instrument into effect.

The *Fair Entitlements Guarantee (Norfolk Island) Rule 2016* (the Rule) prescribes modifications to the FEG Act and FEG Regulation in relation to Norfolk Island. The Rule takes effect on 1 July 2016.

The FEG Act and the FEG Regulation operate by reference to a number of concepts and processes under the *Bankruptcy Act 1966* (Cth) (Commonwealth Bankruptcy Act) and the *Corporations Act 2001* (Cth) (Commonwealth Corporations Act). Neither of these Commonwealth Acts will extend to Norfolk Island on 1 July 2016. Rather, the *Bankruptcy Act 2006* (NI) (Norfolk Bankruptcy Act) and the *Companies Act 1985* (NI) (Norfolk Companies Act) will continue to apply on Norfolk Island on 1 July 2016.

In the absence of modifications of the FEG Act and FEG Regulation in relation to Norfolk Island, significant provisions of the FEG Act and FEG Regulation that refer to concepts in the Commonwealth Bankruptcy Act or the Commonwealth Corporations Act would have no practical application on 1 July 2016.

The Rule therefore modifies the application of some provisions in the FEG Act or FEG Regulation that refer to concepts in the Commonwealth Bankruptcy Act or the Commonwealth Corporations Act to either:

- refer to corresponding provisions in the Norfolk Bankruptcy Act or the Norfolk Companies Act (where these exist); or
- apply the concepts in the Commonwealth Bankruptcy Act or the Commonwealth Corporations Act as if these Acts extended to Norfolk Island.

For clarity, the FEG Act and the FEG Regulation include provisions that relate to administrators being appointed under the Commonwealth Corporations Act. The Rule does not make modifications of the provisions in relation to Norfolk Island. The reason for this is because the Norfolk Companies Act does not have a corresponding concept of administrators being appointed under that Act.

For example, paragraph (b) of the definition of ‘insolvency practitioner’ in section 5 of the FEG Act refers to an administrator being appointed under the Commonwealth Corporations Act. This definition will have no practical application on Norfolk Island on 1 July 2016. However, the other limbs of the ‘insolvency practitioner’ definition will have practical application in Norfolk Island on 1 July 2016.

By way of further example, section 49 of the FEG Act enables the Minister to make a legislative instrument to extend the FEG Act, by references to employers in administration under the Commonwealth Corporations Act in specified circumstances. As there is no corresponding concept under the Norfolk Companies Act, this mechanism will have no practical application on Norfolk Island on 1 July 2016. However, the FEG Act will have practical application on Norfolk Island on 1 July 2016 where a liquidator is appointed under the Norfolk Companies Act, or an employer becomes bankrupt under the Norfolk Bankruptcy Act.

Details of the Rule are provided at [Attachment A](#).

A Statement of Compatibility with Human Rights has been completed for the Rule, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). The Statement’s assessment is that the measures in the Rule are compatible with human rights. A copy of the Statement is at [Attachment B](#).

The Rule is a legislative instrument for the purpose of the *Legislation Act 2003* (Cth).

Consultations took place with the Norfolk Island Administration and community in August 2015 and April 2016.

**Details of the *Fair Entitlements Guarantee (Norfolk Island) Rule 2016***

**Section 1 – Name**

This section sets out the name of the Rule as the *Fair Entitlements Guarantee (Norfolk Island) Rule 2016*.

**Section 2 – Commencement**

This section provides that the instrument commences on 1 July 2016. This is the day that the FEG Act will extend to Norfolk Island, by virtue of the Territories Act.

**Section 3 – Authority**

This section provides that the instrument is made under section 9A of the FEG Act. As new section 9A does not commence until 1 July 2016, this instrument relies on section 4 of the AIA to enable a legislative instrument to be made so that it is operational on 1 July 2016. Section 4 provides that the legislative instrument-making power may be exercised before 1 July 2016 for the purpose of bringing the instrument into effect.

**Section 4 – Prescribed modifications of the Fair Entitlements Guarantee legislation for application in relation to Norfolk Island**

This section provides that the application of the FEG Act and the FEG Regulation in relation to Norfolk Island are modified by Schedules 1 and 2 to the Rule, respectively.

**Schedule 1 – Modifications of the *Fair Entitlements Guarantee Act 2012* relating to Norfolk Island**

***Fair Entitlements Guarantee Act 2012***

Schedule 1 to the Rule modifies the FEG Act in relation to Norfolk Island.

**Item 1 – Section 5 (definition of *bankruptcy trustee*)**

The term *bankruptcy trustee* is defined in section 5 of the FEG Act, by reference to the trustee under the Commonwealth Bankruptcy Act.

This item modifies the definition of ‘bankruptcy trustee’ so that it includes, in relation to Norfolk Island, a trustee under the Norfolk Bankruptcy Act.

**Item 2 – Section 5 (at the end of paragraph (a) of the definition of *cost*)**

The meaning of *cost* in relation to the winding up of an employer is defined in paragraph (a) of the definition of *cost* in section 5 of the FEG Act, by reference to:

- an expense relating to winding up described in paragraph 556(1)(a) of the Commonwealth Corporations Act, being certain expenses in preserving, realising or getting the property of the company, or carrying on the company’s business; or
- an amount described in section 558 of the Commonwealth Corporations Act, being certain debts owed to employees, including relevantly certain wages, employee annual and long service leave entitlements and retrenchment payments, as a cost of winding up (see also paragraphs 556(1)(e), (g) and (h) of the Commonwealth Corporations Act).

Sections 545 and 546 of the Norfolk Companies Act have some similarity to paragraph 556(1)(a) and section 558 of the Corporations Act. For example:

- a first priority debt for certain costs, charges and expenses of winding up the company (see paragraph 545(1)(a) of the Norfolk Companies Act);
- a fifth priority debt for certain wages (see paragraph 545(1)(e) of the Norfolk Companies Act);
- a seventh priority debt for certain employee leave entitlements (see paragraph 545(1)(g) of the Norfolk Companies Act); and
- an eighth priority debt for certain retrenchment payments (see paragraph 545(1)(h) of the Norfolk Companies Act).

This item inserts a new subparagraph (iii) into paragraph (a) of the definition of *cost* in relation to Norfolk Island, so that it applies *as if* the Commonwealth Corporations Act extends to Norfolk Island. That is, an expense or amount referred to in subparagraph (i) or (ii) applies by deeming the Commonwealth Corporations Act to apply for this purpose, as if Norfolk Island was an area covered by the definition of *this jurisdiction* in section 9 of the Commonwealth Corporations Act. This ensures consistent treatment with other jurisdictions.

#### Item 3 – Section 5 (at the end of paragraph (b) of the definition of *cost*)

The meaning of *cost* in relation to the bankruptcy of an employer is defined in paragraph (b) of the definition of *cost* in section 5 of the FEG Act, by reference to:

- an expense relating to the bankruptcy described in paragraph 109(1)(a) of the Commonwealth Bankruptcy Act, being certain taxed costs of the petitioning creditor, and certain costs, charges and expenses of the administration of the bankruptcy; or
- an amount described in section 109A of the Commonwealth Bankruptcy Act as a cost of the bankruptcy, being certain debts due to employees, for certain wages and employee annual and long service leave entitlements (see also paragraphs 109(1)(e) and (g) of the Commonwealth Bankruptcy Act).

Paragraph 121(1)(a) of the Norfolk Bankruptcy Act similarly provides first preferential debt for costs of the trustee administering the bankrupt estate. Paragraphs 121(1)(c) and (d) of the Norfolk Bankruptcy Act provide preferential debts for certain wages and salaries for employees, but do not provide for employee annual and long service leave entitlements.

This item inserts a new subparagraph (iii) into paragraph (b) of the definition of *cost* in relation to Norfolk Island, so that it applies *as if* the Commonwealth Bankruptcy Act extends to Norfolk Island. That is, an expense or amount referred to in subparagraph (i) or (ii) applies by deeming the Commonwealth Bankruptcy Act to apply for this purpose for Norfolk Island. This ensures consistent treatment with other jurisdictions.

#### Item 4 – Section 5 (paragraph (a) of the definition of *insolvency event*)

Paragraph (a) of the definition of *insolvency event* in section 5 of the FEG Act provides that an insolvency event happens to an employer when a liquidator is appointed under the Commonwealth Corporations Act.

The Norfolk Companies Act provides for the appointment of liquidators. This item modifies the definition of *insolvency event* in relation to Norfolk Island to include a liquidator appointed under the Norfolk Companies Act.

Item 5 – Section 5 (paragraph (b) of the definition of *insolvency event*)

Paragraph (b) of the definition of *insolvency event* in section 5 of the FEG Act provides that an insolvency event happens to an employer when an employer becomes bankrupt under the Commonwealth Bankruptcy Act.

The Norfolk Bankruptcy Act provides for bankruptcy of employers. This item modifies the definition of *insolvency event* in relation to Norfolk Island, to include bankruptcy under the Norfolk Bankruptcy Act.

Item 6 – Section 5 (at the end of the definition of *liquidator*)

The meaning of *liquidator* is defined in section 5 of the FEG Act by reference to the appointment of a liquidator under the Commonwealth Corporations Act.

The Norfolk Companies Act provides for the appointment of liquidators. This item modifies the definition of *liquidator* in relation to Norfolk Island, to include the appointment of a liquidator under the Norfolk Companies Act.

Item 7 – Paragraph 10(1)(b)

Item 8 – After paragraph 10(1)(c)

Section 10 of the FEG Act provides for conditions of eligibility for an advance.

Paragraph 10(1)(b) provides that before a person is eligible for an advance, an insolvency event must have happened to the employer after the commencement of section 10. Item 7 substitutes a revised paragraph 10(1)(b) in relation to Norfolk Island, so that to be eligible for an advance an insolvency event must have happened to the person's employer in one of two situations. The first is because of an event occurring under the Commonwealth Corporations Act or Commonwealth Bankruptcy Act (after 4 December 2012). This aligns with the commencement of section 10 of the FEG Act. The second is because of an event occurring under the Norfolk Companies Act or the Norfolk Bankruptcy Act (after 30 June 2016). The effect of these provisions is that a person on Norfolk Island is only eligible for an advance if an insolvency event under the Norfolk Island legislation occurred after 30 June 2016.

Item 8 inserts a new paragraph 10(1)(ca) into section 10. The effect of this new paragraph is to provide that a person on Norfolk Island is only eligible for an advance if the end of employment occurred after 30 June 2016 where an insolvency event happened to the employer under the Norfolk Companies Act or the Norfolk Bankruptcy Act after 30 June 2016.

The modifications made by items 7 and 8 do not affect the existing entitlements under the FEG Act and FEG Regulation.

Item 9 – After subsection 11(1)

Section 11 of the FEG Act provides that certain persons are not eligible for an advance, due to specified personal connections between the employer and the person. Subsection 11(1) provides that a person is ineligible for an advance if section 556 of the Commonwealth Corporations Act applies to the winding up of the company and the person is an *excluded employee* within the meaning of that section. As noted above at item 2, section 556 of the Commonwealth Corporations Act provides for priority debts relating to the winding up of the company. The *excluded employee* concept includes certain directors, spouses and relatives of such directors.

The Norfolk Companies Act does not provide for a similar excluded employee concept. This item modifies the application of section 11 of the FEG Act in relation to Norfolk Island, so that it applies *as if* the Commonwealth Corporations Act extends to Norfolk Island. That is, a person would not be eligible under subsection 11(1) by deeming the Commonwealth Corporations Act to apply for this purpose, as if Norfolk Island was an area covered by the definition of *this jurisdiction* in section 9 of the Commonwealth Corporations Act. This ensures consistent treatment with other jurisdictions.

#### Item 10 – After subsection 11(2)

Subsection 11(2) of the FEG Act provides that a person is ineligible for an advance for the person's employment by an employer who is or was bankrupt under the Commonwealth Bankruptcy Act, and the person is a:

- *relative* as defined in the Commonwealth Corporations Act of the employer; or
- *spouse* or *de facto partner* within the meaning of the AIA of the employer at any time within 12 months of the date of the bankruptcy, as defined by the Commonwealth Bankruptcy Act.

The Norfolk Bankruptcy Act and Norfolk Companies Act do not provide for corresponding meanings of relative, spouse and de facto partner. Section 23 of the Norfolk Bankruptcy Act provides for an act of bankruptcy. This item modifies section 11 of the FEG Act in relation to Norfolk Island, by:

- deeming that the *relative* definition in the Commonwealth Corporations Act applies *as if* the Commonwealth Corporations Act extends to Norfolk Island; and
- the person being a *spouse* or *de facto partner* within the meaning of the AIA of the employer at any time within 12 months of the date of the bankruptcy under the Norfolk Bankruptcy Act.

#### Item 11 – Subsection 11(3)

#### Item 12 – Subsection 11(3)

Items 11 and 12 make minor consequential modifications to subsection 11(3), consequential to items 9 and 10 above.

#### Item 13 – Paragraph 19(1)(b)

#### Item 14 – At the end of section 19

Section 19 of the FEG Act provides a mechanism for determining the amount of a person's employment entitlements. Subsection 19(3) provides for reducing specified amounts for employee entitlements that are not payable. Subparagraph 19(3)(c)(i) sets out one of the descriptors in relation to the amounts covered by subsection 19(3). Subparagraph 19(3)(c)(i) requires that the amount is not payable under the Commonwealth Corporations Act, in the winding up of the person's employer. Subparagraph 19(3)(c)(ii) requires that the amount is not payable under the Commonwealth Bankruptcy Act, from the proceeds of the bankrupt employer.

Item 13 makes a minor consequential modification to paragraph 19(1)(b), consequential to item 14.

Item 14 modifies section 19 of the FEG Act in relation to Norfolk Island to insert new subsections (4) and (5) for the purposes of Norfolk Island. New subsection (4) provides that subsection 19(3) applies *as if* the Commonwealth Corporations Act extends to Norfolk Island. New subsection (5) provides that subsection 19(3) applies as if the Commonwealth Bankruptcy

Act extends to Norfolk Island. This ensures consistent treatment with other jurisdictions for when amounts are, and are not, payable.

#### Item 15 – Section 29

##### Item 16 – At the end of section 29

Division 1 of Part 5 of the FEG Act provides for recovery of the advance through winding up or bankruptcy. Section 29 of the FEG Act provides for the Commonwealth to recover money from the liquidator in the winding up of the employer. The provision operates by reference to an ‘advance’ within the meaning of section 560 of the Commonwealth Corporations Act, being priority payments to employees for specified entitlements.

Section 548 of the Norfolk Companies Act provides for a similar advance mechanism relating to specified employee wages and leaves of absence. However, the advance mechanism in the Norfolk Companies Act does not include retrenchment (i.e. redundancy) payments.

Item 15 makes a minor consequential modification to section 29, consequential to item 16.

Item 16 modifies section 29 of the FEG Act in relation to Norfolk Island to insert a new subsection (2). This subsection modifies the application of subsection (1) by deeming references to section 560 of the Commonwealth Corporations Act to be references to section 548 of the Norfolk Companies Act if the advance by the employer is paid to a liquidator appointed under the Norfolk Companies Act. As subsection (2) excludes paragraph 1(c) it only covers an advance for wages, annual leave and long service leave. Without this modification, the Commonwealth could not recover payments made under the Norfolk Companies Act.

Item 16 does not modify section 29 of the FEG Act relating to recovery of an advance for redundancy payments. There is no such comparable recovery mechanism under the Norfolk Companies Act. For clarity, the modifications of section 29 do not limit the Commonwealth’s ability to recover amounts paid for redundancy payments for Norfolk Island employees under section 31 of the FEG Act.

Further, the modifications of section 29 do not prevent a Norfolk Island employee from receiving a redundancy pay entitlement under the FEG Act (where applicable).

#### Item 17 – Section 30

This item modifies section 30 to clarify that the bankruptcy trustee referred to in that section is a trustee appointed under the Commonwealth Bankruptcy Act. As there is no analogous advance mechanism under the Norfolk Bankruptcy Act that could enable the Commonwealth to recover the advance, modifications similar to those made to section 29 cannot be made. The Commonwealth would need to seek the recovery of the advance under section 31 of the FEG Act.

#### Item 18 – Paragraph 31(3)(b)

Section 31 of the FEG Act provides for the Commonwealth to recover money in certain circumstances, not provided for under sections 29 and 30. Subsections (1) and (2) deal with situations where no payment has been made to the liquidator or bankruptcy trustee. Where a payment has been made to the liquidator or bankruptcy trustee, subsection (3) excludes the operation of subsections (1) and (2) so that the relevant provisions of the Commonwealth Corporations Act or Commonwealth Bankruptcy Act apply.

Further to the modifications described in item 16 above, this item modifies paragraph 31(3)(b) of the FEG Act in relation to Norfolk Island, to include advances made under section 548 of the Norfolk Companies Act.

This item does not otherwise modify the circumstances whereby the Commonwealth may recover money.

#### Item 19 – Section 45

Section 45 of the FEG Act provides for disclosure of personal information to certain agencies in specified circumstances. The provision relates to an ‘agency’ (within the meaning of the *Privacy Act 1988* (Cth)) (Privacy Act) exercising certain functions or powers under the Commonwealth Corporations Act or the Commonwealth Bankruptcy Act, including in connection with the Department administering the FEG Act.

The definition of ‘agency’ in the Privacy Act includes a Norfolk Island agency. This item modifies section 45 of the FEG Act in relation to Norfolk Island, so that permitted disclosures relate to the exercise of powers or performance of functions by an agency under the Norfolk Companies Act or the Norfolk Bankruptcy Act.

### **Schedule 2 – Modifications of the *Fair Entitlements Guarantee Regulation 2012* relating to Norfolk Island**

#### ***Fair Entitlements Guarantee Regulation 2012***

Schedule 2 to the Rule modifies the FEG Regulation in relation to Norfolk Island.

#### Item 1 – Subsection 9(4)

Section 9 of the FEG Regulation sets out the scheme of assistance for TCF contract workers. Subsection 9(4) provides that the scheme operates under Parts 1 to 7 of the FEG Act, as modified by the FEG Regulation.

This item modifies subsection 9(4) of the FEG Regulation in relation to Norfolk Island, so that the scheme of assistance for TCF contract workers operates as modified by Schedule 1 to the Rule. However, the modifications of sections 10, 11, 19, 29, 30, 31 and 45 of the FEG Act operate as modified by this Schedule 2 to the Rule.

This item recognises the modifications of the FEG Act and FEG Regulation made by this Rule.

#### Item 2 – Item 6 of Schedule 1 (paragraph 10(1)(b))

#### Item 3 – Item 6 of Schedule 1 (after paragraph 10(1)(b))

Item 6 of Schedule 1 to the FEG Regulation substitutes the operation of section 10 of the FEG Act in relation to TCF contract outworkers.

These items modify paragraph 10(1)(b) and insert a new paragraph (ba) of the FEG Act in relation to Norfolk Island TCF contract workers. These modifications mirror the effect of items 7 and 8 of Schedule 1 to the Rule.



Item 4 – Item 7 of Schedule 1 (after subsection 11(1))

Item 5 – Item 7 of Schedule 1 (after subsection 11(2))

Item 6 – Item 7 of Schedule 1 (subsection 11(3))

Item 7 – Item 7 of Schedule 1 (subsection 11(3))

Item 7 of Schedule 1 to the FEG Regulation substitutes the operation of section 11 of the FEG Act in relation to TCF contract outworkers.

These items modify section 11 of the FEG Act in relation to Norfolk Island TCF contract workers. These modifications mirror the effect of items 9, 10, 11 and 12 of Schedule 1 to the Rule.

Item 8 – Item 14 of Schedule 1 (paragraph 19(1)(b))

Item 9 - Item 14 of Schedule 1 (at the end of section 19)

Item 14 of Schedule 1 to the FEG Regulation substitutes the operation of section 19 of the FEG Act.

These items modify section 19 of the FEG Act in relation to Norfolk Island TCF contract workers. These modifications mirror the effect of items 13 and 14 of Schedule 1 to the Rule in relation to TCF contract outworkers.

Item 10 – Item 41 of Schedule 1 (section 45)

Item 41 of Schedule 1 to the FEG Regulation substitutes the operation of section 45 of the FEG Act in relation to TCF contract outworkers.

This item modifies section 45 of the FEG Act in relation to Norfolk Island TCF contract workers. This modification mirrors the effect of item 19 of Schedule 1 to the Rule.

**Statement of Compatibility with Human Rights**

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

**Fair Entitlements Guarantee (Norfolk Island) Rule 2016**

**Overview of Fair Entitlements Guarantee Scheme and its extension to Norfolk Island**

Under the *Fair Entitlements Guarantee Act 2012* (Cth) (FEG Act), the Commonwealth provides financial assistance (called an ‘advance’) to cover certain unpaid employment entitlements to eligible employees who lose their job due to the insolvency or bankruptcy of their employer. After making an advance, the Commonwealth assumes the individual’s right to recover these amounts through the winding up or bankruptcy process of their employer.

The *Fair Entitlements Guarantee Regulation 2012* (FEG Regulation), made under section 50 of the FEG Act, builds upon the FEG Act to create a scheme to allow for financial assistance to be advanced to contract outworkers in the textile, clothing and footwear industry (TCF contract outworkers) in the event those amounts are unpaid due to the insolvency or bankruptcy of the person who engaged them to carry out the work.

Before 1 July 2016, neither the FEG Act nor the FEG Regulation applied to employers and employees on Norfolk Island. The *Territories Legislation Amendment Act 2016* (Cth) (Territories Act) extends the FEG Act to Norfolk Island on 1 July 2016. The Territories Act also inserts a rule-making power into the FEG Act (new section 9A) on 1 July 2016, enabling the Minister for Employment (the Minister) to prescribe modifications of the FEG Act and FEG Regulation in relation to Norfolk Island, by legislative instrument.

The *Fair Entitlements Guarantee (Norfolk Island) Rule 2016* (the Rule) prescribes modifications to the FEG Act and FEG Regulation in relation to Norfolk Island. The Rule takes effect on 1 July 2016.

The FEG Act and the FEG Regulation operate by reference to a number of concepts and processes under the *Bankruptcy Act 1966* (Cth) (Commonwealth Bankruptcy Act) and the *Corporations Act 2001* (Cth) (Commonwealth Corporations Act). Neither of these Commonwealth Acts will extend to Norfolk Island on 1 July 2016. Rather, the *Bankruptcy Act 2006* (NI) (Norfolk Bankruptcy Act) and the *Companies Act 1985* (NI) (Norfolk Companies Act) will continue to apply on Norfolk Island on 1 July 2016.

In the absence of modifications of the FEG Act and FEG Regulation in relation to Norfolk Island, significant provisions of the FEG Act and FEG Regulation that refer to concepts in the Commonwealth Bankruptcy Act or the Commonwealth Corporations Act would have no practical application on 1 July 2016.

The Rule therefore modifies the application of some provisions that refer to concepts in the Commonwealth Bankruptcy Act or the Commonwealth Corporations Act to either:

- refer to corresponding concepts under the Norfolk Bankruptcy Act or the Norfolk Companies Act (where these exist); or
- apply the concepts in the Commonwealth Bankruptcy Act or the Commonwealth Corporations Act as if these Acts extended to Norfolk Island.

For clarity, the FEG Act and the FEG Regulation include provisions that relate to administrators being appointed under the Commonwealth Corporations Act. The Rule does not make modifications of the provisions in relation to Norfolk Island. The reason for this is because the Norfolk Companies Act does not have a corresponding concept of administrators being appointed under that Act.

### **Human Rights Implications**

The Rule engages the following human rights:

- the right to social security;
- the right to equality and non-discrimination; and
- the right to privacy.

### **Right to Social Security**

Article 9 of the *International Covenant on Economic, Social and Cultural Rights* (the ICESCR) provides that, ‘the States Parties to the present Covenant recognise the right of everyone to social security, including social insurance.’ The Committee on Economic, Social and Cultural Rights has stated that the right to social security encompasses the right to access benefits, whether in cash or in kind, without discrimination in order to secure protection from lack of work-related income caused by unemployment<sup>1</sup>.

The FEG Act establishes an assistance scheme, which is intended to operate as a safety net for persons whose employment has ended due to the insolvency or bankruptcy of their employer. The FEG Regulation extends the assistance scheme for TCF contract workers. This safety net could be characterised as ‘social insurance’ because it ensures that employees’ unpaid entitlements are met when their employer becomes bankrupt or insolvent. It thus seeks to protect individuals from lack of work-related income due to unemployment, and in this way, promotes the right to social security.

Although the FEG Act and FEG Regulation establish an assistance scheme, some provisions contain conditions of eligibility and restrict access to the scheme. In this way it is analogous to social security legislation, and care has been taken to maintain consistency with conditions of eligibility in analogous social security legislation. This is a legitimate objective.

Section 11 of the FEG Act expressly excludes from being eligible to receive an advance persons who have a personal connection with the employer. Section 11 relies on concepts in the Commonwealth Bankruptcy Act and the Commonwealth Corporations Act. The Rule modifies section 11 of the FEG Act in relation to Norfolk Island employees and TCF contract outworkers, by deeming that the relevant concepts of the Commonwealth Bankruptcy Act and Commonwealth Corporations Act apply to Norfolk Island.

The limitation in section 11, as it will apply in relation to Norfolk Island, is reasonable in the context of the FEG Act’s purpose to provide a safety net for persons whose employment has ended due to the bankruptcy or insolvency of their employer. By preventing persons who have a personal connection with the employer from claiming an advance, section 11 is consistent with the principles of good corporate governance under corporate law. The limitation pursues a legitimate objective and is considered reasonable, necessary and proportionate to that objective.

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<sup>1</sup> Committee on Economic, Social and Cultural Rights, *General Comment 19, The Right to Social Security*, U.N. Doc. E/C.12/GC/19 (2008).

## **Right to Equality and Non-discrimination**

Article 2(1) of the *International Covenant on Civil and Political Rights* (ICCPR) provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 of the *ICCPR* provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The rights to equality and non-discrimination in Articles 2 and 26 ensure that no one is denied their rights because of a prohibited ground (for example race, colour or sex). In addition to the prohibited grounds specified in these articles, discrimination is also prohibited on 'other status'.

The rights to equality and non-discrimination are not absolute rights and can be subjected to permissible limits. The UN Human Rights Committee has recognized that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'<sup>2</sup>.

As mentioned above, the FEG Act as it will operate in relation to Norfolk Island employees and TCF contract outworkers, limits access to the scheme by expressly excluding some persons from being eligible to claim an advance due to specified connections with the employer. This limits the right to equality and non-discrimination. However, as highlighted above, this limitation pursues a legitimate objective and is considered reasonable, necessary and proportionate to that objective. Importantly, the restriction on eligibility under section 11 will not in any way affect an excluded person's right to recover unpaid entitlements from their former employer.

## **Right to Privacy**

The right to privacy in Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence. It also prohibits unlawful attacks on a person's reputation. For the purposes of Article 17 of the ICCPR, the collection, use and disclosure of information would not be "unlawful" as it would be provided for and authorised under the FEG Act.

In order for an interference with the right to privacy not to be 'arbitrary', the interference must be for a reason consistent with the ICCPR and reasonable in the particular circumstances. Reasonableness, in this context, involves notions of proportionality, appropriateness and necessity.<sup>3</sup> Requiring personal information to be provided in an application for an advance would not be an arbitrary interference with the right to privacy, as it would be for the legitimate and necessary objective of administering the FEG Act to provide financial assistance, as well as associated laws. The degree of interference with privacy is proportionate to achieving these legitimate objectives.

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<sup>2</sup> Human Rights Committee, *General Comment XVIII, Non-discrimination (1989)*, paragraph 13.

<sup>3</sup> *Toonen v Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) at 8.3.

The limitation on the right to privacy is proportionate as the provision of personal information would only be triggered if person chooses to apply for assistance under the FEG Act. The information would be used for the purposes of administering the FEG Act. Information collected would be subject to safeguards preventing unauthorised disclosure. These include the Australian Privacy Principles under section 14 of the *Privacy Act 1988* (Cth) (Privacy Act); section 70 of the *Crimes Act 1914* (Cth); and the APS Values and Code of Conduct under the *Public Service Act 1999* (Cth), where applicable. For example, the Australian Privacy Principles govern all stages of the processing of personal information, setting out standards for the collection, storage, security, use, disclosure and quality of personal information.

***Disclosure of personal information to certain agencies- Section 45***

Section 45 of the FEG Act provides for the sharing of personal information about an employer or employee between the Department and other agencies who have a need for the information in relation to the administration of the scheme. As section 45 limits a person's right to control their personal information, it engages and limits the right to privacy under Article 17 of the ICCPR. Section 45 of the FEG Act refers to an 'agency' (within the meaning of the Privacy Act, which includes a Norfolk Island agency) exercising certain functions or powers under the Commonwealth Bankruptcy Act or Commonwealth Corporations Act. The Rule modifies section 45 of the FEG Act (for employees and TCF contract outworkers), so that the permitted disclosure of information relates to the exercise of functions or powers under the Norfolk Companies Act or the Norfolk Bankruptcy Act.

The disclosure of personal information by the Department will facilitate enforcement activities undertaken by other agencies. Such disclosure would be proportionate, appropriate and necessary to the enforcement of Norfolk Island laws (i.e. the Norfolk Companies Act and Norfolk Bankruptcy Act). For example, the Supreme Court of Norfolk Island, which determines bankruptcy matters under the Norfolk Bankruptcy Act, is a Norfolk Island agency for the purposes of the Privacy Act.

Further, with respect to information which is provided about an employer, an officer or an insolvency practitioner, this information will only relate to such persons in their professional capacity. As noted above, each agency to which information will be disclosed has its own legal obligations concerning the collection, storage and use of personal information under privacy laws.

**Conclusion**

The Rule is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.