



AUSTRALIAN  
SENATE

**Senate Standing Committee for the  
Scrutiny of Delegated Legislation**

Parliament House, Canberra ACT 2600  
02 6277 3066 | [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au)  
[www.aph.gov.au/senate\\_sdlc](http://www.aph.gov.au/senate_sdlc)

3 September 2020

The Hon Nola Marino MP  
Assistant Minister for Regional Development and Territories  
Parliament House  
CANBERRA ACT 2600

Via email: [Nola.Marino.MP@aph.gov.au](mailto:Nola.Marino.MP@aph.gov.au)

CC: [Minister.marino@infrastructure.gov.au](mailto:Minister.marino@infrastructure.gov.au); [Rob.terrell@infrastructure.gov.au](mailto:Rob.terrell@infrastructure.gov.au)

  
Dear Assistant Minister,

**Norfolk Island Continued Laws Amendment (Employment) Ordinance 2020  
[F2020L00870]**

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to this matter.

***Delegation of administrative powers and functions***

Senate standing order 23(3)(c) requires the committee to consider whether an instrument makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers.

Item 1 of the instrument has the effect of inserting new sections 47D to 47H into the *Employment Act 1988* (NI) (Employment Act) to set out provisions for the appointment of an Employment Liaison Officer (ELO) and establish the ELO's powers and functions with regard to the management of the Norfolk Island Workers' Compensation Scheme (scheme). These powers include the ability to make a number of discretionary decisions. New subsection 47H(1) further provides that, if the ELO is satisfied an individual has appropriate qualifications and expertise, the ELO may further subdelegate their powers and functions to a range of individuals, including 'any other person'.

Where an instrument provides for the delegation of discretionary powers to a person or broad classes of persons, the committee generally expects those persons to possess the appropriate qualifications or experience necessary to exercise those powers. In this instance, the explanatory statement to the instrument notes that the delegation of the ELO's powers is intended to allow the scheme 'to be administered by a workers' compensation provider and for relevant functions and powers (for example, assessing claims for compensation) to be delegated to suitably qualified staff of the provider'. However, neither the instrument nor explanatory statement provides further information as to the types of qualifications or expertise that a delegate must possess.

**Accordingly, the committee requests your advice as to what qualifications or expertise persons authorised to perform the functions and exercise the powers of the ELO under subsection 47H(1) are required to possess.**

***Availability of accountability safeguards***

*Privacy safeguards*

Senate standing order 23(3)(k) requires the committee to consider whether an instrument complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate. The committee interprets this to include whether certain accountability safeguards are available.

As noted above, it appears that the workers' compensation provider may exercise certain discretionary powers of the ELO under the instrument. This may include the discretion to determine what information may be relevant to the management and control of the scheme or to assess a compensation claim, and the power to gather that information from employers and employees under new subsections 39(10) and 47(2).

As a technical scrutiny matter, the committee is concerned to ensure that, where a private third party is lawfully authorised to exercise certain powers and perform certain functions of a public official, the actions of that third party, are subject to appropriate public accountability safeguards. These include the application of privacy and freedom of information laws as though the third party were a public official.

**The committee therefore requests your advice as to the application of the *Privacy Act 1988* and *Freedom of Information Act 1982* to persons authorised to perform functions and exercise powers of the ELO under subsection 47H(1).**

*Availability of independent merits review*

Senate standing order 23(3)(i) requires the committee to consider whether an instrument unduly excludes, limits or fails to provide for independent review of decisions affecting rights, liberties, obligations or interests.

As noted above, the ELO (and persons authorised to perform the functions and exercise the powers of the ELO under subsection 47H(1)) may make a number of discretionary decisions in determining membership fees, assessing claims for compensation, making payments on behalf of the Commonwealth and requesting specified information related to these functions.

Item 1 of the instrument has the effect of inserting new Division 1 of Part 5 into the Employment Act to provide for an internal review process of such decisions. In addition, the explanatory statement appears to indicate that if a person is not satisfied with the outcome of the internal review process, 'it is open to them to apply to the Tribunal for an inquiry' under new section 82. However, in the absence of further information, it is unclear whether decisions made under the instrument are also subject to independent merits review by the Tribunal, rather than just inquiry by the Tribunal.

**The committee therefore requests your advice as to:**

- **whether decisions made under the instrument by the ELO, or persons authorised to perform functions and exercise powers of the ELO under subsection 47H(1), are subject to independent merits review by the Tribunal; and**
- **if not, the characteristics of decisions that would justify excluding independent merits review, by reference to established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*.**

### ***Immunity from liability***

Senate standing order 23(3)(h) requires the committee to consider whether an instrument trespasses unduly on personal rights and liberties.

New section 107 confers immunity from liability on a range of persons and entities. The immunity applies to acts done, or omitted to be done, in good faith in the exercise of a function or power under the *Norfolk Island Act 1979*. The persons and entities to whom the immunity applies are listed in subsection 107(2) and include the Commonwealth and persons to whom the ELO may delegate a power or function under subsection 47H(1).

This conferral of immunity from liability on the persons and entities listed in subsection 107(2) removes any common law right to bring an action to enforce legal rights, unless a lack of good faith can be demonstrated. The committee notes that, in the context of judicial review, bad faith is said to imply a lack of an honest or genuine attempt to undertake a task, and will involve a personal attack on the honesty of the decision-maker. Consequently, the courts have therefore taken the position that bad faith can only be shown in very limited circumstances.

Additionally, while it is clear from the terms of the instrument why it may be necessary to confer immunity from civil liability on certain persons and entities, it is not clear why it is also considered necessary to extend this immunity to the Commonwealth or persons to whom the ELO may delegate a power or function under subsection 47H(1).

**The committee therefore requests your advice as to why it is considered necessary and appropriate to extend immunity from civil liability to the Commonwealth and persons to whom the ELO may delegate a power or function under subsection 47H(1).**

### ***Significant penalties in delegated legislation***

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be included in primary, rather than delegated, legislation). This includes instruments which impose custodial penalties.

New subsection 39(2) makes it a strict liability offence if an employer does not have a policy of insurance or indemnity with an insurer for the full amount of the employer's liability if they are not a member of the scheme and are not prescribed by the rules. The offence is punishable by 50 penalty units or 2 years imprisonment for individuals or 250 penalty units for body corporates.

The explanatory statement states that the enabling Act 'authorises the broadest range of ordinances to be made for the good government of Norfolk Island, which includes the power to prescribe offences that impose penalties exceeding a fine of 50 penalty units and/or punishable by imprisonment'. The explanatory statement further notes that subsection 39(2) replaces an existing offence in the Employment Act to bring it into line with modern drafting standards and that similar offence provisions are included in other state and territory workers' compensation legislation.

Whilst noting the special legislative framework in which Norfolk Island legislation operates, the committee does not generally consider consistency with an existing regime alone to justify the inclusion of significant matters, such as custodial penalties, in delegated legislation. Further, the committee notes that, where legislation prescribes a custodial penalty, paragraph 3.3 of the *Guide to Framing Commonwealth Offences* (guide) requires that the Attorney-General be consulted. In the absence of further information in the explanatory statement, it is also unclear whether such consultation was undertaken.

Accordingly, the committee requests your advice as to:

- **why it is considered necessary and appropriate to prescribe custodial penalties in new subsection 39(2); and**
- **whether the Attorney-General was consulted in relation to the inclusion of custodial penalties, in accordance with paragraph 3.3 of the *Guide to Framing Commonwealth Offences*.**

#### ***Evidentiary certificates***

Senate standing order 23(3)(h) requires the committee to consider whether an instrument trespasses unduly on personal rights and liberties, including the right to the presumption of innocence.

New subsection 39(4) provides that, in proceedings against a person for an offence under subsection 39(2), the ELO may issue a certificate saying an employer did not have an insurance policy in place or was not a member of the scheme. Such certificates are prima facie evidence of the matters stated in the certificates.

Where an evidentiary certificate is issued, this allows evidence to be admitted into court which would need to be rebutted by the other party to the proceedings. This may effectively reverse the evidential burden of proof and may, if used in criminal proceedings, interfere with the common-law right to be presumed innocent until proven guilty. The committee would therefore expect a sound justification for the use of evidentiary certificates to be included in the explanatory materials.

In this instance, the explanatory statement to the instrument notes that subsection 39(4) is consistent with paragraph 5.3 of the guide, which indicates that it is acceptable to use evidentiary certificates to settle formal or technical matters of fact that would be difficult to prove by adducing admissible evidence. Whilst it appears that the matters included in a certificate issued under subsection 39(4) may relate to technical matters, the committee notes that paragraph 5.3 of the guide also provides that '[I]n legislation that provides for the use of an evidentiary certificate should provide that it be issued by a responsible officer who is independent of the prosecution, not by a prosecutor'.

Noting that an SES officer within the department may be appointed as the ELO, it is unclear whether they (or any persons to whom they delegate the power to issue an evidentiary certificate under subsection 47H(1)) are sufficiently independent of the prosecution so as to comply with the requirements of paragraph 5.3 of the guide.

**The committee therefore requests your advice as to whether the ELO, and any persons to whom they may delegate their power to issue evidentiary certificates under subsection 47H(1), are sufficiently independent of the prosecution so as to comply with the requirements of paragraph 5.3 of the *Guide to Framing Commonwealth Offences*.**

#### ***Significant matters in delegated legislation***

Finally, I take this opportunity to reiterate the committee's ongoing concerns about the inclusion of significant matters in territory ordinances, which have the effect of amending primary legislation. As the committee has previously indicated, it will continue to monitor this issue with a view to seeking your more detailed advice about the government's approach to territory ordinances at a later date.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

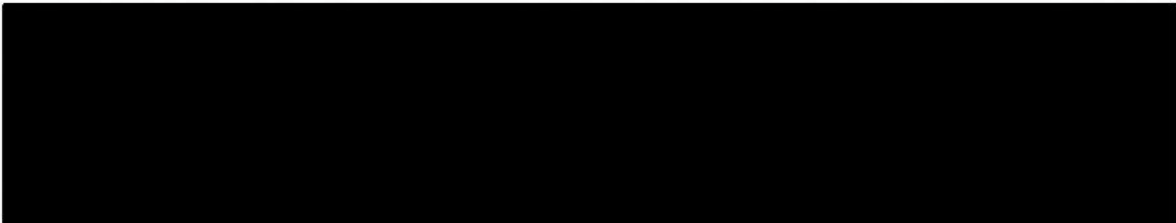
Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **17 September 2020**.

Please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Thank you for your assistance with this matter.

Yours sincerely,



Senator the Hon Concetta Ferravanti-Wells  
Chair  
Senate Standing Committee for the Scrutiny of Delegated Legislation



**The Hon Nola Marino MP**

**Assistant Minister for Regional Development and Territories  
Federal Member for Forrest**

Ref: MC20-007670

Senator the Hon Concetta Fierravanti-Wells  
Chair  
Senate Standing Committee for the Scrutiny of Delegated Legislation  
Parliament House  
CANBERRA ACT 2600

Dear Senator *Bonnie*

Thank you for your letter of 3 September 2020 regarding the *Norfolk Island Continued Laws Amendment (Employment) Ordinance 2020* (the Ordinance).

The Ordinance makes amendments to the *Employment Act 1988* (NI) (the Employment Act) to enable a private, third party workers' compensation scheme administrator (scheme administrator) to deliver the Norfolk Island Workers' Compensation Scheme (the Scheme). It also makes a number of improvements to the Scheme (for example, giving people better access to rehabilitation programs), bringing it closer into line with workers' compensation schemes in the rest of Australia.

In relation to the concerns raised by the Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) about some aspects of the Ordinance, I offer the following responses.

**The committee requests your advice as to what qualifications or expertise persons authorised to perform the functions and exercise the powers of the Employment Liaison Officer (ELO) under subsection 47H(1) are required to possess.**

The Department of Infrastructure, Transport, Regional Development and Communications (the Department) will engage a scheme administrator with extensive experience managing workers' compensation claims to deliver the Scheme.

For the ELO to authorise employees of the scheme administrator to perform functions and exercise powers relevant to the administration of the Scheme, they must be satisfied those employees have:

- Experience managing claims for compensation under other Australian workers' compensation schemes.

- Knowledge and understanding of the Norfolk Island Scheme.
- The ability to work effectively with claimants, employers and medical practitioners.
- Time management and communication skills and the ability to work autonomously and as part of a team.

No specific qualifications are needed to manage workers' compensation claims. However, the fields of study which are relevant to these roles include allied health, public administration, business management and law.

**The committee requests your advice as to the application of the *Privacy Act 1988* and *Freedom of Information Act 1982* to persons authorised to perform functions and exercise powers of the ELO under subsection 47H(1).**

The *Privacy Act 1988* (Privacy Act) and the *Freedom of Information Act 1982* (FOI Act) applies to persons authorised to perform functions and exercise powers of the ELO under subsection 47H(1) of the Employment Act as outlined below.

*'Constructive possession' of documents*

With respect to any person authorised by the ELO to exercise powers and functions relevant to the administration of the Scheme, any documents created or otherwise obtained by that person as a result of this power will remain in the 'constructive possession' of the ELO and hence remain subject to the provisions of the Privacy Act and the FOI Act as it applies to the ELO. Under section 47F of the Employment Act, the Commonwealth Minister may only appoint a Senior Executive Service (SES) employee, or acting SES employee, of the Department as the ELO. The Department is an agency for the purposes of both the Privacy Act and the FOI Act and hence its APS employees are subject to its provisions. This would mean, for instance, that the ELO has a right to possession of any documents created by the authorised person when exercising their delegated powers, and enables the ELO to comply with their obligations under the FOI Act.

*Privacy Act*

I also note that section 95B of the Privacy Act requires the Department, when entering into a Commonwealth contract, to take contractual measures to ensure that a contracted service provider for the contract does not do an act, or engage in a practice, that would breach an Australian Privacy Principle if done or engaged in by the Department. The delegation of any of the ELO's powers and functions to employees of the scheme administrator will therefore be complemented by the Department's contract with the scheme administrator, consistent with this requirement.

The scheme administrator itself may also be subject to additional requirements under the Privacy Act (for instance, if it is an 'organisation' for its purposes).

## *FOI Act*

Similarly, section 6C of the FOI Act requires the Department to take contractual measures to ensure that the Department receives a document from a 'contracted service provider' if the:

- Department receives an FOI request for access to the document,
- document relates to the performance of a 'Commonwealth contract', and
- document is created by, or is in the possession of, the contracted service provider.

Any employee of a scheme administrator exercising these delegated powers will also be a contracted service provider of the Department. The Department's contract with any private third party scheme administrator will be consistent with this requirement.

**The committee requests your advice as to whether decisions made under the instrument by the ELO, or persons authorised to perform functions and exercise powers of the ELO under subsection 47H(1), are subject to independent merits review by the Tribunal.**

Yes, these decisions are subject to independent merits review. Subsection 82(1) provides for the Tribunal to consider any matter arising under Part 3 of the Employment Act which concerns the administration of the Scheme, including decisions made by the ELO or a person authorised under subsection 47H(1) to perform functions or exercise powers relevant to the administration of the Scheme.

Paragraph 83(b) provides that for the purposes of an inquiry, the Tribunal shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.

**The committee requests your advice as to why it is considered necessary and appropriate to extend immunity from civil liability to the Commonwealth and persons to whom the ELO may delegate a power or function under subsection 47(H)(1).**

It is necessary and appropriate to extend immunity from civil liability to the Commonwealth and persons to whom the ELO may delegate a power or function because it ensures people making decisions about claims for workers' compensation, who hold the genuine belief they are acting correctly, and who are acting in good faith, are able to do their jobs without fear they will incur liability for their actions. Not offering such immunities would likely lead to an inability for the Government to obtain the services necessary to discharge key functions, ultimately disadvantaging the community.

In the context of the Scheme, the ELO and their delegates must rely on information provided to them by claimants, employers and medical practitioners in order to assess claims for compensation. In this sense, the ELO and their delegates must act on the assumption the information which has been provided to them is a true and correct representation of the circumstances surrounding the injury. With this comes the risk that if a vital piece of information is not provided or the circumstances have been misrepresented by one of the parties, the ELO or their delegates may make an error when assessing a claim.



To avoid the unintended consequence that people assessing compensation claims will be driven to act with excessive caution, perhaps seeking copious amounts of supporting information from claimants and employers, or taking an undue amount of time to reach a decision, immunity provides them with assurance they can exercise their powers and functions with confidence they will not be the subject of legal action if they make a mistake.

This is not to say the decisions made by the ELO or their delegates are beyond scrutiny. Decisions made by the ELO or their delegates when assessing claims for compensation can be subject to internal review and merits review by the Tribunal. In the course of these review processes, errors made by the ELO and their delegates can be picked up and the outcome of the assessment of the claim can be revised.

**The committee requests your advice as to:**

- **why it is considered necessary and appropriate to prescribe custodial penalties in new subsection 39(2); and**

I note the committee does not generally consider consistency with an existing regime alone to justify the inclusion of significant matters, such as custodial penalties, in delegated legislation. However, as the committee has also acknowledged, a special legislative framework applies in Norfolk Island and it is this framework which makes it both necessary and appropriate to do so.

Workers' compensation insurance is compulsory in every state and territory in Australia to ensure all workers who suffer a work-related injury or disease are protected. As workers' compensation schemes are administered by the states and territories, penalties for not having workers' compensation insurance are contained in legislation made by state or territory parliaments.

In Norfolk Island, legislation which is equivalent to the legislation made by state and territory parliaments are laws made by the former Legislative Assembly of Norfolk Island. These laws can be amended by virtue of section 19A of the *Norfolk Island Act 1979* (Norfolk Island Act) which provides that the Governor-General may, subject to the Norfolk Island Act, make Ordinances 'for the peace, order and good government of the Territory'.

In this case, the Employment Act requires an employer to either hold an appropriate insurance policy or be a member of the Scheme. Given the seriousness of not having workers' compensation insurance an employer commits an offence under the Employment Act if they fail to have an insurance policy or are not a member of the Scheme.

Maintaining the penalty provisions in the Employment Act is appropriate on two counts: firstly, because penalties are designed to act as a deterrent to employers who may consider not complying with the law; and secondly, because they are included within a body of law which, if it existed outside of the special legislative framework applying in Norfolk Island, operates on a level which is equivalent to the laws in other jurisdictions and which underpin the administration of similar schemes.

- **whether the Attorney-General was consulted in relation to the inclusion of custodial penalties in accordance with paragraph 3.3 of the *Guide to Framing Commonwealth Offences*.**

The Attorney-General's Department was not consulted in relation to the inclusion of custodial penalties, because no new penalties were included in the instrument. The instrument revises the existing penalty provisions to make them consistent with modern drafting requirements, and therefore easier to interpret and apply.

**The committee requests your advice as to whether the ELO and any persons to whom they may delegate their power to issue evidentiary certificates to under subsection 47H(1), are sufficiently independent of the prosecution so as to comply with the requirements of paragraph 5.3 of the *Guide to Framing Commonwealth Offences*.**

Subsection 39(2) provides that an employer commits an offence if they do not have a workers' compensation insurance policy. As this is a Commonwealth offence, for a prosecution to occur the ELO would refer a brief to the Commonwealth Director of Public Prosecutions (CDPP) and, after this information has been assessed, the CDPP would decide whether or not to prosecute.

The CDPP is an independent authority which makes its decisions about whether to prosecute in accordance with the Prosecution Policy of the Commonwealth. That Policy is a public document based on the principles of fairness, openness, consistency, accountability and efficiency which the CDPP seeks to apply in prosecuting offences against the laws of the Commonwealth. The CDPP both decides whether charges should be laid and runs the prosecution process. The ELO and any persons to whom their power has been delegated are therefore not part of the prosecution process.

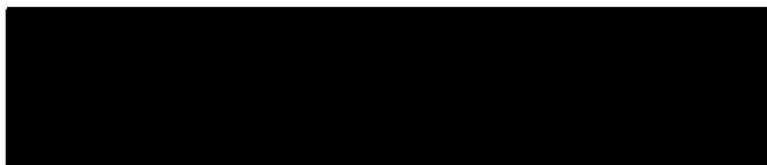
In terms of evidentiary certificates, the certificate would likely state the defendant was not a member of the Scheme. As records relating to membership of the Scheme will be managed and held by the scheme administrator, the evidentiary certificate would be issued by an employee of the scheme administrator. These employees would not be part of the prosecution process.

For the defendant, the evidence provided by the certificate may be rebutted by providing documents which demonstrate they held an insurance policy. These could include a copy of the employers' application to become a member, correspondence from the insurer and/or copies of bank statements showing payment of membership fees or premiums.

While I acknowledge the ELO and their delegates might provide information to inform a prosecution, such a model is not uncommon where a state-funded administrator (such as a motor vehicle registry) might provide evidence to support the prosecution of offences under state laws (e.g. driving an unregistered vehicle) by that state's police force or Director of Public Prosecutions.

Thank you for bringing your concerns to my attention and I trust this is of assistance.

Yours sincerely



Nola Marino

11 SEP 2020



AUSTRALIAN  
SENATE

**Senate Standing Committee for the  
Scrutiny of Delegated Legislation**

Parliament House, Canberra ACT 2600  
02 6277 3066 | [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au)  
[www.aph.gov.au/senate\\_sdlc](http://www.aph.gov.au/senate_sdlc)

8 October 2020

The Hon Nola Marino MP  
Assistant Minister for Regional Development and Territories  
Parliament House  
CANBERRA ACT 2600

Via email: [Nola.Marino@aph.gov.au](mailto:Nola.Marino@aph.gov.au)

CC: [minister.marino@infrastructure.gov.au](mailto:minister.marino@infrastructure.gov.au); [rob.terrell@infrastructure.gov.au](mailto:rob.terrell@infrastructure.gov.au)

Dear Assistant Minister,

**Norfolk Island Continued Laws Amendment (Employment) Ordinance 2020  
[F2020L00870]**

Thank you for your response of 11 September 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on 7 October 2020. On the basis of your advice, the committee has concluded its examination of the instrument in relation to its concerns about the availability of accountability safeguards, independent merits review, significant penalties in delegated legislation, and evidentiary certificates. However, the committee has resolved to seek your further advice about the issues outlined below.

***Delegation of administrative powers and functions***

Your response indicates that, prior to authorising persons to perform relevant powers and functions in administering the Norfolk Island Workers' Compensation Scheme (scheme), the Employment Liaison Officer (ELO) must be satisfied that the persons have:

- knowledge and understanding of the scheme;
- experience managing claims for compensation under other Australian workers' compensation schemes;
- the ability to work effectively with claimants, employers and medical practitioners; and
- time management and communication skills and the ability to work autonomously and as part of a team.

The committee considers that the information about these requirements should be set out on the face of the instrument, or at least in the explanatory statement to the instrument,

noting the importance of explanatory statements as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

**The committee therefore requests your advice as to whether the instrument, or at least the explanatory statement to the instrument, could be amended to provide greater specificity as to the qualifications and expertise that the ELO must be satisfied a person possesses before the ELO delegates a power or function under section 47H to that person.**

***Immunity from civil liability***

Your response explains that you consider it necessary and appropriate to extend immunity from civil liability to persons to whom the ELO may delegate a power or function under section 47H because such immunity ensures that persons making decisions about claims for workers' compensation are able to perform their jobs effectively. In this regard, you state that not offering immunity to persons administering the scheme would likely undermine its effective functioning and ultimately disadvantage the community. You also note that decisions made by the ELO and their delegates are subject to some scrutiny, as they are subject to internal review and independent merits review.

Your response does not, however, appear to address the necessity of extending immunity from civil liability to the Commonwealth as an entity for the purposes of the scheme, as distinct from particular persons administering the scheme. In the absence of such information, it remains unclear to the committee why it is necessary to make the Commonwealth immune from civil liability, in addition to persons to whom the ELO may delegate a power or function under section 47H.

**The committee therefore requests your more detailed advice as to why it is considered necessary and appropriate to extend immunity from civil liability to the Commonwealth as an entity.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **22 October 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Thank you for your assistance with this matter.

Yours sincerely,

**Senator the Hon Concetta Fierravanti-Wells**

**Chair**

**Senate Standing Committee for the Scrutiny of Delegated Legislation**



---

**The Hon Nola Marino MP**

---

**Assistant Minister for Regional Development and Territories  
Federal Member for Forrest**

Ref: MS20-001687

Senator the Hon Concetta Fierravanti-Wells  
Chair  
Senate Standing Committee for the Scrutiny of Delegated Legislation  
Parliament House  
CANBERRA ACT 2600

**22 OCT 2020**

Dear Senator

Thank you for your letter of 8 October 2020 regarding the *Norfolk Island Continued Laws Amendment (Employment) Ordinance 2020* (the Ordinance) [F2020L00870].

***Delegation of administrative powers and functions***

I advise I have approved an amendment to the explanatory statement to the Ordinance. The Employment Liaison Officer (ELO) must be satisfied a person possesses qualifications and expertise before the ELO delegates a power or function under section 47H to that person. This amendment specifies these qualifications and expertise. The revised explanatory statement will be available on the Federal Register of Legislation within the next 2 weeks. I have enclosed an extract of the revised statement, with the additional content highlighted, for the Committee's reference.

***Immunity from civil liability***

In my response of 11 September 2020, I explained why extending civil liability immunity to persons delegated a power or function, by the ELO, is necessary. This ensures people making decisions about claims for workers' compensation are able to do their jobs effectively. I offer the following explanation in relation to the Commonwealth as an entity for the purposes of the Norfolk Island Workers' Compensation Scheme (the Scheme).

It is necessary and appropriate to extend immunity from civil liability to the Commonwealth, as to not do so may have an inhibiting effect on its agents who make decisions, on its behalf, about claims for workers' compensation. Under the *Employment Act 1988* (NI), as amended by the Ordinance, the Commonwealth remains ultimately responsible for the administration of the Scheme and any liabilities that are incurred under this Scheme.

---

The Hon Nola Marino MP  
Parliament House Canberra | (02) 6277 4293 | minister.marino@infrastructure.gov.au  
PO Box 2028 BUNBURY WA 6231

If civil immunity was not extended to the Commonwealth with respect to acts done in good faith by its agents under this Act there remains the risk that its agents, who hold the genuine belief they are acting correctly and who are acting in good faith, are not able to do their jobs without fear of incurring liability for the Commonwealth for their actions. Not extending this immunity to the Commonwealth may diminish the ability of the Australian Government to obtain the services necessary to discharge key functions, ultimately disadvantaging the community.

In the context of the Scheme, as explained in my previous response, the ELO and their delegates, as agents of the Commonwealth, must rely on information provided to them by claimants, employers and medical practitioners in order to assess claims for compensation. In this sense, the ELO and their delegates, as agents of the Commonwealth, must act on the assumption the information provided to them is a true and correct representation of the circumstances surrounding the injury. With this comes the risk that if vital information is omitted or circumstances misrepresented by any party the ELO or their delegates may make an error when assessing a claim.

To avoid the unintended consequence that people assessing compensation claims will be driven to act with excessive caution, perhaps seeking copious amounts of supporting information from claimants and employers, or taking an undue amount of time to reach a decision, Commonwealth immunity also provides them with assurance they can exercise their powers and functions with confidence that the Commonwealth will not be the subject of legal action if they make a mistake.

This is not to say the decisions made by the ELO or their delegates, as agents of the Commonwealth, are beyond scrutiny. Decisions made by the ELO or their delegates when assessing claims for compensation can be subject to internal review and merits review by the Tribunal. In the course of these review processes, errors made by the ELO and their delegates can be picked up and the outcome of the assessment of the claim can be revised. These review arrangements are preferable to these decisions being subject to potential collateral challenge in costly civil litigation in the courts.

Thank you for bringing your concerns to my attention and I trust this is of assistance.

Yours sincerely

Nola Marino

Enc

## **EXPLANATORY STATEMENT**

Issued by the authority of the Assistant Minister for Regional Development and Territories  
Parliamentary Secretary to the Deputy Prime Minister and Minister for Infrastructure,  
Transport and Regional Development.

*Norfolk Island Act 1979*

### ***Norfolk Island Continued Laws Amendment (Employment) Ordinance 2020***

#### **Authority**

The *Norfolk Island Act 1979* (Norfolk Island Act) provides for the government of the Territory of Norfolk Island (Norfolk Island). Section 19A of the Norfolk Island Act provides that the Governor-General may make Ordinances for the peace, order and good government of Norfolk Island.

The *Norfolk Island Continued Laws Amendment (Employment) Ordinance 2020* (the Ordinance) is made under section 19A of the Norfolk Island Act.

The Ordinance amends the *Norfolk Island Continued Laws Ordinance 2015* (the Continued Laws Ordinance) with the effect of amending the *Employment Act 1988* (NI) (the Employment Act) and the *Employment Regulations 1991* (NI) (the Employment Regulations).

Under section 17 of the Norfolk Island Act, Norfolk Island laws continued in force under either section 16 or 16A of the Norfolk Island Act may be amended or repealed by an Ordinance made under section 19A.

#### **Purpose and operation**

The primary purpose of the Ordinance is to amend the Employment Act to allow for a new service provider to administer the Norfolk Island Workers' Compensation Scheme (the Scheme) established under the Employment Act.

In 2018, the Norfolk Island Regional Council (NIRC) advised the Department of Infrastructure, Transport, Regional Development and Communications (the Department) it was not in a position to continue administering the Scheme. As the largest employer on Norfolk Island, there is potential for conflicts of interest to arise if NIRC continues to deliver this service.

The Department has since engaged a nationally recognised workers' compensation service provider with experience managing workers' compensation schemes across multiple jurisdictions to take over administration of the Scheme. The Ordinance makes the following amendments to the Employment Act and repeals the Employment Regulations to enable the new service provider to start delivering this service.

#### ***Employment Liaison Officer***

Under the Employment Act, the Employment Liaison Officer (ELO) is responsible for the management and control of the Scheme. To allow a new service provider to administer the Scheme, the Ordinance amends provisions relating to the ELO's appointment, powers and functions.



Prior to amendment, the ELO was appointed by the Chief Executive Officer of the NIRC and is an employee of the NIRC. The amendments instead allow the Commonwealth Minister with responsibility for Norfolk Island to appoint an SES employee in the Department as the ELO.

Revised delegation provisions provide for the ELO to delegate functions or powers relevant to the day-to-day administration of the Scheme to relevant staff of the new service provider if satisfied the person has appropriate qualifications or expertise. An ELO could be satisfied in this regard if the relevant person has:

- Experience managing claims for compensation under other Australian workers' compensation schemes.
- Knowledge and understanding of the Norfolk Island Scheme.
- The ability to work effectively with claimants, employers and medical practitioners.
- Time management and communication skills and the ability to work autonomously and as part of a team.

No specific qualifications are needed to manage workers' compensation claims, however, the fields of study which are relevant to these roles include allied health, public administration, business management and law.

The ELO who, prior to the amendments, was an employee of the NIRC, was also responsible for the management and control of inspectors and had some functions under Part 4 of the Employment Act relating to safe working practices. To ensure these powers and functions remain with the NIRC (which employs inspectors and is responsible for work health and safety regulation) these powers and functions have been transferred to the Chief Executive Officer.

### *Compensation*

The Ordinance also amends the Employment Act to allow for easier interpretation of provisions relating to eligibility for compensation and to improve the way claims for compensation are assessed.

Under the Employment Act, employers are required to have an insurance policy for the full amount of their liability to pay compensation unless they are members of the public scheme. Amendments to existing provisions relating to this requirement make this requirement clearer and update the offence provision to comply with modern drafting standards. The substance of the offence and the penalties imposed have not changed.

While there are normally limitations on the use of penalties in delegated legislation, the special legislative framework applying to Norfolk Island permits these provisions as they relate to an existing penalty relevant to a state-level matter. More information about this can be found in the section titled 'Special legislative framework' below.

Amendments to the Employment Act also allow for the powers and functions of the Medical Superintendent to be performed by any registered medical or health practitioner or by the ELO. This gives employees greater flexibility when seeking medical treatment for a work-related accident and makes the assessment of claims for compensation simpler.

Under rewritten provisions relating to compensation for medical treatment, the ELO will be responsible for approving any costs relating to medical treatment payable as compensation.



AUSTRALIAN  
SENATE

**Senate Standing Committee for the  
Scrutiny of Delegated Legislation**

Parliament House, Canberra ACT 2600  
02 6277 3066 | [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au)  
[www.aph.gov.au/senate\\_sdlc](http://www.aph.gov.au/senate_sdlc)

12 November 2020

The Hon Nola Marino MP  
Assistant Minister for Regional Development and Territories  
Parliament House  
CANBERRA ACT 2600

Via email: [Nola.Marino.MP@aph.gov.au](mailto:Nola.Marino.MP@aph.gov.au)

CC: [minister.marino@infrastructure.gov.au](mailto:minister.marino@infrastructure.gov.au); [rob.terrell@infrastructure.gov.au](mailto:rob.terrell@infrastructure.gov.au)

  
Dear Assistant Minister,

**Norfolk Island Continued Laws Amendment (Employment) Ordinance 2020  
[F2020L00870]**

Thank you for your response of 22 October 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on 11 November 2020. On the basis of your advice, the committee has concluded its examination of the instrument.

The committee welcomes your undertaking to amend the explanatory statement to the instrument to set out further details in relation to the qualifications and expertise required of delegates of the Employment Liaison Officer and notes that this undertaking was implemented on 27 October 2020.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

**Senator the Hon Concetta Fierravanti-Wells**  
**Chair**  
**Senate Standing Committee for the Scrutiny of Delegated Legislation**