



# Procedural Information Bulletin

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## COVID-19 pandemic response

An unusual element of the order passed at the end of the last sitting – colloquially, a next meeting motion – empowered the President to alter the time and date of the next scheduled meeting at the joint request of the Leaders of the Government and Opposition in the Senate: see [Bulletin 342](#). On 2 April 2020, the President notified senators of such a request, and the Senate duly convened at 1.55pm on 8 April for another single-day sitting to consider a further round of economic stimulus measures.

The meeting proceeded on a similar basis to the meeting of 23 March, with extended pairing arrangements and procedural adjustments to observe social distancing advice.

The routine of business for the day was agreed without dissent, and included question time, consideration of a motion to establish a Senate select committee to oversee the Government's coronavirus response, and the four bills comprising the new stimulus measures.

The Senate again adjourned to the next scheduled sitting day, 11 August 2020, with the same ability for the President to alter the meeting date at the request of, or with the agreement of, the two Leaders. A number of crossbench senators voted to reinstate the scheduled sitting dates for May and June, subject to their being deferred again should circumstances so require, but that proposal was not supported by government and opposition senators. Although a majority of senators argued that the Parliament should continue to sit, the opposition did not support scheduling meetings of the Senate unless it was intended the House of Representatives also meet. While the Government supported retaining additional flexibility to allow the Senate to sit when required, it remained opposed to scheduling meetings while public health advice against travel and gatherings continues to apply.

## COVID-19 and committees

The Senate established the [Select Committee on COVID-19](#), with broad terms of reference and a reporting date of 30 June 2022. An amendment to the motion proposing to instead establish two joint select committees, looking at the economic and health implications of the pandemic respectively, was defeated. The debate on the motion canvassed the relative merits of the two different types of committees concluding, in the end, that scrutiny of government performance was best done in the Senate.

One argument run in the media was that the scrutiny sought required a joint committee or, indeed, a House committee, as a Senate committee could not require the attendance of House Ministers (such as the Prime Minister and the Minister for Health). This constraint arises from the principle of comity between the Houses, which holds that the members of one House cannot inquire into the activities of a member of the other House. The system of ministerial representation – ministers in one House representing ministers in the other before committees, in debates and when answering questions –

provides a means of scrutinising the executive while respecting comity. In practice, though, neither House allows their members to be summoned by a committee. Committees can request that senators or members appear as witnesses, but their attendance may only be required by order of their respective Houses.

On 1 April the Scrutiny of Delegated Legislation Committee [announced](#) that it will regularly meet and report to the Senate in the coming months to scrutinise delegated legislation made while the Parliament is not sitting. The committee has set particular expectations of delegated legislation implementing significant COVID-19 response measures, including that such delegated legislation be time-limited and trespass on personal rights and liberties only to the extent necessary to protect public health. The committee is also maintaining a [list of all delegated legislation relating to COVID-19](#), with 68 instruments on the list as at 9 April.

Both the Scrutiny of Delegated Legislation Committee and the Scrutiny of Bills Committee presented reports out-of-sitting on 2 April.

With the expectation that Parliament would meet only intermittently for a time, the Senate agreed on 23 March to an order permitting committees to extend their own reporting dates for inquiries rather than seeking authorisation from the Senate. Twenty-two legislation and references inquiries across nine different committees have been extended under this order, and those extensions duly notified to the President.

## Further economic response

Four government bills, including two additional appropriation bills, were passed without amendment or request after around 6 hours of debate in the Senate. The bills included measures dealing with lending guarantees for businesses and support for the childcare sector, but their main purpose was to introduce the JobKeeper program announced by the Prime Minister the previous week.

The program as announced will pay eligible businesses \$1,500 per fortnight per eligible employee as a wage subsidy, to be passed on to those employees, for a period of 6 months. The program seeks to retain the connection between employers and employees through the ongoing economic downturn so that businesses may more easily revive when the social restrictions associated with the health crisis are relaxed. However, none of this detail is in the legislation; it will be included in rules the Treasurer is empowered to make under the [Payments and Benefits](#) bill. Subclause 7(1) of that bill reveals the breadth of the rules that may be made:

The rules may make provision for and in relation to:

- (a) one or more kinds of payments by the Commonwealth to an entity in respect of a time that occurs during the prescribed period; and
- (b) the establishment of a scheme providing for matters relating to one or more of those payments, and matters relating to such a scheme.

Paragraphs (a) and (b) do not limit each other.

Subclause 7(2) exemplifies, but again does not limit, the matters the rules might prescribe, including the entitlement to a payment, the amount of a payment and when a payment is payable. The provision is time-limited to the prescribed period, defined as the period between 1 March 2020 and 31 December 2020.

External negotiations on the package saw several important safeguards announced, some of which were legislated as part of the Coronavirus Economic Response Package Omnibus (Measures No 2) Bill 2020, including by way of amendments to the Fair Work Act 2009.

However, much of the parliamentary debate about the package revolved around the form and substance of the rules to be made once the bills passed, rather than the detail of the bills themselves. Several amendments called on the government to implement variations on the proposals as announced, particularly to include additional employees or types of employers within the scope of the program. A common refrain was that the Treasurer could make such changes “at the stroke of a pen”, by varying the proposed rules before they were made. Several other amendments took the form of textual amendments to the bill, seeking to require the Treasurer to include (or not to carve out) particular types of employer or employee when making the rules.

In any event, the bills passed without amendment, with many observers commenting that it remained open to the Treasurer to vary the program by revising the rules, and without the need to recall the parliament to pass further legislation. Similar flexibility was introduced into the Social Security system by a late amendment to the bills considered on 23 March: see [Bulletin 342](#).

## Amendments and requests

One esoteric question for the Senate was whether amendments to the Payments and Benefits bill seeking to extend the eligibility for the Jobkeeper payment ought take the form of Senate amendments, or whether the Senate could only request the House of Representatives to make the changes. Senate precedents on the application of section 53 of the Constitution hold that requests are necessary where amendments would “clearly, necessarily and directly” increase expenditure under a standing appropriation. This can be a difficult test to apply when the expenditure under a bill is itself uncertain. It could be argued that the bill causes no expenditure itself; and that the rules it empowers the Treasurer to make are so broad that it is impossible to say with any certainty what the expenditure under the program might be.

As recently as the previous sitting, the Senate applied the principle that requests are not necessary where the effect of an amendment is merely to empower a minister to cause an increase in expenditure, by way of legislative instrument. The “financial initiative” protected by the relevant Constitutional provisions remains with the executive. In this case, amendments requiring the minister to extend eligibility for payments were classified as requests, on the basis that they were intended to cause expenditure beyond the intended scope of the scheme, however uncertain that base expenditure may be.

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## RELATED RESOURCES

[Dynamic Red](#) – updated continuously during the sitting day, the Dynamic Red displays the results of proceedings as they happen.

[Senate Daily Summary](#) – a convenient summary of each day’s proceedings in the Senate, with links to source documents.

Like this bulletin, these documents can be found on the Senate website: [www.aph.gov.au/senate](http://www.aph.gov.au/senate)

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