



**The Hon Christian Porter MP**

Attorney-General  
Minister for Industrial Relations  
Leader of the House

MS20-000278

Senator Helen Polley  
Chair  
Senate Scrutiny of Bills Committee  
Parliament House  
CANBERRA ACT 2600

Dear Senator 

I am writing in response to the letter from the Senate Standing Committee for the Scrutiny of Bills (the Committee) regarding Schedule 16 of the *Coronavirus Economic Response Package Omnibus Act 2020* (Economic Response Act) in Scrutiny Digest 5 of 2020.

Sunset provisions are intended to compel Ministers and the Parliament to consider whether, past a particular time, a law is still required. Schedule 16 of the Economic Response Act allows Ministers responsible for Acts or legislative instruments which are due to sunset on or before 15 October 2020 to extend the operation of these laws by up to six months through a ministerial determination (a deferral determination). This will ensure that there are no gaps in our laws while Parliament's attention is focused on other high priority and urgent measures.

The deferral determination mechanism is subject to a range of important safeguards. First, the mechanism only applies to Acts and legislative instruments that are due to sunset on or before 15 October 2020. Second, the sunset date can only be extended for up to six months and cannot be extended a second time. Third, I have advised Ministers that the Explanatory Statement accompanying a determination should clearly outline the steps that will be taken to address the sunset of an Act or legislative instrument ahead of the revised sunset date. Finally, as deferral determinations are disallowable legislative instruments, they will be subject to Parliamentary scrutiny.

Sunsetting Acts, or provisions of Acts

As the Committee has identified, there are no criteria within the Economic Response Act or its Explanatory Memorandum that Ministers must apply in making a deferral determination. However, I have advised Ministers that they should consider, and address in explanatory statements:

- (i) whether the sunset Act or provision should continue beyond the current sunset date;
- (ii) whether, as a result of the coronavirus pandemic, there are material difficulties in passing legislation to extend the sunset date before the Act or provision is due to sunset;
- (iii) whether there is an identifiable risk to the public of allowing the Act or provision to sunset, such as detriment to the welfare of the community, creating adverse consequences for industry and the economy, constraining the ability of Government to effectively carry out its functions, or prejudicing Australia's national security interests, and

- (iv) any other exceptional circumstances that justify the making of a deferral determination.

Legislative instruments or provisions of legislative instruments that are sunseting

Section 50 of the *Legislation Act 2003* provides for the automatic repeal of legislative instruments. The next sunset date under section 50 of the *Legislation Act* is 1 October 2020. For these instruments, Ministers should use the existing mechanisms for deferral and alignment of sunset dates in sections 51 and 51A of the *Legislation Act*. A deferral determination can only be made if these deferral and alignment mechanisms have been exhausted, or are not appropriate.

For legislative instruments that cannot be extended through the deferral and alignment provisions in the *Legislation Act*, or for legislative instruments or provisions of instruments that are self-ceasing, a deferral determination may be appropriate where:

- (i) there is insufficient time to assess the ongoing need for an instrument or provisions of an instrument, due to competing priorities or circumstances arising from the coronavirus pandemic, or
- (ii) the instrument is still required, and there is insufficient time to develop a replacement or amending instrument due to competing priorities or circumstances arising from the coronavirus pandemic.

I have provided the advice contained in this letter to all portfolio Ministers to guide their consideration when assessing the need for a deferral determination.

The Committee also requested a list of all Acts and provisions of Acts that are due to sunset on or before 15 October 2020. My department has sought input from all Commonwealth agencies to compile this information. Outlined below are provisions of Acts which I am aware are due to sunset during this period, and their relevant sunset date:

- Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* – 7 September 2020
- paragraph 124PF(1)(b) and paragraphs 123UF(1)(g) and 2(h) of the *Social Security (Administration) Act 1999* – 30 June 2020 and 1 July 2020, and
- subsection 504(2) of the *Social Security Act 1991* – 25 September 2020.

Since the passage of the *Economic Response Act*, the Parliament has also enacted time limited amendments to the *Fair Work Act 1999* to complement the \$130 billion JobKeeper payment scheme. These amendments sunset on 28 September 2020 to align with the operation of that scheme.

I thank the Committee for its consideration of the *Economic Response Act* and I trust this information is of assistance.

Yours sincerely

**The Hon Christian Porter MP**  
 Attorney-General  
 Minister for Industrial Relations  
 Leader of the House



**THE HON JOSH FRYDENBERG MP**  
**TREASURER**

Ref: MS20-000853

Senator Helen Polley  
Chair  
Senate Standing Committee for the Scrutiny of Bills  
Parliament House  
CANBERRA ACT 2600

Dear Senator Polley,

I refer to correspondence from the Senate Standing Committee for the Scrutiny of Bills (the Committee) requesting my advice in respect of Schedule 8 to the *Coronavirus Economic Response Package Omnibus Bill 2020* (the Bill). The Committee has sought my advice as to why it is necessary and appropriate to include broad powers in the Bill which allow delegated legislation to amend the operation of the *Corporations Act 2001* (the Corporations Act), and the circumstances in which it is envisaged that these powers are likely to be used.

As the Bill has now been enacted, I provide this advice in relation to the *Coronavirus Economic Response Package Omnibus Act 2020*. The powers given to the Treasurer under section 1362A of the Corporations Act are a necessary and appropriate response to the impact on Australian businesses of the Coronavirus pandemic and the health measures put in place to limit its spread.

The nature of the impact of the Coronavirus health crisis is unprecedented. While it is difficult to predict precisely what regulatory issues will arise, Australian businesses and the economy will require extraordinary levels of support. To that end, section 1362A has been enacted on a contingency basis to relieve, if necessary, any unreasonable pressure being placed by the existing law on business as a direct consequence of the Coronavirus.

Section 1362A establishes a temporary and time-limited mechanism to provide short-term regulatory relief to classes of persons that, due to the Coronavirus, are unable to meet their obligations under the Corporations Act or the *Corporations Regulations 2001* (the Corporations Regulations). The impact of the Coronavirus and the health measures in place to limit its spread, particularly social distancing, have impeded businesses' ability to comply with certain provisions of the Corporations Act and Corporations Regulations.

Section 1362A also provides for short-term regulatory changes to facilitate continuation of business or mitigate the economic impact of the Coronavirus. The powers included in section 1362A are appropriate to achieve these objectives. The powers granted are limited, in terms of scope, by subsection 1362A(2), and in terms of time, by subsections 1362A(4) and 1362A(5). The provision does not provide a blanket power to amend the Corporations Act or Corporations Regulations. It is a temporary provision intended to provide targeted, short-term relief for companies from specified

obligations in the Corporations Act and Corporations Regulations during the Coronavirus health crisis.

Under subsection 1362A(2), in order to make a legislative instrument under subsection 1362A(1), the Minister must be satisfied that certain circumstances exist, specifically that:

- it would not be reasonable to expect a specified class of persons to comply with the provisions because of the impact of the Coronavirus; or
- the exemption or modification is otherwise necessary or appropriate to: facilitate business continuity in circumstances relating to the Coronavirus; or, mitigate the economic impact of the Coronavirus.

The power to grant regulatory relief is thereby limited in scope to the Coronavirus pandemic or its impact on business or the economy. Under subsection 1362A(5), the time in which instruments can be made under subsection 1362A(1) is limited to 6 months, so that instruments cannot be made after 24 September 2020. Further, a legislative instrument made under section 1362A ceases to be in force six months after it is made, or earlier if specified. It is anticipated that Australian individuals, businesses and the economy will need extraordinary levels of support during this period, and so it is appropriate the Treasurer be given this power during this time.

Finally, any legislative instruments made by the Minister under section 1362A would be disallowable under section 42 of the *Legislation Act 2003* and subject to review by the Senate Standing Committee for the Scrutiny of Delegated Legislation.

I trust this information will be of assistance to the Committee.

Yours sincerely

THE HON JOSH FRYDENBERG MP

21 / 05 / 2020





**THE HON JOSH FRYDENBERG MP**  
**TREASURER**

Ref: MS20-000979

Senator Helen Polley  
Chair  
Senate Standing Committee for the Scrutiny of Bills  
Parliament House  
CANBERRA ACT 2600

Dear Senator Polley

I am writing in response to your letter of 15 May 2020 on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee) regarding the Coronavirus Economic Response Package (Payments and Benefits) Bill 2020 (the Bill).

As this Bill has now been enacted, I provide this advice in relation to the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (the Act).

In that letter, the Committee sought my advice as to the type of documents that it is envisaged may be applied, adopted or incorporated by reference as they exist from time to time in rules made under the Act as a result of subsection 20(5) of the Act and whether those documents would be freely available to the public.

The power to make rules that make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument as they exist from time to time was included to provide flexibility in the event unforeseen developments required urgent payments in circumstances where it may not have been possible to arrange for the sitting of Parliament. It has not been exercised in relation to the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* and it is not currently expected that it will be used.

The inclusion of the power allows, for example, a future payment to operate by reference to a concept set out in a document that was published by an international medical organisation or in a State or Territory Act or instrument, the incorporation of a definition set out in an instrument detailing the current travel restrictions applying in a State or Territory or an industry classification as set out in a publication of the Australian Statistician.

While it was not considered likely that such a reference would be required for the purposes of a future payment at this time, the need for this to occur to permit an appropriate response to unforeseen developments could not be ruled out.

Given this and the seriousness of the Coronavirus pandemic, ensuring that the rules could apply, adopt or incorporate documents as they exist from time to time was considered a reasonable precaution, noting that if such rules were needed there may be significant adverse effects from a delay.

As noted above, this power has not been exercised, however, if it were, any relevant document applied, adopted or incorporated into the relevant rules would be available to the public or made available to the public free of charge.

Thank you for bringing your concerns to my attention.

Yours sincerely

THE HON JOSH FRYDENBERG MP

28 / 5 /2020



**The Hon Christian Porter MP**  
Attorney-General  
Minister for Industrial Relations  
Leader of the House

MC20-015512

Senator Helen Polley  
Chair  
Senate Scrutiny of Bills Committee  
Suite 1.111  
Parliament House  
CANBERRA ACT 2600  
[Scrutiny.Sen@aph.gov.au](mailto:Scrutiny.Sen@aph.gov.au)

Dear ~~Senator Polley~~ 

Thank you for the email of 15 May 2020, from the Senate Standing Committee for Scrutiny of Bills (the Committee) requesting my advice in respect of the Coronavirus Economic Response Package Omnibus (Measures No. 2) Bill 2020 (the Bill).

The Committee has sought advice on s 789GX of the Bill (the provision), which temporarily amends the *Fair Work Act 2009* (FW Act) to provide the Minister with the power to exclude specified employers from seeking to apply any of sections 789GDC, 789GE, 789GF, 789GG and 789GJ of the FW Act, as introduced by the Bill.

As the Committee notes, the provision is a limited regulation-making power, which only enables the Minister, by legislative instrument, to exclude one or more specified employers from applying any or all of the sections in the FW Act that authorise a JobKeeper enabling direction or agreement. The explanatory memorandum also notes that this might be done in circumstances that include where an employer contravenes a civil remedy provision.

The provision is an integrity measure designed to protect employees. It can only operate to restrict an employer's access to the JobKeeper enabling direction or agreement provisions in the Bill. That is, the powers cannot expand the application of the JobKeeper enabling direction or agreement provisions in the Bill in any way. I consider the provision is an appropriate safeguard that will enable the Government to swiftly address any emerging issues in the operation of the provisions pertaining to instances of misuse, such as where an employer has contravened the new civil penalty provisions in sections 789GD, 789GDA, 789GDB, 789GU, 789GW or 789GXA.

The provision supports the overall intent of the Bill's temporary amendments to the FW Act, which is to support the practical operation of the JobKeeper scheme in Australian workplaces in the national system and to keep Australians employed.

My department is progressing guidelines on how this power may be exercised by the Minister. I also note that these powers, which must be exercised by legislative instrument, would be subject to Parliamentary scrutiny.

I trust this information is of assistance to the Committee.

Yours sincerely

**The Hon Christian Porter MP**  
Attorney-General  
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