



AUSTRALIAN
SENATE

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

Parliament House, Canberra ACT 2600
02 6277 3066 | sdlc.sen@aph.gov.au
www.aph.gov.au/senate_sdlc

12 November 2020

Senator Slade Brockman
Chair
Senate Economics Legislation Committee
Parliament House
CANBERRA ACT 2600

via email: economics.sen@aph.gov.au

cc: The Hon Josh Frydenberg MP, Treasurer, tsrdlos@treasury.gov.au


Dear Chair,

Matters of interest to the Senate

I write on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation which assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the scrutiny principles outlined in Senate standing order 23.

Standing order 23(4) requires the committee to scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues or otherwise gives rise to issues that are likely to be of interest to the Senate. These may include instruments which contain significant policy matters or significant elements of a regulatory scheme, instruments which amend primary legislation, and instruments which have a significant impact on personal rights and liberties.

Noting that the following instruments appear to contain significant policy matters, the committee has determined that the instruments engage standing order 23(4) and accordingly has resolved to draw them to the attention of your committee:

Instrument	Purpose	Last day to lodge disallowance notice
ASIC Corporations (Hardship Withdrawals Relief) Instrument 2020/778 [F2020L01069]	To provide responsible entities of registered managed investment schemes relief from certain provisions in Chapter 5C of the <i>Corporations Act 2001</i> to facilitate withdrawals by members suffering hardship while the scheme is frozen.	07/12/2020
ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787 [F2020L01045]	To support the transition to the new regulatory framework for litigation funding schemes commencing on 22 August 2020 and to give effect to government policy on the regulation of litigation funding, including by providing exemptions to responsible entities of litigation funding schemes from certain provisions in Chapter 7 and Chapter 5C of the <i>Corporations Act 2001</i> .	01/12/2020
Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 8) 2020 [F2020L01165]	To amend the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 to extend the period of wage subsidy support provided under the JobKeeper scheme until 28 March 2021 by introducing a new two-tiered payment structure for fortnights beginning on or after 28 September 2020.	First sitting day of 2021
Foreign Acquisitions and Takeovers Amendment (Commercial Land Lease Threshold Test) Regulations 2020 [F2020L01131]	To amend the Foreign Acquisitions and Takeovers Regulation 2015 to reinstate certain monetary thresholds for leasehold interests in non-sensitive commercial land that is not vacant.	First sitting day of 2021

I note that under standing order 25(2)(a) your committee is empowered to conduct own-motion inquiries into legislative instruments which relate to the portfolios allocated to your committee, although there is no requirement to do so. Should your committee decide to further examine any of the above instruments, I note that the table above identifies the last day (based on the current sitting pattern) for lodging a disallowance notice in the Senate.

Further details about the instruments are published on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

Please note that in the interests of transparency this correspondence will be published on the Scrutiny of Delegated Legislation Committee's website.

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

Yours sincerely,

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



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12 November 2020

Senator Katy Gallagher
Chair
Senate Select Committee on COVID-19
Parliament House
CANBERRA ACT 2600

via email: covid.sen@aph.gov.au

cc: The Hon Josh Frydenberg MP, Treasurer, tsrdlos@treasury.gov.au

Senator the Hon Anne Ruston, Minister for Families and Social Services,
dlos@dss.gov.au

The Hon Dan Tehan MP, Minister for Education,
minister@education.gov.au

Senator the Hon Richard Colbeck, Minister for Aged Care and Senior
Australians, Minister.Colbeck.DLO@health.gov.au

Katy
Dear Chair,

Matters of interest to the Senate—COVID-19 response instruments

I write on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation which assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the scrutiny principles outlined in Senate standing order 23.

Standing order 23(4) requires the committee to scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues or otherwise gives rise to issues that are likely to be of interest to the Senate. These may include instruments which contain significant policy matters or significant elements of a regulatory scheme, instruments which amend primary legislation, and instruments which have a significant impact on personal rights and liberties.

Noting that the following instruments appear to contain significant policy matters relating to the Australian Government's response to the COVID-19 pandemic, the committee has determined that the instruments engage standing order 23(4) and accordingly has resolved to draw them to the attention of your committee:

Instrument	Purpose	Last day to lodge disallowance notice
Aged Care (Transitional Provisions) (Subsidy and Other Measures) Amendment (Cessation of Temporary Funding Increases) Determination 2020 [F2020L01076]	To cease, from 1 September 2020, temporary aged care funding increases payable to approved aged care providers announced by the government on 20 March 2020.	07/12/2020
Aged Care (Subsidy, Fees and Payments) Amendment (Cessation of Temporary Funding Increases) Determination 2020 [F2020L01077]		08/12/2020
Child Care Subsidy Amendment (Coronavirus Response Measures No. 6) Minister's Rules 2020 [F2020L01052]	To increase the number of allowable absence days that are available to individuals whose children are in care at approved child care services in Victoria and to increase the cap on the appropriation in section 233 of the <i>A New Tax System (Family Assistance) (Administration) Act 1999</i> for payments under the Community Child Care Fund Special Circumstances Grant Opportunity program for the 2020-2021 financial year from \$584 million to \$623 million.	01/12/2020
Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 8) 2020 [F2020L01165]	To amend the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 to extend the period of wage subsidy support provided under the JobKeeper scheme until 28 March 2021 by introducing a new two-tiered payment structure for fortnights beginning on or after 28 September 2020.	First sitting day of 2021
Foreign Acquisitions and Takeovers Amendment (Commercial Land Lease Threshold Test) Regulations 2020 [F2020L01131]	To amend the Foreign Acquisitions and Takeovers Regulation 2015 to reinstate certain monetary thresholds for leasehold interests in non-sensitive commercial land that is not vacant.	First sitting day of 2021

Instrument	Purpose	Last day to lodge disallowance notice
Social Security (Coronavirus Economic Response—2020 Measures No. 14) Determination 2020 [F2020L01093]	To amend multiple instruments and modify the <i>Social Security Act 1991</i> to: <ul style="list-style-type: none"> • extend the period in respect of which the COVID-19 supplement will be paid (at a lower rate of \$250); • reinstate the assets tests and the liquid assets test waiting period for certain payments; • temporarily increase the income free area to \$300 a fortnight for certain JobSeeker Payment and Youth Allowance (Other) recipients; and • increase the partner income taper rate for JobSeeker Payment recipients from 25 cents for every dollar over the partner income free area to 27 cents for every dollar over the partner income free area. 	09/12/2020

Should your committee decide to further examine any of the above instruments, I note that the table above identifies the last day (based on the current sitting pattern) for lodging a disallowance notice in the Senate. The committee has also drawn these instruments to the attention of the relevant Senate legislation committees.

Further details about the instruments are published on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

Please note that in the interests of transparency this correspondence will be published on the Scrutiny of Delegated Legislation Committee's website.

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

Yours sincerely,

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



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12 November 2020

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: Josh.Frydenberg.MP@aph.gov.au

CC: tsrdlos@treasury.gov.au; Committeescrutiny@treasury.gov.au;
chris.reside@treasury.gov.au

Josh

Dear Treasurer,

Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 8) 2020 [F2020L01165]

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 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.

Matters more appropriate for parliamentary enactment

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).

The instrument amends the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 to make a number of significant changes to the JobKeeper scheme. Among other things, these changes include:

- extending the operation of the JobKeeper scheme until 28 March 2021;
- establishing new payment rates from 28 September 2020 to provide that the JobKeeper scheme is tapered in the December 2020 and March 2021 quarters;
- introducing a new actual decline in turnover test for entities to qualify for the JobKeeper scheme from 28 September 2020; and
- delegating additional discretionary powers to the Commissioner for Taxation to administer the JobKeeper scheme.

The committee generally considers that significant matters, such as significant COVID-19 economic response measures, are more appropriately enacted via primary, rather than delegated, legislation. This is to ensure a greater degree of parliamentary oversight of significant policy matters. Where significant matters nonetheless are left to delegated legislation, the committee expects a sound justification to be provided.

In this context, the committee acknowledges that the extraordinary circumstances created by the COVID-19 pandemic may have necessitated the establishment of the JobKeeper scheme via delegated legislation when the Parliament was not sitting. However, it is unclear why it continues to be necessary to leave significant details as to how the scheme will operate, including the implementation of significant changes to the scheme, to delegated legislation, particularly noting that regular parliamentary sittings have recommenced. In this instance, the explanatory statement to the instrument provides no justification as to why it is necessary to utilise delegated, rather than primary, legislation.

The committee therefore requests your advice as to why it is considered necessary and appropriate to implement significant changes to the JobKeeper scheme via delegated legislation, rather than primary legislation, particularly noting that regular parliamentary sittings have recommenced.

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 **26 November 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.

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 JOSH FRYDENBERG MP
TREASURER

Ref: MS20-002579

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

Dear Senator Fierravanti-Wells

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) regarding the *Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 8) 2020* [F2020L01165] (the Amending Rules).

In that letter, the Committee sought my advice as why it was considered necessary and appropriate to implement significant changes to the JobKeeper scheme via delegated legislation, rather than primary legislation, particularly noting that regular parliamentary sittings have recommenced.

As the Committee has noted, the *Coronavirus Economic Response Package (Payments and Benefits) 2020* (the Act) was enacted on the basis that the details of any payments authorised under the Act would be provided through a subordinate legislative instrument.

This legislative framework means that incorporating the details of the JobKeeper scheme directly into the Act would require significant restructuring of both the Act and the existing provisions that establish the JobKeeper scheme. The necessary redrafting exercise would have significantly delayed the time at which the amendments to the JobKeeper scheme could have been implemented.

A key change introduced by the Amending Rules was the extension of the scheme beyond its scheduled end date of 27 September 2020. This extension was authorised by amendments to the Act that were passed by the Parliament on 1 September 2020. Without those amendments, I, in my capacity as Treasurer, would not have had the authority to make the Amending Rules, which generally apply from 28 September 2020.

The Amending Rules were made and registered on 15 September 2020 after a substantial and complex drafting process which followed other significant amendments that were registered on 25 August 2020.

Notwithstanding the resumption of the parliamentary sittings, it would not have been possible to prepare and implement the changes in the Amending Rules to the JobKeeper scheme through primary law amendments before 27 September 2020. A delay of this kind would have caused significant uncertainty for employers participating in the JobKeeper scheme. A priority of the Government in implementing the changes was to provide employers with certainty about their ongoing entitlements under the scheme. This was particularly important because employers must

first make payments to their employees in order to qualify for the JobKeeper payment (which is paid in arrears).

I also note that the Government's ability to amend the JobKeeper scheme has been fundamental to the success of the program. As the Committee is aware, the JobKeeper scheme has now been amended seven times after it was first implemented in April 2020. These changes have been critical in addressing unforeseen issues and ensuring that the JobKeeper scheme operates as intended.

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

Yours sincerely

THE HON JOSH FRYDENBERG MP

24 / 11 / 2020



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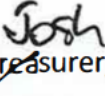
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10 December 2020

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: Josh.Frydenberg.MP@aph.gov.au

CC: tsrdlos@treasury.gov.au; committeescrutiny@treasury.gov.au


Dear Treasurer,

Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 8) 2020 [F2020L01165]

Thank you for your response of 24 November 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 Wednesday, 9 December 2020. On the basis of your advice, the committee has concluded its examination of the instrument.

The committee notes that the instrument was made in response to the COVID-19 pandemic. The committee's views in relation to COVID-19 related delegated legislation are set out in detail in the interim report of the committee's inquiry into the exemption of delegated legislation from parliamentary oversight. The interim report highlights the importance of ensuring parliamentary oversight during times of emergency and notes that COVID 19 serves to shine a light on the deeper, systemic issues which inhibit Parliament from effectively overseeing delegated legislation at all times, not just during emergencies.

The committee will continue to closely monitor COVID-19 related delegated legislation in the future to ensure that it complies with the recommendations set out in the interim report.

A copy of the committee's interim report is available at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight/Interim_report.

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