



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_sdsc

27 August 2020

The Hon Christian Porter MP
Minister for Industrial Relations
Parliament House
CANBERRA ACT 2600

Via email: Christian.Porter.MP@aph.gov.au

CC: attorney@ag.gov.au; dlo@ag.gov.au


Dear Minister,

Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020 [F2020L00702]

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.

Compliance with the Legislation Act 2003 – consultation

Senate standing order 23(3)(a) requires the committee to scrutinise each instrument as to whether it complies with all legislative requirements. This includes the requirements in paragraphs 15J(2)(d) and (e) of the *Legislation Act 2003*, which provide that the explanatory statement to an instrument must describe the nature of any consultation that was undertaken in relation to the instrument or, if no consultation was undertaken, explain why no consultation was undertaken.

The Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020 [F2020L00702] (the repeal instrument) repeals amendments made by the Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020 to access periods for employees in relation to variations to enterprise agreements.

The explanatory statement to the repeal instrument does not appear to provide any information about consultation, as required by paragraphs 15J(2)(d) and (e) of the *Legislation Act 2003*.

The committee therefore requests your advice as to how the current explanatory statement for the repeal instrument complies with the requirements of paragraphs 15J(2)(d) and (e) of the *Legislation Act 2003*.

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.

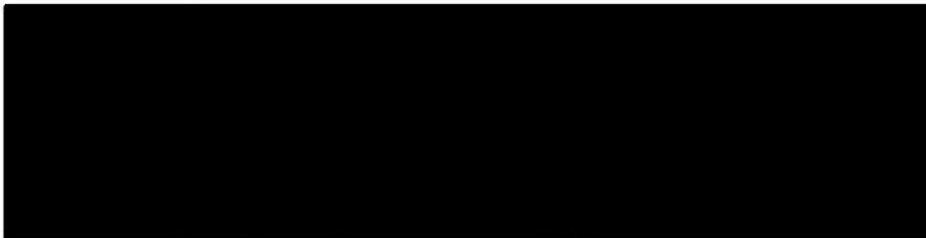
Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **10 September 2020**.

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 Christian Porter MP

Attorney-General
Minister for Industrial Relations
Leader of the House

MC20-028480

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600
sdlc.sen@aph.gov.au

Dear Senator 

I refer to the committee's request in relation to the **Fair Work Amendment (Variation of Enterprise Agreements No.2) Regulations 2020** (the repeal instrument). The committee has noted that the explanatory statement for the repeal instrument does not appear to provide information about consultation that was undertaken in relation to the instrument, as required by paragraphs 15J(2)(d) and (e) of the *Legislation Act 2003*.

The repeal instrument repealed temporary measures introduced by the Fair Work Amendment (Variation of Enterprise Agreements) Regulation 2020 (the regulations) introduced in the context of the COVID-19 crisis. The regulations temporarily reduced the minimum access period before employees may be asked to vote on a variation to their enterprise agreement, and would have automatically ceased to have effect six months after commencement.

I consulted the trade union movement prior to making the regulations, and publicly committed to review the measure at two months. This review found a majority of employers had continued to provide a notice period well in excess of the minimum timeframe permitted by the regulations and that a reduced timeframe was rarely necessary.

Taking this into account, along with the views publicly and privately expressed to me by representatives of the union movement and the business community about the measure, the Government considered it appropriate to bring forward the repeal date of the regulations.

I am satisfied that appropriate consultation was undertaken prior to the making of the repeal instrument.

I trust this information will assist the committee.

Yours sincerely

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



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8 October 2020

The Hon Christian Porter MP
Minister for Industrial Relations
Parliament House
CANBERRA ACT 2600

Via email: Christian.Porter@aph.gov.au

CC: attorney@ag.gov.au; dlo@ag.gov.au; parliamentary@ag.gov.au


Dear Minister,

Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020 [F2020L00702]

Thank you for your response of 22 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 resolved to seek your further advice about the issues outlined below.

Compliance with the Legislation Act 2003 – consultation

Your response indicates that you consulted with trade union movement prior to making the Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020 (principal instrument). You further advised that, taking into account the views publicly and privately expressed to you by representatives of the union movement and the business community, the government considered it appropriate to bring forward the repeal date of the principal instrument.

On this basis, you have advised that you are satisfied that appropriate consultation was undertaken in relation to the Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020 (repeal instrument).

While noting this advice, the committee remains concerned that the repeal instrument does not, at present, comply with the technical requirements of paragraphs 15J(2)(d) and (e) of the *Legislation Act 2003* (Legislation Act). These provisions require that the explanatory statement to an instrument *must* describe the nature of any consultation that was undertaken in relation to the instrument, or if no consultation was undertaken, explain why no such consultation was undertaken.

The committee therefore requests that the explanatory statement to the repeal instrument be amended to include the information that you have provided to the committee to ensure that it complies with the technical requirements of paragraphs 15J(2)(d) and (e) of the Legislation Act.

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.

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

MC20-031229

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600
sdlc.sen@aph.gov.au

21 OCT 2020

Dear ~~Senator~~

I refer to the committee's request in relation to the **Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020** (the repeal instrument) and the further information I recently provided to the committee on the consultation undertaken in respect of this instrument.

The repeal instrument brought forward the repeal of temporary measures introduced to reduce the minimum access period before employees may be permitted to vote for a variation to their enterprise agreements with the effect that the measure ceased to operate on 13 June 2020. In the absence of the repeal instrument the measure would have automatically sunset six months after commencement, on 17 October 2020.

I do not consider it necessary to amend the explanatory statement as the consultation undertaken in respect of the measure, including bringing forward the repeal, is already on the public record.

Thank you for raising this ~~matter~~ with me. I trust this information is of assistance.

Yours sincerely

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



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12 November 2020

The Hon Christian Porter MP
Minister for Industrial Relations
Parliament House
CANBERRA ACT 2600

Via email: Christian.Porter@aph.gov.au

CC: attorney@ag.gov.au; DLO@ag.gov.au


Dear Minister,

**Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020
[F2020L00702]**

Thank you for your response of 21 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. Whilst noting your advice, the committee remains concerned that the above instrument raises significant scrutiny concerns that should be brought to the attention of the Senate.

The committee's scrutiny concerns are detailed in Chapter 1 of its *Delegated Legislation Monitor 12 of 2020*, available on the committee's website at:

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

As set out in the Monitor, the committee requests your advice as to why the explanatory statement to the instrument cannot be amended to include the information previously provided by you with regard to consultation to ensure that it complies with the technical requirements of paragraphs 15J(2)(d) and (e) of the *Legislation Act 2003*.

To facilitate the committee's timely consideration of this matter the committee would appreciate your response by **26 November 2020**.

I also take this opportunity to inform you that on 10 November 2020 the committee placed a notice of motion to disallow the instrument in the Senate to provide additional time for the committee to correspond with you in relation to its technical scrutiny concerns. Your response to the committee's request for further advice will inform the committee's consideration of whether to withdraw the notice of motion to disallow the instrument.

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*.

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

Yours sincerely,

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



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

MS20-001102 / MC20-034167

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600
sdlc.sen@aph.gov.au

Dear ~~Senator~~ 

I refer to your letter dated 12 November 2020 in relation to the **Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020** (the repeal instrument) and the further information I recently provided to the committee on the consultation undertaken in respect of this instrument.

The committee raised concern that the explanatory statement for the repeal instrument does not include the detail that I have previously provided the committee on the consultation undertaken.

A replacement explanatory statement for the repeal instrument has been prepared (as attached) and I have requested my department arrange for the registration of the replacement statement on the Federal Register of Legislation.

Thank you for raising this matter with me. I trust this information is of assistance.

Yours sincerely

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

Enc: Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020,
Explanatory Statement

**FAIR WORK AMENDMENT (VARIATION OF ENTERPRISE AGREEMENTS
NO. 2) REGULATIONS 2020**

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General
under subsection 211(6) of the *Fair Work Act 2009*

PURPOSE AND OPERATION OF THE INSTRUMENT

The *Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020* (the Repeal Regulations) repeal amendments made by the *Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020* (the Regulations).

The Regulations modified the period that employees must have access to a copy of a proposed variation of an enterprise agreement, and before which employees must be notified of the details of the vote on the variation (the ‘access period’), from seven days to one day.

This measure is repealed with the effect that the ‘access period’ for a proposed variation of an enterprise agreement is no longer modified and will revert to the previous period of seven days.

The repeal of the Regulations follows a review which found that a majority of employers had continued to provide a notice period well in excess of the minimum timeframe permitted by the Regulations and that the reduced timeframe introduced by the Regulations was rarely necessary.

Taking into account the review’s findings, and views expressed to the Attorney-General, it is considered appropriate to bring forward the repeal date of the Regulations. The Attorney-General is satisfied that appropriate consultation was undertaken prior to the repeal of the measure.

The repeal of the measure will not affect variations to enterprise agreements made in accordance with the Regulations before the repeal date, including those that have been agreed to by employees before the repeal date but not yet approved by the Fair Work Commission (FWC).

The FWC has a further six months after the repeal date to determine an application to approve a variation of an enterprise agreement made with a shortened ‘access period’ that occurred before the repeal date.

Details of the Repeal Regulations are set out in the Attachment.

The Repeal Regulations are a legislative instrument for the purposes of the *Legislation Act 2003* and commence the day after they are registered on the Federal Register of Legislation.

REGULATION IMPACT STATEMENT

An exemption from Regulation Impact Statement requirements has been granted by the Prime Minister for measures related to the Australian Government's response to the COVID-19 pandemic.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

The *Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020* (the Repeal Regulations) are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

The Repeal Regulations repeal amendments made by the *Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020*, which modified the period that employees must have access to a copy of a proposed variation of an enterprise agreement, and before which employees must be notified of the details of the vote on the variation (the 'access period'), from seven days to one day. This measure was intended to be a time-limited change to enable employers and their employees to quickly respond to issues that may arise in response to COVID-19.

Human Rights Implications

The Regulations are compatible with human rights as the Regulations do not engage any of the applicable rights or freedoms and do not raise any human rights issues.

NOTES ON SECTIONS

Section 1 – Name

This section provides that the title of the instrument is the *Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020*.

Section 2 – Commencement

This section provides that the whole of the instrument will commence the day after it is registered.

Section 3 – Authority

This section provides that the instrument is made under the *Fair Work Act 2009* (the Act).

Section 4 – Schedules

This section provides that each instrument specified in a Schedule to the Regulations is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument will have effect according to its terms.

SCHEDULE 1 – Amendments

Item 1 – Regulation 2.09B

Item 1 repeals regulation 2.09B.

Item 2 –Part 7-4 (heading)

Item 2 repeals and substitutes the heading of Part 7-4 in Chapter 7.

Items 3 and 4 – Subregulation 7.04(2)

Item 3 omits “under subregulation 2.09B(3)” and substitutes it with “by Schedule 1 to the *Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020*”.

Item 4 omits “subsection 180(2) and (3) of the Act that starts before that repeal” and substitutes it with “subsections 180(2) and (3) of the Act that starts before the commencement of that Schedule”.

These amendments make clear that regulation 2.09B is repealed by Schedule 1 to the proposed Regulations, and ensure that the FWC can determine an application to approve a variation of an enterprise agreement that was made in relation to an access period that started before the commencement of Schedule 1 to the proposed Regulations.

Item 5 – Subregulation 7.04(2)(note)

Item 5 repeals the note at subregulation 7.04(2).

Item 6 – Regulation 7.05

Item 6 makes clear that Part 7-4 is repealed at the end of the period of 6 months starting on the day Schedule 1 to the proposed Regulations commences. This has the effect of providing the FWC with a further six months after the repeal of regulation 2.09B to consider an application to approve a variation of an enterprise agreement made with a one day access period pursuant to regulation 2.09B.



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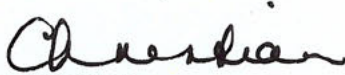
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10 December 2020

The Hon Christian Porter MP
Minister for Industrial Relations
Parliament House
CANBERRA ACT 2600

Via email: Christian.Porter@aph.gov.au
CC: attorney@ag.gov.au; DLO@ag.gov.au


Dear Minister,

**Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020
[F2020L00702]**

Thank you for your response of 27 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 9 December 2020.

In summary, the committee welcomes your undertaking to amend the instrument. The committee notes that this undertaking was implemented on 30 November 2020.

In light of your implemented undertaking to amend the explanatory statement to the instrument, the committee has concluded its examination of the instrument and resolved to withdraw the notice of motion to disallow the instrument.

The committee's concluding comments are set out in Chapter 1 of its *Delegated Legislation Monitor 14 of 2020*, available on the committee's website at:

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

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*.

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

Yours sincerely,

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