



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 Wendy Askew
Chair
Senate Community Affairs Legislation Committee
Parliament House
CANBERRA ACT 2600

via email: community.affairs.sen@aph.gov.au

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

Senator the Hon Richard Colbeck, Minister for Aged Care and Senior
Australians, Minister.Colbeck.DLO@health.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
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
Social Security (Coronavirus Economic Response—2020 Measures No. 14) Determination 2020 [F2020L01093]	<p>To amend multiple instruments and modify the <i>Social Security Act 1991</i> to:</p> <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

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 either 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

Senator the Hon Anne Ruston
Minister for Families and Social Services
Parliament House
CANBERRA ACT 2600

Via email: Senator.Ruston@aph.gov.au

CC: dlos@dss.gov.au

Dear Minister,

**Social Security (Coronavirus Economic Response—2020 Measures No. 14)
Determination 2020 [F2020L01093]**

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.

Modification of primary legislation

Parliamentary oversight

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 enacted via primary rather than delegated legislation). This includes where an instrument modifies primary legislation. In addition, Senate standing order 23(3)(k) requires the committee to scrutinise each legislative instrument as to whether it complies with any ground relating to the technical scrutiny of delegated legislation. This includes whether an instrument limits parliamentary oversight.

The instrument was made pursuant to provisions of the *Social Security Act 1991* (Social Security Act) relating to the COVID-19 supplement and item 40A of Schedule 11 to the *Coronavirus Economic Response Package Omnibus Act 2020*, which provides that the minister may make a determination modifying the operation of the social security law relating to the qualification for, or the rate of, a social security payment.

The instrument has the effect of modifying certain provisions of the Social Security Act to make a number of significant changes to social security payments, including extending the period that the COVID-19 supplement will be paid (at a lower rate of \$250), reinstating the

assets test and liquid assets test waiting period, temporarily increasing the income free area for JobSeeker Payment and Youth Allowance (Other) recipients, and increasing the temporary partner income taper rate for JobSeeker Payment recipients from 25 to 27 per cent.

The committee has significant scrutiny concerns about enabling delegated legislation to override the operation of legislation which has been passed by Parliament. Such provisions may limit parliamentary oversight, and may subvert the appropriate relationship between Parliament and the executive. In this regard, the committee generally considers that such measures should ordinarily be included in primary legislation, unless a sound justification for the use of delegated legislation is provided.

The committee acknowledges that the extraordinary circumstances relating to the COVID-19 pandemic may have necessitated the use of such provisions when the Parliament was not sitting. However, it is unclear why it continues to be necessary or appropriate to continue to make significant modifications to primary legislation via delegated legislation noting that regular parliamentary sittings have recommenced. In this regard, the committee notes that the explanatory statement provides no justification for why it is necessary and appropriate for the instrument to modify primary legislation.

The committee therefore requests your advice as to why it is considered necessary and appropriate to continue to use delegated legislation to make significant modifications to primary legislation, particularly noting that regular parliamentary sittings have recommenced.

Consultation with persons affected

Senate standing order 23(3)(d) requires the committee to scrutinise each instrument as to whether persons likely to be affected by the instrument were adequately consulted in relation to it.

In this instance, the explanatory statement to the instrument states that consultation was undertaken with the Department of Veterans' Affairs, the Department of Agriculture, Water and the Environment and Services Australia. The explanatory statement notes that the majority of measures introduced by the instrument were announced in July 2020 and have been considered in public hearings by the Senate Select Committee on COVID-19. Additionally, the explanatory statement explains that no public consultation was undertaken in relation to certain provisions as they have a beneficial effect on recipients of social security payments. However, in the absence of further information in the explanatory statement, it is unclear whether public consultation was undertaken in relation to any of the other provisions of the instrument.

The committee therefore requests your advice as to whether persons likely to be affected by the instrument, such as social security payment recipients, were consulted in relation to any of the measures implemented by the instrument, and if not, why not.

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



Senator the Hon Anne Ruston

**Minister for Families and Social Services
Senator for South Australia
Manager of Government Business in the Senate**

Ref: MC20-017618

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 dated 12 November 2020, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation, regarding the Social Security (Coronavirus Economic Response – 2020 Measures No. 14) Determination 2020. The Committee has raised concerns that the Determination limits parliamentary oversight and asks whether consultations were undertaken with persons likely to be affected by the Determination.

The Determination provides for temporary enhanced support, balanced with incentives to work, in response to the uncertainty around the evolving nature of the labour market, including:

- extending the COVID-19 Supplement at a rate of \$250 a fortnight, from 25 September 2020 until 18 December 2020;
- extending the waivers for the Ordinary Waiting Period, Newly Arrived Resident's Waiting Period and Seasonal Worker Preclusion Period until 18 December 2020;
- reinstating the assets tests and liquid assets test waiting period from 25 September 2020; and
- temporarily increasing the income-free area to \$300 a fortnight with a 60 cent taper rate for JobSeeker Payment recipients and Youth Allowance (other) recipients as well as the partner income taper rate for JobSeeker Payment recipients from 25 cents to 27 cents for every dollar over the partner income-free area until 31 December 2020.

The Determination was made pursuant to provisions of the *Social Security Act 1991* relating to the COVID-19 Supplement and item 40A under Schedule 11 of the *Coronavirus Economic Response Package Omnibus Act 2020*. This provision outlines that, as the Minister for Families and Social Services, I may make a determination modifying the social security law in relation to the qualification for or payment rate of a social security payment.

This power allows the Australian Government to respond quickly and flexibly, with appropriate and targeted supports, to changing conditions as the Coronavirus situation unfolds. This was necessary and appropriate, given the uncertain economic outlook that prevailed in the lead up to the 2020-21 Budget, including the lockdown in Victoria, and the potential for further outbreaks which may require a quick response.

The Government continues to monitor evolving economic conditions arising from COVID-19 to ensure assistance to individuals and families is appropriate and commensurate with the recovering economy and labour market. My department continues to closely monitor social media, incoming correspondence from members of the public including income support recipients, and feedback from Services Australia and other stakeholders as temporary measures are rolled out, to support income support recipients and as Australia transitions to a post-COVID economy.

In relation to some of the specific measures in the Determination, I note that consultation on the reinstatement of the liquid assets test waiting period was not feasible as this waiting period was only reintroduced for new claimants and it was not possible to identify the specific cohort of individuals affected by this change. The reintroduction of the waiting period did not adversely impact existing payment recipients and claimants.

Services Australia undertook a comprehensive communication campaign to work with recipients in the month prior to the reinstatement of the assets test. Affected individuals were contacted by Services Australia by letter, SMS and direct outbound telephone calls and informed of the need to provide or update their assets details.

There was no consultation undertaken on the beneficial measures in the Determination, including the continuation of the COVID-19 Supplement and the introduction of more generous income testing arrangements. I note that by increasing the ordinary income-free area for JobSeeker Payment recipients to \$300 a fortnight means those recipients can receive more income before their payment reduces. The increase in the free area has also ensured that a recipient's partner can earn more income before the recipient's rate of JobSeeker Payment starts to reduce under the 27 cent partner income taper rate introduced by the Determination. Therefore, the ordinary income-free area and partner income taper rate changes made by the Determination produces a more beneficial income test for JobSeeker Payment when compared to the social security law as in force on 24 September 2020.

The Government remains committed to supporting all Australians affected by the impacts of COVID-19 and encouraging them to re-engage with the workforce as the economy reopens.

Thank you for raising these matters with me. I trust the information provided will be of assistance to the Committee.

Yours sincerely

Anne Ruston

25 / 11 / 2020



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10 December 2020

Senator the Hon Anne Ruston
Minister for Families and Social Services
Parliament House
CANBERRA ACT 2600

Via email: Senator.Ruston@aph.gov.au

CC: dlos@dss.gov.au

Dear ~~Minister~~,

Social Security (Coronavirus Economic Response—2020 Measures No. 14) Determination 2020 [F2020L01093]

Thank you for your response of 25 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.

While it has concluded its examination of this particular instrument, the committee reiterates its view that where an instrument implements measures which may affect the rights, interests or obligations of individuals, those individuals should be consulted in relation to that instrument.

The committee also 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