AUSTRALIAN SENATE

Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House, Canberra ACT 2600
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www.aph.gov.au/senate_sdlc

21 May 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) Regulations 2020 [F2020L00432]

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 instruments, and seeks your advice about this matter.

Matters more appropriate for parliamentary enactment

Adequacy of explanatory materials

Senate standing order 23(3)(j) requires the committee to scrutinise each instrument as to whether it contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). In addition, Senate standing order 23(3)(g) requires the committee to scrutinise each instrument as to whether the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument.

The instrument was made under subsection 211(6) of the *Fair Work Act 2009* (the Act). It has the effect of modifying one of the conditions of which the Fair Work Commission must be satisfied before approving a variation to an enterprise agreement. Specifically, it shortens the minimum period ('access period') in which employees must be able to access the proposed variation before voting from seven calendar days to one calendar day.

The reduction of the access period of which the Fair Work Commission must be satisfied before approving a variation to an enterprise agreement appears to constitute a significant change to the regulatory scheme for the variation of enterprise agreements provided for in the Act. As a technical scrutiny committee, the committee does not express a view as to the policy merits of this measure. However, the committee's longstanding technical scrutiny view is that any significant modification to a regulatory scheme should be enacted via primary legislation, unless the explanatory materials provide a sound justification for the use of delegated legislation instead. In this instance, the explanatory statement does not appear to explain why delegated legislation has been used to modify the access period, rather than primary legislation.

The committee would therefore appreciate your detailed advice as to:

- **why it was considered necessary and appropriate to include these measures in delegated legislation, rather than primary legislation; and**
- **noting that the Parliament is now sitting more regularly than was envisaged at the time the instrument was made, the appropriateness of amending the *Fair Work Act 2009* to include the measures in primary legislation, rather than delegated legislation.**

Adequacy of consultation

Senate standing order 23(3)(d) requires the committee to consider whether those likely to be affected by an instrument were adequately consulted in relation to it. This principle is informed by subsection 17(2) of the *Legislation Act 2003*, which provides that, in assessing whether appropriate consultation has taken place in making the instrument, the rule-maker may have regard to the extent to which persons likely to be affected by the instrument had an adequate opportunity to comment on its proposed content.

In this instance, the explanatory statement to the instrument notes that the government consulted with the referring states and territories under the *Intergovernmental Agreement for a National Workplace System for the Private Sector.* However, it does not appear to indicate whether the government also consulted with persons and entities likely to be affected by the instrument, such as employers and employees and their representatives.

The committee would therefore appreciate your detailed advice as to:

- **whether persons and entities likely to be affected by the measures in the instrument, such as employers and employees and their representatives, were consulted before the instrument was made; or**
- **if not, why such persons and entities were not consulted.**

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 **4 June 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

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

Dear ~~Senator Fierravanti-Wells~~ Concetta

Thank you for your letter of 21 May 2020 on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) concerning the *Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020* (the Regulations).

As you are aware, the Regulations temporarily reduce the minimum period during which employees have access to a copy of a proposed variation to an enterprise agreement, and by which they must be notified about the vote, from seven calendar days to one calendar day. This notice period operates as a minimum period prior to a vote on a proposed variation.

The Committee has sought my advice in relation to why it was necessary and appropriate to include the measure in delegated legislation, as well as further information on the consultation undertaken regarding the Regulations.

When the economic effects of the COVID-19 pandemic became clear, urgent industry wide award changes were made by the Fair Work Commission (FWC) within days of applications for variations being made. The timely benefits that flowed from those changes did not extend to those employers and employees covered by enterprise agreements, and I considered it important that those covered by enterprise agreements were also not subject to unnecessary delays in making variations.

It was clear that this temporary measure would give employers and their employees flexibility to respond more rapidly, by agreement, to urgent workplace issues in the COVID-19 pandemic. The change is temporary (operating for a six month period); could be implemented expeditiously by specific regulation as provided for in the Act; and at the time these Regulations were made Parliament was not sitting and future sitting dates were unknown.

Statutory safeguards for employees include that the FWC must be satisfied when approving a variation that the employees have genuinely agreed to the variation; that the employer has taken all reasonable steps to explain the terms of the variation and their effect to employees (provided in an appropriate manner taking into account the employees' particular circumstances and needs); and that the agreement as varied passes the Better Off Overall Test and does not contravene the National Employment Standards.

As you note, senior officials from referring states and territories were informed about the Regulations and sent a copy before the Regulations were made.

The Government's approach throughout the COVID-19 pandemic has been to work together with business and employee representatives (such as the ACTU) to remove barriers and implement sensible measures to save jobs and keep employees safe.

As a result of my consultation with the ACTU, I committed to closely monitor the operation of the Regulations to ensure they are operating effectively and without misuse.

In that regard, I note that the Regulations complement the strong cooperation that has already taken place between employers and unions to support sensible amendments to awards.

Yours sincerely

[redacted]

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

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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) Regulations 2020 [F2020L00432]

Thank you for your response of 9 June 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 26 August 2020. Noting that the instrument has since been repealed, the committee has concluded its examination of 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.*

Thank you for your assistance with this matter.

Yours sincerely,

[redacted]

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