



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

18 February 2021

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


Dear Treasurer,

**Taxation Administration (Remedial Power – Seasonal Labour Mobility Program)
Determination 2020 [F2020L01474]**

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments 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

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 provides that foreign resident employees of Approved Employers under the Seasonal Labour Mobility Program will continue to be taxed by application of a final withholding tax rate of 15 per cent, and will not have to lodge an income tax return unless the employee earns another Australian sourced income. To do this, sections 5 and 6 of the instrument modify the operation of paragraph 840-905(b)(ii) and paragraph 12-319A(b)(ii) in Schedule 1 to the *Income Tax Assessment Act 1997*.

Provisions that modify the operation of primary legislation may limit parliamentary oversight, and may subvert the appropriate relationship between Parliament and the executive. The committee considers that such measures should ordinarily be included in primary legislation, unless a sound justification for the use of delegated legislation is provided.

In this instance, the explanatory statement explains that, had the circumstances and policy intent of the instrument been considered when the primary Act was drafted then the law would have been drafted differently. The committee considers that this explanation indicates it would be more appropriate to amend the primary legislation to provide for the intended policy change, rather than leaving these matters to delegated legislation.

In light of the above, the committee requests your advice as to whether you intend to move amendments to the *Income Tax Assessment Act 1997* to provide for this change in tax policy on the face of the primary legislation 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. Noting that the 15th sitting day after the instrument was tabled in the Senate is 22 February 2021, the committee has resolved to give a notice of a motion to disallow the instrument on that day 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 March 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: MS21-000409

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

Dear Senator

Thank you for your letter on behalf of the Committee in relation to the *Taxation Administration (Remedial Power – Seasonal Labour Mobility Program) Determination 2020* (the Determination). In that letter you requested my advice as to whether there is an intention to move amendments to the *Income Tax Assessment Act 1997* to provide for the changes to tax policy, currently in the Determination, to the face of primary law, and if not, why not.

In preparing this response, my Department consulted with the Australian Taxation Office (ATO), who made the Determination.

The Determination has been made in response to temporary changes to visa arrangements announced by the Government on 4 April 2020 due to the COVID-19 pandemic, which included allowing employees under the Seasonal Labour Mobility Program (the Program) to extend their stay in Australia using a different temporary visa and still continue to be eligible to participate in the Program. Without the Determination critical seasonal workers for the agricultural sector are subject to a higher non-resident tax rate and a requirement to lodge an income tax return. The outcome of the negative tax effects may be to jeopardise Australian farmers' ability to obtain the seasonal worker labour force it needs.

With regard to amendments to the primary law to incorporate the amendments from the Determination, I will ask my Department to consider whether the amendments to the primary law are necessary and appropriate. In the meantime, the use of the Commissioner's Remedial Power allows for a timely and effective solution to be put in place to ensure affected individuals are not subjected to taxation at the higher non-resident tax rates and required to lodge an income tax return.

The appropriate exercising of the Commissioner's Remedial Power (CRP) allows the taxation law to be remedied to apply as intended in more situations, enhancing certainty and reducing compliance burdens for taxpayers. The inability to address unintended outcomes in a timely manner places the onus on affected taxpayers to either comply with the provision and the unintended outcome it gives effect to, thereby incurring additional tax and compliance costs; or comply with the provision as intended but bear the risk of being penalised.

I understand that the Commissioner remains cognisant that the power he has been given is to be used judiciously and not to circumvent nor limit the need for parliamentary oversight. The Commissioner balances the exercise of the power with the need to help clarify obligations for taxpayers more quickly, providing certainty and confining the need for complicated anticipatory administrative approaches. The ATO have advised that they remain sensitive to the balances that need to be struck. The inability to address these issues in a timely manner could reduce people's confidence in the tax system and willingness to voluntarily comply with tax obligations. This could draw resources away from resolving unintended outcomes and towards managing downstream effects from these outcomes.

The ATO have advised that they have implemented thorough governance processes to ensure consistent decision making before exercising the power. The ATO undertakes rigorous consultation with the CRP Advisory Panel (comprised of private sector specialists, Treasury and senior ATO representatives), the Board of Taxation, and externally with the community.

I trust this information has been of assistance.

Yours sincerely

THE HON JOSH FRYDENBERG MP

22 April 2021



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13 May 2021

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: tsrdlos@treasury.gov.au

CC: committeescrutiny@treasury.gov.au; Chris.Reside@treasury.gov.au


Dear Treasurer,

Taxation Administration (Remedial Power – Seasonal Labour Mobility Program) Determination 2020 [F2020L01474]

Thank you for your response of 22 April 2021 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 12 May 2021. On the basis of your advice and noting that the instrument will repeal in three years, the committee has concluded its examination of the instrument and has resolved to withdraw the disallowance notice in place on this 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,

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