Monitor 1 of 2022 – Ministerial Responses

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The Hon Greg Hunt MP
Minister for Health and Aged Care

Senator the Hon Richard Colbeck
Minister for Senior Australians and Aged Care Services
Minister for Sport

Ref No: MC21-039175

15 DEC 2021

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

Thank you for your correspondence of 25 November 2021 on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation concerning the Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 (instrument). Your correspondence seeks further advice in relation to two matters.

Firstly, the correspondence seeks advice as to whether the instrument could be amended to include a high-level, inclusive definition of the term 'emergency' to provide guidance in relation to the scope of this term in respect of the arrangements on the use of restrictive practices in residential aged care.

As stated in previous advice to the Committee on 3 September 2021 and 15 October 2021, 'emergency' is not defined so not to speculate or limit the term and to ensure there are no unintended consequences that may exclude situations of a genuine emergency. The Australian Government considers that the existing guidance available on the Aged Care Quality and Safety Commission's website, in addition to the further guidance included in the replacement explanatory statement, are suitable to assist aged care providers, consumers, and others to understand how these arrangements are intended to operate.

However, given that the Quality of Care Principles 2014 are proposed to be amended in the coming months in relation to other projects, we have requested that the Department of Health work with the Office of Parliamentary Counsel to consider options for the potential inclusion of a definition of the term 'emergency' as part of that existing project.

The correspondence also notes that Committee's view that amendments be made to the *Aged Care Act 1997* (Act) and the instrument to require that a provider act consistently (as opposed to not acting inconsistently) with the Charter of Aged Care Rights (Charter). Relevantly, the Committee seeks advice as to whether the implications of amending the Act and the instrument to require consistency with the Charter can be considered immediately and as a matter of urgency.

As stated in previous advice to the Committee on 15 October 2021, we are hesitant to make the amendments suggested by the Committee without carefully considering the implications, especially given the broad nature of the rights under the Charter.

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Advice from parliamentary drafters is that revising references from 'not inconsistent' to 'consistent' may be problematic. 'Not inconsistent with' is the preferred drafting over 'consistent with' because it accounts for the fact that some elements of the Charter may be irrelevant. In such circumstances it would not be possible to be 'consistent' with them.

With this in mind, we reiterate the importance that this matter be considered very carefully before progressing any legislative amendments, and that this consideration will be undertaken in the context of the new Aged Care Act, proposed to commence from 1 July 2023 (subject to parliamentary processes).

As you and the Committee will be aware and would appreciate, the Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021 contains several significant time critical measures in response to recommendations of the Royal Commission into Aged Care Quality and Safety. Progressing non-urgent government amendments at this stage of the Bill's progress could put those measures at risk, along with the additional safety measures for consumers.

Thank you for writing on this matter

Yours sincerely

Greg Hunt

Richard Colbeck

THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS21-002957

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 correspondence of 25 November 2021, on behalf of the *Senate Standing committee for the Scrutiny of Delegated Legislation (the Committee) regarding the Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021 [F2021L01080]*.

In response to my letter of 22 October 2021, the Committee has sought my advice as to:

- whether the *Corporations Regulations 2001* can be amended to provide that the exceptions set out in the instrument cease to operate three years after they commence, noting that this would allow sufficient time for the findings of the ALRC's review of the Corporations Act to be finalised and considered prior to the cessation of the provisions; and

- if the measures are intended to be in force for a longer term, whether the exemptions can be included in primary legislation.

Cessation of provisions after three years

I reiterate my view that it is not appropriate for these exemptions to cease after three years. The permanency of these exemptions within the *Corporations Regulations 2001* is appropriate so as to give effect to the policy intention that the hawking prohibitions apply only in situations where there is a risk of consumer harm. Additionally, repealing the exemptions after three years would undermine certainty for businesses that rely on these exemptions, and impose significant commercial risks and compliance costs to businesses.

Inclusion of the provisions in primary legislation

While I note the Committee's concerns regarding the inclusion of provisions in delegated legislation that exempt persons or entities from the operation of the primary law, in this case I also confirm my view that it is appropriate for these exemptions to be included in the *Corporations Regulations 2001*.

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The *Corporations Act 2001* currently provides a broad prohibition on the hawking of products and a small number of broad exemptions that apply across financial products. The exemptions set out in the Regulations apply in limited circumstances and use a specifically delegated power under section 992A of the *Corporations Act 2001*.

Specifically, these exemptions relate to the sale or offer of specific financial products, and as such apply to a niche and defined group, rather than all persons who are offering to sell or issue financial products. For example, the exemption in subregulation 7.8.21A(j) only applies to persons making offers to sell or issue a general insurance product to a person who has held a substantially similar product in the 30 day period before the offer is made, usually this will be an offer to renew a lapsed insurance policy. As such it will not impact all persons offering to sell or issue general insurance products. It is my view that setting out enduring exemptions of that nature in the *Corporations Regulations 2001* is an appropriate use of that regulation making power and was foreseen by the *Corporations Act 2001*. Utilising the Regulations in this manner also allows the Government to quickly respond to new and different financial products as required to mitigate the risk of consumer harm.

Additionally, including those exemptions in the primary law would render it unnecessarily complicated and negatively affect its usability. This would make it more difficult for businesses to understand and comply with their obligations and make compliance and enforcement actions more difficult.

Thank you for bringing the Committee's concerns to my attention. I trust that this information will be of assistance to the Committee.

Yours sincerely

THE HON JOSH FRYDENBERG MP

10 December 2021

THE HON SUSSAN LEY MP
MINISTER FOR THE ENVIRONMENT
MEMBER FOR FARRER

MC21-093969

Senator the Hon Concetta Fierravanti-Wells
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
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13 DEC 2021

Dear Senator Connie

Thank you for your further letter of 25 November 2021 regarding - (Senate Standing Committee for the Scrutiny of Delegated Legislation) - Great Barrier Reef Marine Park Amendment (No-Anchoring Areas) Regulations 2021 (Amending Regulations).

I appreciate this additional opportunity, following my letter of 12 October 2021, to provide further information with the view it may comprehensively explain my position, and that of the Great Barrier Reef Marine Park Authority (Reef Authority).

At the outset, I would like to reassert that the Government's approach to managing 'no-anchoring areas', through the Reef Authority, is intended to deliver improved agility in managing the World Heritage Area, while at the same time reducing administrative burden on agencies, the Parliament and, importantly, everyday users of the Great Barrier Reef Marine Park.

Purpose of No-Anchoring Areas

As you are aware, the Great Barrier Reef is a World Heritage Area, supports a range of commercial activities and, under normal circumstances, attracts millions of visitors each year.

Dropping an anchor from a vessel can take seconds but anchoring over sensitive habitats in the Great Barrier Reef has consequences for years to come. It is for this reason that anchoring is linked to three current threats to the Great Barrier Reef Region's values. These are noted in the most recent Great Barrier Reef Outlook Report (a report which is tabled in both Houses of Parliament) and include: damage to coral reefs, seafloor habitat and World Heritage-related values.

To avoid anchor damage to coral and the sea floor, the Reef Authority communicates responsible reef practices, delivers reef protection infrastructure (such as no-anchoring areas and public moorings), and applies regulatory approaches including those relating to no-anchoring areas.

Regulation of No-Anchoring Areas

Regulating the use of anchors in some areas of the Marine Park was first introduced in the *Great Barrier Reef Marine Park Regulations 1983* through 'designated anchorage areas'. This has since evolved to include no-anchoring areas and superyacht anchorage areas provided for in the existing *Great Barrier Reef Marine Park Regulations 2019* (Principal Regulations).

The Principal Regulations allowed for no-anchoring areas to be declared via notifiable instrument and referenced (in Schedule 3) existing no-anchoring areas not provided for elsewhere. The Explanatory Statement of the Principal Regulations provides that no-anchoring areas are determined by the Reef Authority through site assessment to determine where the coral is located, by stakeholder and public consultation and desktop planning to take account of these elements and to ensure a good understanding of the site and its use. The Statement recognised that the ability to make declarations by notifiable instrument provided greater flexibility to changing circumstances.

Importantly, subsection 5(3) of the Principal Regulations requires the Reef Authority to have regard to the environmental, economic and social values of the relevant area in determining whether to make a declaration. As the Explanatory Statement recognised, this criteria "appropriately constrains, and gives guidance to, the Authority's power to determine matters in a notifiable instrument".

The Explanatory Statement acknowledged that the declaration of designated anchorages, superyacht anchorages and no-anchoring areas along with Plans of Management did restrict the right to freedom of movement (some of which to a minor degree, like no-anchoring areas). However, such restrictions were described as appropriate and reasonable given the need to protect the environment and public safety.

Strict Liability Offence

To make the declarations enforceable, the Principal Regulations include a strict liability offence (section 234) relating to contraventions of certain parts of the Plans of Management (including the no-anchoring area provisions) and prohibitions relating to damaging coral including when anchoring. The offence was drafted in accordance with the *Guide to Framing Commonwealth Offences* and, being a strict liability offence, brought it in-line within the infringement notice scheme created by the Principal Regulations.

The penalty is not more than 60 penalty units and there is no possibility of imprisonment. The existence of the Plans of Management and no-anchoring areas is highlighted on the Reef Authority's website and through other public education materials. This aims to place Marine Park users on notice of what is and is not permitted in the areas.

Preparing the Principal Regulations

The Office of Parliamentary Counsel was engaged in drafting the Principal Regulations and extensive consultation occurred in relation to them. The re-making of the regulations was widely supported. Consultation was conducted at both the Commonwealth level (including the Attorney-General's Department and Commonwealth Department of Public Prosecutions) and the State level (including the Queensland Department of the Premier and Cabinet and Department of Environment and Science).

Lastly, extensive consultation had been undertaken in relation to the preceding regulations, with such consultation informing regular amendments and informing the form of the Principal Regulations.

No-Anchoring Area Declarations: Whitsundays & Townsville/Whitsunday Management Area

Following the introduction of the Principal Regulations, section 5(2)(b) of the Principal Regulations was relied upon to introduce the *Great Barrier Reef Marine Park (Declaration of Whitsundays No-Anchoring Areas) Notifiable Instrument 2020* followed by the *Great Barrier Reef Marine Park (Declaration of No-Anchoring Areas – Townsville/Whitsunday Management Area) Notifiable Instrument 2021.*

In preparing these notifiable instruments, the Reef Authority had regard to the environmental, economic and social values of the area (in accordance with section 5(3) of the Principal Regulations). This was achieved through evidence-based information such as Reef Health Impact Surveys and local knowledge provided through Reef Authority staff, the tourism industry and general user feedback including through public consultation undertaken by the Queensland Parks and Wildlife Service. Where potential impacts on existing users that could have restricted their anchoring access to the location were identified, public moorings were installed to allow vessels to moor within the no-anchoring areas.

Amending Regulations

As I understand it, the Committee remains concerned with:

1. the Reef Authority's existing ability to declare no-anchoring areas by notifiable instrument; and
2. characterising the content of such a declaration as 'administrative'.

1. Declaration by Notifiable Instrument

The Principal Regulations defined 'no-anchoring areas' as those existing areas (contained within Schedule 3) and declarations of no-anchoring areas made by notifiable instrument (section 5(2)).

As at the time of lodgement of the Amending Regulations, Schedule 3 of the Principal Regulation had become redundant by the introduction of the *Great Barrier Reef Marine Park (Declaration of No-Anchoring Areas – Townsville/Whitsunday Management Area) Notifiable Instrument 2021*. This is because that instrument included all of the areas previously included in Schedule 3 and, following the successful implementation of that declaration and the preceding Whitsundays declaration, reference to Schedule 3 was no longer needed or preferred.

In addition to the rationale outlined in the Explanatory Statements of the Principal Regulations and Amending Regulations, the following outlines why the declaration of no-anchoring areas by notifiable instrument is necessary and appropriate:

- Operational practicalities: reef protection markers (used to delineate the boundary of the no-anchoring area on the surface of the water) need to be adjusted for operational reasons such as following severe weather events (for example, cyclones) or in response to the further damage (or revival) of surrounding areas. The ability to declare such areas by notifiable instrument allows the Reef Authority to act urgently and decisively in response to changing circumstances (including in response to emergencies impacting the Marine Park);

- Scale and level of impact: unlike changes to the Zoning Plan (which apply to the whole of the Marine Park and have high levels of impact for users), the areas declared to be no-anchoring are very small in scale and, noting the increased number of public moorings installed in the areas which complement the no-anchoring areas, the level of impact to Marine Park users is minor;

- Reef values-informed decision: the Reef Authority's ability to declare such an area is not currently, and was never, intended to be unfettered. The requirement of s5(3) of the Principal Regulations require the consideration of the impact of environment, economic and social value of the area - thus providing guidance to the decision and constraining the making of such a decision;

- Commonwealth precedents: provision for declarations via notifiable instruments are successfully used by other Commonwealth Departments and agencies. For example, the *Determination Prohibiting Use of Vessels Cartier Island Marine Park And Part of The Ashmore Reef Marine Park 2018* made pursuant to *Environment Protection and Biodiversity Conservation Regulations 2000* subregulation 12.56 regarding the use of vessels and ability to make a determination (noted as also containing a strict liability offence);

- Accountability: the Reef Authority, as the managing agency for the Great Barrier Reef, is best placed to make informed decisions about the uses and management of the Marine Park. In fact, this is expressly noted as a function of the Reef Authority as outlined in section 7 of the *Great Barrier Reef Marine Park Act 1975* (Cth). It follows that existing declarations and any further declarations are based upon evidence-based assessments relying upon information held by the Reef Authority or readily available to it through its partnership with governments, operators and Marine Park users; and

- Legislative consistency and certainty: as mentioned previously, the *Great Barrier Reef Marine Park (Declaration of No-Anchoring Areas – Townsville/Whitsunday Management Area) Notifiable Instrument 2021* had incorporated the areas previously listed in Schedule 3 of the Principal Regulations in a single instrument. As such, Schedule 3 was no longer necessary in the definition of 'no-anchoring areas'. Continuing to utilise the existing mechanism of declaration by notifiable instrument provides consistency and certainty to Marine Park users.

I note that the Committee has enquired if the Principal Regulations could be amended to state that declarations could only occur via legislative instruments. I trust that the above section provides a sound basis for such declarations to appropriately remain as notifiable instruments.

2. Characterising the Content

I understand that the Committee's second concern relates to whether the content of a declaration of a no-anchoring area amounts to it having a 'legislative character' and therefore it is a legislative instrument by way of section 8(4) of the *Legislation Act 2003* (Cth) (LA). In addressing this concern, it is necessary to examine both the operation of the LA and application of relevant case law principles. It is also pertinent to consider broader policy considerations that are relevant to this issue.

Operation of the Legislation Act

The enabling provisions (specifically section 5(2) of the Principal Regulations) provide that the Reef Authority "may, by notifiable instrument, declare an area decscribed in the declaration to be… a no-anchoring area for the purposes of the definition of ***no-anchoring area***".

As section 11(1) LA provides, if the primary law gives the power to do something by notifiable instrument then:

1) if the thing is done, it must be done by instrument; and
2) that instrument is a notifiable instrument.

Section 11(1) LA therefore provides for a requirement to include the declaration of no-anchoring areas in a notifiable instrument. Notably, 'Example 1' of a notifiable instrument (provided below section 11(2) in the LA) is notably similar to the above provided in the Principal Regulations.

Finally, the operation of section 8(8)(a) of the LA outlines that, despite anything else in section 8 (including section 8(4)), an instrument that is a notifiable instrument because of section 11(1) is not a legislative instrument (and cannot become one).

In the event of any lingering doubt, paragraph 35 of the *Office of Parliamentary Counsel's Legislative Handbook* states "[i]f an instrument is declared to be a notifiable instrument, no further action is required to establish its status under the LA". For the reasons outlined above, it remains the Reef Authority's position that the declaration of a new no-anchoring area must be done by notifiable instrument. Even if this was not the case, the Reef Authority's view is that it is reasonable to characterise such a decision as administrative.

As the Committee has outlined, an important consideration is whether the decision to declare a no-anchoring area determines or alters the contents of the law or, alternatively, whether the decision determines particular cases or circumstances in which the law (as set out elsewhere) is to apply. As previously noted, the law prohibiting dropping an anchor in a no-anchoring area and the consequences for doing so are set out in the Principal Regulations (and continues through the Amending Regulations). By contrast, decisions to declare the specific no-anchoring areas have the effect of determining particular circumstances to which the law applies.

By way of example, in the *Great Barrier Reef Marine Park (Declaration of No-Anchoring Areas – Townsville/Whitsunday Management Area) Notifiable Instrument* 2021, the reiteration of the declaration of Manta Ray Bay, Hook Island as a no-anchoring area did not provide the law regarding dropping an anchor. It however, has the effect of providing the area to which the law is to apply in that specific locality. As such, it is reasonable to assume that these decisions deal with the particular circumstances in which a law applies, rather than determining or altering the contents of the law.

Application of Case Law

As was noted by the Full Court of the Federal Court in *Federal Airports Corporation v Aerolineas Argentinas* [1997] FCA 723 general tests for characterisation of acts as either administrative or legislative are unfortunately of limited utility as differentiating the two can be difficult.

Ultimately, it appears that the task is an evaluative one, as acknowledged in *Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee* (2007) 163 FCR. This evaluation was undertaken in *RG Capital Radio Pty Ltd v Australian Broadcasting Authority* [2001] FCA 855 and, of the matters taken into account in that case, the following relevant issues are noted:

- Generality: as has been outlined above, the relevant legislative decision was to provide that dropping an anchor in a no-anchoring area was contrary to the law. It determined the general application whereas the declaration of certain no-anchoring areas determines where those rules apply;

- Parliamentary control: by including provision for such a declaration to occur via notifiable instrument, it is submitted that not only does the Parliament not control the decision to declare no-anchoring areas but that this was its explicit intention;

- Publication: the declaration of a no-anchoring area does not prescribe a process of public notification. However, in increasing awareness and ensuring transparency, the Reef Authority acknowledged the importance of publishing the declaration on its website; and

- Public consultation: while the Reef Authority is required to consider the social values of the relevant area, the Principal Regulations (and Amending Regulations) do not require the Reef Authority to engage in public consultation prior to a declaration of a no-anchoring area.

For completeness, it is acknowledged that the absence of a merits review and the binding effect of the declarations do lend themselves towards being of legislative character. However, as outlined in the *RG Capital Radio* case, it is the cumulative effect of these considerations that is critical; no single consideration was determinative.

Other Policy Considerations

Notifiable instruments play a crucial role in the Government's deregulation agenda by creating administrative efficiencies across government and enhancing the public accessibility of Commonwealth laws. In ensuring the Amending Regulations are consistent with the expectations of the Government, the Reef Authority engaged with the Office of Parliamentary Counsel and, in preparing them, the Reef Authority consulted with the:

- Department of Prime Minister and Cabinet (Office of Best Practice Regulation);
- Attorney-General's Department (Human Rights Unit);
- Department of Agriculture, Water and Environment (Planning and Governance Branch and Regulatory Reform Section); and
- Commonwealth Department of Public Prosecutions.

If the Amending Regulations are disallowed, this would seem contrary to the intent of Parliament in enacting the Principal Regulations and, crucially, would not have the effect of requiring no-anchoring areas in the future to be declared by legislative instrument. Instead, to achieve that aim, the Principal Regulations would need to be amended. This would result in an undesireable delay in the Reef Authority's ability to carry out its functions and, importantly, to respond to emerging situations in a timely manner. It will also result in an increased regulatory burden on the Parliament.

I would be happy to arrange a more detailed background discussion for you through the Reef Authority. This may assist in providing greater clarity on the matters discussed through our correspondence and the appropriateness of these instruments generally.

Thank you again for the opportunity to address the Committee's concerns.

Yours sincerely

SUSSAN LEY